

RWK Goodman

HR Hub – Legal Update

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New Employment Tribunal forms

Back in August, updated versions of the employment tribunal claim form (ET1) and response form (ET3) were issued.

These forms are used to bring, or respond to, a claim in the employment tribunal and are available to download on the .Gov website.

The changes made are:

- When filling in personal details:
 - On ET1 and ET3, the term “Other” has been added as an alternative title to “Mr, Mrs, Miss or Ms”;
 - On ET1, the term “prefer not to say” has been added as an option under the claimant’s sex;
 - On ET1 and ET3, fax has been removed as a preferred method of contact;
 - On ET1 and ET3, new tick boxes have been included for parties to indicate whether they can take part in phone or video hearings. However, on ET1, if a claimant says they can take part in neither they will need to explain why, whereas there is no such requirement for the respondent.
- On ET3, Company respondents will now be able to indicate what type of company they are – providing immediate information to the employment tribunal regarding the type of work done by the organisation.
- On ET1, a claimant can tick a box to say they are making a whistleblowing claim. They can also now specify the relevant regulator (prescribed person) they would like a copy of the ET1, or information from it, to be sent to.
- On ET3, a respondent is asked to indicate whether it wishes to contest, rather than defend, all or part of the claim.

- On ET3, a respondent can choose to provide annual figures for a claimant's pay before tax and normal take-home pay, rather than weekly or monthly figures.

New Flexible Working Rights

The Employment Relations (Flexible Working) Act 2023

On 20 July 2023, The Employment Relations (Flexible Working) Act 2023 ("the Act") received Royal Assent. Despite receiving Royal Assent, draft legislation is still awaited, and it's believed that this Act and the relevant statutory instrument won't come into force until July 2024.

The Act makes changes to the current rights of employees to request a flexible working amendment to their contracts of employment. These changes are:

1. Employees will now be able to make two flexible working requests within any 12-month period.
2. Employers will have to deal with flexible working requests within 2 months of receiving them unless there is a mutually agreed extension. This change will ensure that requests are handled promptly and employees receive a timely response.
3. Employers will no longer be able to refuse a request outright without having first "consulted" with the employee.
 - a. Notably however, the Act does not specify the minimum requirements for this consultation process, leaving it open to interpretation by employers. At present, the draft ACAS Code of Practice on handling requests for flexible working states that *"consultation meetings about requests should be approached with an open mind to discuss what may be suitable. Meetings are an opportunity to listen carefully and engage meaningfully with each other so that a fully informed, evidence-based decision can be made."*
4. Employees are no longer required to explain how their flexible working request may impact their employer or propose how any potential issues arising will be addressed. This change reduces the burden on employees when submitting their requests and leaving it up to employers to manage their respective teams accordingly.

What is next?

Acas have issued a consultation on an updated statutory Code of Practice (Code of Practice on handling requests for flexible working), anticipating changes introduced by the Act and will also update the non-statutory Acas Guidance which sits alongside the Code.

The Department for Business and Trade has also launched a consultation on the approach being taken to non-statutory flexible working requests (i.e., those who submit requests without the 26 weeks' qualifying service).

Issues with the Act

Whilst The 2023 Act represents an important step forward in modernising the current flexible working framework and does go some way to making it easier for employees and employers to seek flexibility in working practices, the lack of procedural requirements from

an employer's perspective may leave companies open to grievances if the proper procedures are not in place or followed.

In addition, although it has been reported by the media that the Act makes flexible working a "day one right", that's currently not the case as the right to request flexible working still only applies to employees with 26 weeks' continuous service and has not been extended to workers. Whilst the Government has indicated it intends to change the 26 weeks continuous service requirement, it remains to be seen if this will be incorporated.

Practical Take-Aways

For now, there is no need for employers to take any immediate action, given the Act is not due to come into force for a year or so.

However, it would be a good idea to review any flexible working policies and practices to ensure compliance of these with the Act and new ACAS guidance, and also to consider the general, cultural approach to flexible working within your organization in light of these changes.

Other practical steps employers can start to take now include:

- As it appears entirely open for employers to determine the nature, length and content of the consultation, companies should consider how they would like to handle these consultations.
- Whilst it is not a legal requirement to properly consult employees on the outcome of a request for flexible working, doing so may help minimise risk. Companies should consider the process by which they assess the request for flexible work.
- Employers should give training to all those involved in the process around the right to request, including HR and line managers within organisations, to ensure an open and supportive culture around flexible working.

