SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

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EMPLOYMENT RIGHTS BILL: FURTHER AMENDMENTS AND IMPLEMENTATION ROADMAP

As the Employment Rights Bill approaches its final stages in Parliament, the Government has published Implementing the Employment Rights Bill - Our roadmap for delivering change, a timetable for consultation on, and implementation of, the provisions of the Employment Rights Bill. It now seems likely that Royal Assent will be in the Autumn, although the roadmap does not confirm any anticipated date. A summary of the timetable is included in this briefing note.

Although the Bill has nearly completed its Parliamentary progress, the Government last week announced some substantial amendments which are likely to be approved by Parliament. The changes include the addition of some easing of the dismissal and re-engagement provisions and the introduction of new restrictions on non-disclosure agreements.

Dismissal and re-engagement: The Bill makes it automatically unfair to dismiss an employee for refusing to agree a variation to their contract of employment, or to enable the employment of another person, or the same employee, under a varied employment contract to carry out substantially the same duties. As originally drafted, this covered changes to any contractual term without employee agreement, making "fire and rehire" all but impossible unless the employer could satisfy a narrowly drawn "financial difficulties" exemption.

The provisions are being amended so that the automatic unfair dismissal provisions only bite when the proposed variation in the contract is a "restricted variation" - broadly, if it relates to contractual pay, pension, hours, time off, or anything else specified in regulations - or if it is the inclusion of a term allowing unilateral amendment of any of these terms by the employer (but not, seemingly, if the term is included before these provisions come into force). The amendment means that changes to, for example, place of work or duties would not be caught. In considering the fairness of a dismissal for refusing to agree a non-restricted variation, a tribunal will be obliged to consider a list of factors: the reason for the variation, any consultation with employees, and any incentive offered for agreement (all factors which would be relevant in any event under the existing reasonableness test).

The amendment also introduces a new section into the Employment Rights Act 1996 to apply the automatic unfair dismissal provisions when an employer dismisses employees (in a non-redundancy scenario) for the principal reason of replacing them with people who are not employees, such as agency workers or self-employed contractors, carrying out substantially the same duties. The same financial difficulties exemption would apply as in other dismissal and re-engagement cases (with a slightly different definition of the exemption for public sector employers).

The roadmap schedules the dismissal and re-engagement provisions as coming into force in October 2026, with a consultation this Autumn.

Non-disclosure agreements (NDAs): The Bill adds a new section to the Employment Rights Act 1996, restricting the use of NDAs. It is already the case that an NDA cannot validly seek to prevent a person from reporting a crime to the police, or from whistleblowing about wrongdoing at work. In addition, as mentioned in our Employment Bulletin June 2025, NDAs

signed on or after 1 October 2025 will be unenforceable to the extent that they seek to prevent certain disclosures by victims of crime. Under the new section, any provision in an agreement between an employer and a worker will be void where it attempts to prevent the worker from making allegations or disclosures of information about workplace harassment or discrimination by the employer or a fellow worker. This will also cover disclosures about how the employer responded to the harassment or discrimination, or to the making of the allegation or disclosure. The new section could be extended by regulations to include, in addition to workers, individuals such as contractors, trainees, and those on work experience. The amendment gives the Government the ability to make regulations on "excepted agreements" where the ban would not apply, but no details on this have been released.

The NDA amendment is not included in the implementation roadmap and the Government has not yet indicated when the new restrictions might come into force.

Bereavement leave: The Bill extends the existing right to parental bereavement leave (following the death of a child under 18 or a stillbirth) to a more general right to bereavement leave, with details of eligibility to be set out in regulations. The amendment further extends the leave to include those who suffer pregnancy loss before 24 weeks. The roadmap lists this for implementation in 2027, with consultation this Autumn.

GC100 AND INVESTOR GROUP DIRECTORS' REMUNERATION REPORTING GUIDANCE 2025

The GC100 (the industry association of general counsel and company secretaries of FTSE100 companies) and Investor Group has published its 2025 Directors' Remuneration Reporting Guidance, designed to assist companies and their investors in the interpretation of the disclosures required by the Large and Medium-sized Companies and Groups (Accounts and Reports) Regulations.

Key changes include new guidance on:

- **Engagement with shareholders and consideration of shareholders' views:** Companies should consider shareholder consultation when changing their remuneration approach, even where the change still falls within the scope of the approved directors' remuneration policy.
- **ESG measures in variable pay:** Investors expect companies to consider using environmental, social and governance (ESG) metrics where they relate to operational or strategic objectives that promote the creation of long-term value. ESG metrics should be quantifiable, and the method of performance measurement well explained, suitably stretching, objective and clearly linked to implementing company strategy. Where companies are still considering how to reflect any ESG corporate strategy in variable pay, current market practice is for this to be fully explained and, if relevant, to show how the company's executive pay strategy is otherwise aligned with its sustainability strategy.
- **Consideration of general workforce pay:** Companies are expected to outline in the remuneration policy why the remuneration levels and maximum opportunities are appropriate for the specific circumstances of the company and its material stakeholders, including the workforce. For example, they could include more granular information or additional disclosures on pay distribution throughout the workforce. It may also be helpful for companies to include information such as reporting on staff with pay awards of over a certain amount, pay levels across the workforce and the number of employees in a range of different pay bands.
- **Potential windfall gains:** Investors generally expect that where there has been a material fall in share price over the year, companies consider reducing the grant size of long-term incentive awards to prevent the potential of windfall gains at vesting. The reasons why remuneration committees have, or have not, deemed it appropriate to reduce grant sizes should be clearly disclosed. Similar considerations should be provided in respect of the decisions at vesting so that shareholders can assess the appropriateness of these decisions.

