SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

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EMPLOYMENT RIGHTS BILL: FURTHER CHANGES TO THE UNFAIR DISMISSAL REGIME

The Employment Rights Bill is expected to receive Royal Assent this week. At the very last minute, the Government made significant changes to the unfair dismissal provisions, following discussions with trade unions and business representatives. The proposed "day one" right to bring an unfair dismissal claim is to be replaced by a six-month qualifying period. The intention is that, from 1 January 2027, protection from unfair dismissal will apply to employees with six months' service or more. In addition, the cap on unfair dismissal compensation (currently £118,223 or, if lower, 52 weeks' actual gross pay) is to be removed.

Other contentious matters have also been resolved:

- The removal of the current requirement that there must be a turnout of at least 50% of those eligible to vote in a ballot for industrial action will go ahead.
- The right to guaranteed hours offers for workers on zero and low hours will remain an obligation on employers rather than a right to request for workers.

Meanwhile, the Government has issued further consultation papers on measures in the Bill:

- **Electronic and workplace balloting:** The Government plans to allow three new voting methods, in addition to postal ballots, for industrial action and certain other statutory ballots: fully electronic balloting, hybrid electronic balloting (voting materials distributed by post, with members voting by post or electronically) and workplace in-person balloting (for industrial action ballots only). The consultation, which runs until 28 January 2026, is asking for views on a draft Code of Practice.
- **Consultation on rights for unpaid carers:** The Government's review aims to examine the existing unpaid carer's leave entitlement and options for paid carer's leave and/or extensions to the current unpaid entitlement. The Government expects to conclude the review by the end of 2026.

COLLECTIVE REDUNDANCIES: NEW ONLINE FORM HR1

The Insolvency Service has updated its guidance on Form HR1: Advance Notification of Redundancies (the form that must be submitted to the Insolvency Service's Redundancy Payments Service where 20 or more redundancies are proposed at a single establishment within a 90-day period). Form HR1 can no longer be submitted by post or email; it must now be submitted online. The digital form does not accept consultation start dates in the future, and there is an additional reason for redundancy: change in supply chain or loss of supply chain contract. Once submitted, employers cannot access a copy of the online form. Therefore, they should print or save the final summary page before submission to comply with the obligation to share the form with trade union and employee representatives.

EXTENSION OF ACAS EARLY CONCILIATION

The ACAS Early Conciliation period has been extended from six to 12 weeks, to ease the burden on ACAS. The new limit applies where a prospective claimant has contacted ACAS on

or after 1 December. For most Employment Tribunal claims, employees must go through ACAS Early Conciliation before they can make a claim. The effect is to "stop the clock" on the statutory time limit for bringing a claim. Although this extension gives employers more time to settle claims, it may also result in a delay of several months before they become aware of claims, particularly once the time limits increase to six months under the Employment Rights Bill. This makes preservation of documents and gathering of witness evidence at an early stage even more important.

REFORM OF NON-COMPETE CLAUSES

The Government has issued a working paper, inviting views (by 18 February 2026) on options to restrict post-termination non-compete clauses in employment contracts (which, research reveals, affect around 26% of workers in the UK). The options put forward are:

- Statutory limits on the length of non-compete clauses, or different limits according to employer size. The existing principle, that restrictions are unenforceable unless the employer can demonstrate they are reasonable, would continue to apply to clauses shorter than the statutory limit.
- A ban on non-compete clauses in employment contracts, or a ban below a salary threshold (possibly the additional rate tax threshold of £125,140), with measures to ensure that other restrictive covenants are not used to achieve a similar effect.
- A combination of a ban below a salary threshold and a statutory limit of three months for those earning above the threshold. Reading between the lines, this seems to be the favoured approach.

The Government also asks whether restrictions should be extended beyond non-compete clauses to cover other restrictive covenants, and whether they should apply to "wider workplace contracts". Another question relates to legal costs. Enforcement of restrictive covenants is currently through the county courts or the High Court. Consequently, the losing party will generally bear the winner's legal costs. It has been argued that this can deter workers from taking any action which may risk legal proceedings.

There is no mention of mandatory compensation for non-competes, a suggestion raised in the previous government's consultation on this issue, nor any indication of timescale or possible impact on existing clauses.

APPOINTMENT OF PROVISIONAL LIQUIDATOR MEANT EMPLOYEES DID NOT TRANSFER UNDER TUPE

Summary: The Employment Appeal Tribunal (EAT) confirmed that the usual automatic transfer of employee liabilities under TUPE did not apply where the transfer of the business took place after a provisional liquidator had been appointed but before the winding-up order (*Secretary of State for Business and Trade v Sahonta*).

Key practice point: The EAT decision clarifies that insolvency proceedings can be regarded as having started when a provisional liquidator is appointed, with the result that, under regulation 8(7) of TUPE, automatic transfer of contracts do not apply, even if a sale happens before the winding-up order is made. However, whether regulation 8(7) is triggered will depend on the circumstances. In some cases, appointment of a provisional liquidator may not lead to liquidation, for example if bringing a petition results in payment of a debt, and the petition is abandoned.

The decision also confirms that the date of a transfer depends on when responsibility for carrying on the business moves to the transferee, not when the deal is signed.

Background and facts: If TUPE applies, it will usually be the case that employees will automatically transfer to the buyer. However, in order to facilitate the sale of an insolvent business, regulation 8(7) prevents the usual transfer of contracts of employment and unfair dismissal rights where the transferor is undergoing solvency proceedings "*with a view to the liquidation of the assets of the transferor*". The timeline in the case was:

- 3 March 2023: a conditional business transfer agreement was entered into for the sale of a bakery business. The business stopped trading on that day.
- 7 March: a provisional liquidator was appointed, following a creditor's petition for a winding up order.