General Case Law Update

1. Allowing a second appeal against dismissal and what does it mean to extend the termination?

Garcha-Singh v British Airways Plc [2023] EAT 97

Facts

The claimant was employed by British Airways ("BA") as cabin crew and was dismissed by reason of incapability following a lengthy sickness absence. However, BA extended the termination date on multiple occasions, primarily to accommodate the claimant's ongoing medical conditions and support his return to work.

BA's absence management policy ("AMP") was incorporated into the claimant's contract of employment and set out the procedure that be followed in the event of an employee's medical incapacity, which included a right to appeal against the decision to dismiss but did not contain any reference to termination dates being postponed.

Following an earlier extension, the claimant made a formal grievance which BA treated as an appeal against the decision to terminate his employment, which was subsequently rejected.

6 months after the claimant's original termination date, BA declined to extend the termination date any further and the claimant's employment was terminated that same day.

The claimant brought claims in the ET for multiple claims. The ET dismissed all his claims and the claimant was given leave to appeal to the EAT in respect of his unfair dismissal claim only.

The Claimant's appeal was on the basis that:

1. The ET had erred in failing to conclude that the successive extensions to his termination date constituted a breach of the AMP and therefore his contract of employment; and
2. The failure to allow him a right of appeal from the actual termination date was a breach of contract and consequently also affected the reasonableness of his dismissal.

Decision

The EAT dismissed the Claimant's appeal.

The EAT held that the extensions to the claimant's termination date was not in breach of the AMP or their contract of employment, on the basis that each of the extensions were to the claimant's advantage, which was to help their return to work. It was also irrelevant that the AMP didn't cover the extension of a termination date, as it didn't purport to cover every eventuality.

Additionally, even if the extensions were a breach of the AMP and contract, it would still not have been sufficient to have found the dismissal unfair.

In regard to the right to appeal, the EAT concluded that failure to allow an appeal on the actual date of termination was a breach of contract as the AMP entitled the claimant to an appeal from "the decision to dismiss", which covered the earlier appeal the claimant made.

Additionally, the EAT found that the additional matters the claimant wanted to raise at a further appeal added little to the previous appeal and didn't address the employer's reason for terminating his employment. In the circumstances, fairness did not require the claimant to be given a second appeal.

Comment

Whilst the Claimant argued that it was more stressful for BA to give notice to dismiss and kept extending this, it was key here that these extensions were for the benefit of the Claimant to support their return to work. Therefore, extensions of a termination date for this purpose will not make a dismissal unfair.

Whilst on these facts, the refusal to allow the claimant a further appeal was not unfair, this was on the basis that there was no new information to raise. Employers should be careful in circumstances where the termination date is a long time after the original decision to dismiss, as new information could arise that would make it appropriate to offer a further right to appeal.

2. **Does a tribunal have to consider subconscious discrimination in direct discrimination?**

Kohli v Department for International Trade [2023] EAT 82

Facts:

Ms Kohli was of Indian origin and alleged that the Department for International Trade had directly discriminated against her on grounds of race when it failed to give her various internal roles and in awarding her appraisal grade. The tribunal dismissed her claims and found non-discriminatory reasons for all of her complaints. On appeal, she argued that the tribunal had failed to consider the question of subconscious discrimination.

Decision:

The EAT dismissed the appeal.

The reason why the claimant was treated less favourably is a question of fact for the tribunal. But it does not follow that in every case it must expressly refer to the possibility of subconscious discrimination and consider it separately.

The reality is that, in all direct discrimination cases, the tribunal must consider the true reasons of the alleged discriminator. This task addresses what operated on their mind and implicitly encompasses consideration of their subconscious. Therefore, once a tribunal has found the true reasons for an alleged discriminator's actions, there will be little or no room for a finding of subconscious discrimination unless those reasons are themselves discriminatory, for example, because they reflect stereotypical assumptions.

Comment:

Tribunals are not required to refer separately and/or expressly to the possibility of subconscious discrimination in every decision.

3. Can a worker bring a claim if they did not realise they were being harassed?***Greasley-Adams v Royal Mail Group Limited [2023] EAT 86*****Facts**

The Claimant had Asperger's Syndrome and brought a claim in the ET for harassment against his employers as he said they had allegedly leaked his confidential information and that colleagues had been making unpleasant comments about his autism. However, the Claimant only became aware of the alleged harassment after they themselves were the subject of a harassment claim.

Decision

The tribunal ruled that the claimant could not have been harassed prior to being aware of the conduct in question.

The judge emphasised that a key consideration when assessing the second limb of the test in s26 of Equality Act 2010 is Person B's perception of the conduct and whether it is reasonable for the conduct to have the stated effect. Therefore, if the claimant was not aware of the conduct in question, then they had no perception of it and so could not be made to feel that their dignity had been violated or that an adverse environment had been created.