The GC100 also reiterates its view that the vesting of long-term incentive awards made to former directors should be fully and clearly disclosed to shareholders, even when the vesting happens in a year after the one in which the director stepped down and where the treatment for the awards was disclosed to shareholders in the remuneration report for the year of the director's departure.

REDUNDANCY UNFAIR BECAUSE EMPLOYER FAILED TO CONSIDER ALTERNATIVE EMPLOYMENT

Summary: The Employment Appeal Tribunal (EAT) confirmed that a dismissal for redundancy was unfair because the employer had not properly considered alternative employment for the employee (*Hendy Group Ltd v Kennedy*).

Key practice point: Redundancy is likely to be unfair if the employer does not look for suitable alternative employment for the employee within the company and/or group. The extent of the efforts needed depend on the size and administrative resources of the employer, but a proactive approach is required. Although this decision does not go as far as to suggest that, when selecting for a vacancy, an at-risk employee should be preferred (special protection applies for employees on or returning from family leave), it does indicate that employers should offer some help with applications.

Facts: The claimant had worked for a large car dealership for many years. His latest position was in a training role but he had over 30 years' experience in the motor trade and specifically in sales. A redundancy situation arose, and he was selected for redundancy. It was accepted that the redundancy was genuine and his selection fair. Apart from being told that he could apply for posts listed on the intranet, and his line manager saying he would speak to anyone who wanted to phone him, the claimant received no assistance with applications, and hiring HR managers were not told that he was at risk. Shortly after being told that he was to be dismissed, he had to return his laptop and thereafter had only the same access to vacancies as an external applicant.

The Employment Tribunal held that the dismissal was unfair because the employer had failed to consider alternative employment. The employer appealed.

Decision: The EAT upheld the Tribunal's decision. Under the test for unfair dismissal in section 98 of the Employment Rights Act 1996, in the circumstances, which included the size and administrative resources of the business, the employer's approach was one which no reasonable employer would have adopted.

The EAT referred to the case law which establishes that a reasonable employer should usually seek to ascertain whether alternative employment can be offered. In this case, the Tribunal found that the employer did nothing in terms of alternative employment. There was no evidence of other steps a reasonable employer might have taken, such as speaking to him about where his interests might lie, assisting in identifying other roles, and encouraging conversations about different roles even if that meant demotion.

The duty to consider alternative employment had to be considered in the context of the employer being a sizeable organisation with relatively large resources. The claimant's career background was also relevant. In a short period of time, there were a number of vacancies for which, on paper at least, he was suitable to be considered.

ANNUAL HR SPOTLIGHT

Please click here for an insight into our annual HR Spotlight, hosted at our offices on 19 June. The event focused on "*A Day in the life of the HR and Rewards teams*" using case studies and interactive elements to bring the issues to life, including voicemails, news articles and Slido. The delegates had the opportunity to discuss the issues in groups, which sparked lively discussions as well as engaging questions. Topics covered included workplace harassment and workforce rightsizing under the Employment Rights Bill, the latest thinking on DEI, remuneration trends and pay transparency. If you would like to discuss any of the above issues with us, please get in touch with your Employment and Incentives contact at Slaughter and May.

HORIZON SCANNING

What key developments in employment should be on your radar?

Autumn 2025	Some provisions of the Employment Rights Bill relating to trade unions and industrial action to come into force at or soon after Royal Assent
1 September 2025	Economic Crime and Corporate Transparency Act 2023: failure to prevent fraud offence for large organisations in force
1 October 2025	Section 17 Victims and Prisoners Act 2024: Non-disclosure agreements signed on or after 1 October 2025 unenforceable to the extent they prevent certain disclosures by victims of crime
April 2026	Some Employment Rights Bill provisions to come into force, including on the collective redundancy protective award, family leave, whistleblowing protections, Statutory Sick Pay, trade union recognition and workplace balloting
October 2026	Further Employment Rights Bill provisions to come into force, including on dismissal and re-engagement, protection from harassment, tribunal time limits, protections against industrial action detriment, trade unions (rights of access in the workplace, employer duty to inform workers of their right to join, protections for reps)
2027	Further Employment Rights Bill provisions to come into force, including on collective redundancy consultation threshold, Day-one protection from unfair dismissal, zero hours contracts, gender pay gap and menopause action plans, pregnancy and maternity returners' rights, flexible working
Uncertain	• 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 race and disability, and ensure that outsourcing cannot be used to avoid equal pay • Extension of employer right to work checks to working arrangements other than under a contract of employment • Three-month limit on non-compete clauses in employment and worker contracts proposed by previous government

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

Discrimination / equal pay: *Bailey v Stonewall Equality Limited* (Court of Appeal: whether third party had caused employer to discriminate); *Randall v Trent College Ltd* (EAT: whether worker's treatment was belief discrimination or was treatment because of objectionable manifestation of belief); *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); *Thandi v Next Retail Ltd* (EAT: whether there was a general material factor defence to an equal pay claim by shop floor sales staff seeking to compare themselves with warehouse staff)

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)

Whistleblowing: *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)

Working time: *Taylors Service Ltd v HMRC* (Court of Appeal: whether travel time was "time work" for minimum wage purposes)

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