- 21 March: a new company, Phoenix, recommenced production.
- 31 March: a winding-up order was made.

Employees of the bakery business sought payments from the National Insurance Fund, to cover debts due to them, such as arrears of pay. The Employment Tribunal found that date of the TUPE transfer was 21 March but regulation 8(7) applied, so that contracts of employment and dismissal rights did not transfer to Phoenix. The Secretary of State appealed, arguing that an insolvency situation did not exist until 31 March, after the date of the transfer, making Phoenix liable.

Decision: The EAT upheld the Tribunal's decision. There was not a transfer of the business at 3 March, despite the existence of the transfer agreement, because there was no going concern at the time: the bank account was frozen, all employees had been laid off, and there were no premises. The transfer took place later, on 21 March, when Phoenix had secured occupancy rights to premises, agreed a revaluation and payment terms for plant and machinery, understood the liquidator would not challenge the transfer, and had taken on employees ready to commence production. That was a reasonable conclusion, even though (the EAT commented) another tribunal might have reached a different decision.

The EAT also agreed that regulation 8(7) applied because, by the date of the transfer, a provisional liquidator had been appointed by the court, leading to the liquidation of the transferor. This conclusion was consistent with the purpose of regulation 8(7) – to relieve the transferee of obligations to the transferor's employees in order to increase the potential for saving jobs. The provisional liquidator was actively involved in continuing discussions about the transfer to Phoenix. That transfer ultimately happened, with some jobs being saved.

EMPLOYERS CAN BE VICARIOUSLY LIABLE FOR WHISTLEBLOWING DISMISSAL DETRIMENT

Summary: The Court of Appeal decided that employees could bring vicarious liability claims against their employers for the acts of individual workers who allegedly subjected them to detriment because they had made protected disclosures, even though the detriment was dismissal (*Rice v Wicked Vision Ltd*).

Key practice point: The decision resolves, for the moment at least, a dispute over the meaning of the whistleblowing protection provisions in the Employment Rights Act 1996. It is now clear that an employee who is dismissed for whistleblowing can potentially bring three types of claim:

- Automatically unfair dismissal, against their employer (under section 103A).
- Detriment of dismissal against the dismissing manager (under section 47B).
- Detriment of dismissal, against the employer, based on its vicarious liability for the actions of the dismissing manager (under section 47B). The employer will have a defence if it can show it took "all reasonable steps" to prevent the detriment.

The ability to bring dismissal detriment claims against employers is significant because detriment claims have advantages over unfair dismissal claims (for the claimant). Not only are they available to workers as well as employees, but there is also a less restrictive causation test – the whistleblowing only has to be a significant part of the motivation, rather than the principal reason (for the dismissal) - and damages for injury to feelings can be claimed. It is important, therefore, that employers can turn to an "all reasonable steps" defence if necessary.

Background: The dispute related to wording in section 47B which says that a worker who is an employee cannot bring a detriment claim where alleged detriment "*amounts to a dismissal*". The Court of Appeal, in *Timis v Osipov*, found that, despite this wording, an employee could bring a claim under section 47B against an individual co-worker for the detriment of dismissal and a claim of vicarious liability for that act against the employer. (The point of the wording was to prevent a dismissal detriment claim directly against an employer, rather than as vicariously liable.) In two recent cases, the Employment Appeal Tribunal came to different conclusions on whether to follow *Osipov*. Both cases went to the Court of Appeal.

Decision: Even though it disagreed with the decision in *Osipov*, the Court of Appeal concluded it had to follow it, and so it allowed vicarious liability claims against the employers for dismissal detriment. The Court added that it was plainly unsatisfactory that the legislation had produced conflicting decisions, but that could only be resolved by the Supreme Court or by amendment to the legislation.

NON-EXECUTIVE REMUNERATION: NEW GUIDANCE FROM THE FINANCIAL REPORTING COUNCIL

The Financial Reporting Council recently published updated guidance on how UK-listed companies can remunerate their non-executive directors (NEDs) using shares in the company that engages them. This update forms part of a broader regulatory effort to increase London's attractiveness as a listing venue (in particular when compared to the major US stock markets). The aim is to help companies attract high-calibre board members in the global market for talent while maintaining strong governance standards. In this Briefing from our colleagues in the Incentives team, we explore the key steps involved in remunerating NEDs with shares. If you would like to discuss any of the 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?

1 December 2025	ACAS Early Conciliation Period extended to 12 weeks
December 2025/January 2026	Certain provisions of the Employment Rights Bill relating to trade unions and industrial action to come into force at or soon after Royal Assent
April 2026	Certain 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
By June 2026	Data (Use and Access) Act 2025 in force: organisations required to have data protection complaints procedure
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, employer duty to inform workers of right to join, protections for reps)
2027	Further Employment Rights Bill provisions to come into force, including on collective redundancy consultation threshold, unfair dismissal, zero hours contracts, gender pay gap and menopause action plans, pregnancy rights, bereavement leave, flexible working
2027 or before	Employment Rights Bill: NDAs to be unenforceable to the extent they prevent worker from making allegations or disclosures about workplace harassment or discrimination
Uncertain	Publication of the Equality (Race and Disability) Bill, extending pay gap reporting to ethnicity and disability for employers with 250+ staff, extending equal pay rights to race and disability, and preventing outsourcing from being used to avoid equal pay Extension of employer right to work checks to working arrangements other than under a contract of employment

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

Discrimination and 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 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); *Augustine v Data Cars Ltd* (Supreme Court: whether part-time status must be the sole reason for less favourable treatment)

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).

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