It was also held that once the claimant became aware of the unwanted conduct, it would not be reasonable to consider that this had the effect of violating the claimant's dignity or creating an adverse environment going forward, as the

information was acquired through previous investigations into the claimant's own harassing behaviour against their colleagues.

Comment

A worker will not succeed in a claim for harassment where they did not realise they were being harassed.

Also means that it is harder for individuals to bring claims based on what is revealed in internal investigations – thereby protecting complainants and witnesses.

Sending personal data to the USA

Earlier in July, the European Commission (EC) adopted an adequacy decision for the EU-U.S. Data Privacy Framework.

Under GDPR, transfers of personal data outside the EU and the European Economic Area (EEA) are prohibited unless the intended destination jurisdiction offers an "adequate level of protection" of personal data when compared to the one guaranteed in EU law, unless appropriate safeguards are in place or certain derogations apply.

An adequacy decision is a determination made by the EC that a specific jurisdiction offers an adequate standard of protection of personal data. It therefore allows for the unrestricted transfer of personal data from the EU/EEA to that jurisdiction.

Previously, the USA had installed two self-certification schemes that had adequacy status from the EC – the Safe Harbour and the Privacy Shield. However, both were invalidated by the Court of Justice of the EU due to US authorities' having access to personal data for national security and law enforcement purposes.

The new adequacy decision introduces new binding safeguards, which include:

- When accessing the personal data of EU/EEA individuals, USA authorities must conduct a balancing test to ensure that any access to the data is necessary and proportionate.
- Greater oversight of USA authorities by both judicial and non-judicial bodies, such as the Department of Justice, to ensure their compliance with these rules.
- The establishment of an independent and impartial redress mechanism for EU/EEA individuals to lodge complaints before a new Data Protection Review Court.

How does the EU-US Data Privacy Framework apply to data transfers from the UK?

This new EU-U.S. Data Privacy Framework does not apply to the UK, following our withdrawal from the EU.

Therefore, any companies in the UK who wish to transfer personal data to the US might benefit from the UK Extension to the DPF. US organisations must apply to the Department of Commerce separately to use this transfer mechanism.

However, it should be noted that organisations cannot rely on the UK Extension as the appropriate safeguard for transfers of personal data to the US until the UK government issues its own adequacy regulations in respect of both the EU-U.S. Data Privacy Framework and UK Extension.

Why have Acas been so busy over the last year?

Acas have seen a record increase in demand for dispute resolution services between 1 April 2022 and 31 March 2023.

The public body handled over 600 collective conciliations in 2022-23, compared to 500 the year before.

There were 649,000 calls to the helpline and 105,000 early conciliation notifications.

Acas' Chief Executive, Susan Clews, said "*High inflation, the cost-of-living crisis and staff shortages over the past year have seen workplace tensions and large-scale disputes dominate the headlines, which have led to an increase in demand for our dispute resolution services.*"

They also helped over 72,000 individual dispute cases avoid the need to progress to a costly tribunal. The cost of workplace conflict in Britain estimated to be £28.5bn per year, which shows the continued importance of engaging with ACAS to resolve disputes.

Confidentiality during employment and after termination

Businesses will want to ensure that any confidential information which has an application in the market is sufficiently protected to prevent employees from making use of the information either for themselves or a third party (which is most commonly a competitor) – both during and after the termination of an employee's employment.

Types of Confidential Information

Case law categorises different types of business information and the category of information will govern to what extent it can be protected. These are:

1. Trade Secrets – This can be protected by the employer and we will discuss how below. This could include, for example, the formula for a product like a drink etc.
2. Confidential Information – This can be protected by the employer and we will discuss how below. Examples of confidential information can include a list of the employer's supplier, details of customers' previous orders, the employer's future business plans and information relating to the employer's finances, etc.
3. Information that amounts to skill and knowledge of the employee – This information belongs to the employee and cannot be protected by the employer.
4. Public information – This cannot be protected by the employer.

Contractual Confidentiality Obligations

There are several contractual ways in which an employer can ensure confidentiality:

a) Implied Duties of Confidentiality during employment

During employment, there is an implied duty that employees will conduct themselves with fidelity and good faith. This duty is implied into all contracts of employment and employment relationships, regardless of seniority. This principle came from case law, *Robb v Green* [1895] 2 QB 1 and requires that employees:

- i) Act honestly towards the employer.
- ii) Disclose to the employer all information relevant to its business.

- iii) Not make secret profits from the employer's business.
- iv) Respect the confidentiality of the employer's commercial and business information.
- v) Not compete with the employer's business.

This implied duty will only protect information that the employee is expressly told is confidential, and which is obviously confidential as a result of its character. Employees may not use such information for their own advantage or to benefit a third party.

Breach of this implied duty means the employer may summarily dismiss the employee, as it is a fundamental breach of contract. However, employers should seek legal advice prior to doing so, in case an unauthorised disclosure of confidential information does not amount to a fundamental breach. Employers will also need to follow a fair procedure before taking the decision to dismiss.

b) *Expressed Confidentiality Terms during employment*

Despite the existence of the implied duty of confidentiality, it is advisable that employers expressly protect their confidential information. Whilst the implied duty allows an employer to make non-confidential information confidential simply by deeming it so, there is a grey area between information which is clearly confidential and that which is the skill and knowledge of the employee. By putting an express term in an employee's contract of employment, the employer can seek to specify exactly what information they consider to be confidential.

By doing so, employers will be entitled to seek damages or injunctive relief if an employee discloses any confidential information.

c) *Implied duty of confidentiality after termination of employment*

Only trade secrets can be protected under the implied duty of confidentiality after termination of employment, as confirmed in the case of *Roger Bullivant Ltd v Ellis* [1986] 5 WLUK 225.

Again, therefore it is advisable that employers include an express post-termination clause in contracts of employment.

d) *Expressed Confidentiality Terms after termination of employment*

Even though trade secrets are protected after termination of employment thanks to the implied duty, drafting an express term into an employee's contract of employment will mean employees will know what is expected of them and it will help the court make a decision as to what information is considered a trade secret – meaning the clause has a higher chance of being enforced.

Express terms can also protect confidential information. Whether confidential information will be protected post-termination will ultimately depend on:

- its nature (needs to be wider than a trade secret and narrower than mere confidential information);
- the commercial damage which could be done to the employer were the information to be disclosed, and
- the extent to which the highly confidential nature of the information was drawn to the employee's attention or would have been apparent to them in any event.

Case law indicates that confidential information can include matters such as:

- details of customers and the goods they buy, and
- information about clients, partners and employees, e.g. information about internal grievance processes.

Whether a clause meets these requirements can only be determined on the basis of all the facts of the case.

To improve the chances of enforcing a confidentiality clause for confidential information, the express term will need to set out what the employer considers to be confidential information, being as precise as possible. We would advise thinking carefully about the scope and type of information you would like to protect and also seek legal advice to ensure any clauses are properly drafted to address the employer's needs and interests.

There are also other ways in which you can protect confidential information post termination, these include:

- Garden leave clauses
- Post-employment competition clauses (for example to prevent the poaching of customers, soliciting employees, etc)

Practical Ways to protect Confidential Information

It is advisable that alongside incorporating express confidentiality provisions, that employers take other steps to protect their confidential information:

- Circulating certain key information to only limited numbers of employees.
- Marking sensitive information "Confidential".
- If it is practical, operating security measures for some databases.
- Regularly monitoring the use of email, photocopiers and similar devices.
- Ensuring there is a proper reporting procedure. Employers should know what their staff are doing.
- Putting in place effective confidentiality agreements.

Employee Defences to Breach of Confidentiality

a) Public Interest / "Just Cause"

Case law has developed to acknowledge that there are circumstances in which public policy or interest overrides an implied or express duty of confidentiality. This defence is normally raised in relation to the cover up of criminal activity, conduct which misleads the public or danger to the public health.

b) Public Knowledge

A matter of common sense, information which is public knowledge will not, generally speaking, be capable of protection.

c) Whistleblowing

The Public Interest Disclosure Act 1998 (PIDA), which provides statutory protection for employees who "blow the whistle" on malpractice or unlawful activity within their employer's organisation, does not, allow individuals to disclose all information about their employer with impunity. There are strict and complex procedures that must be followed.

Qualifying for Unfair Dismissal and Future Changes

In order for an employee to claim unfair dismissal in the UK, they are required to have two years continuous employment.

Whilst there are some grounds for dismissal will always be regarded as unfair and which do not require a qualifying period (whistleblowing, trade union membership, asserting a statutory right and more), essentially this means that an employee who has only been continuously employed for less than two years can be dismissed – provided the employer gives notice – on a whim and with no requirement for the employer to justify the decision.

This leaves the door open for employers to act unreasonably and leaves newer employees vulnerable with no legal recourse for unfair dismissal.

It hasn't always been this way though. Previous Labour governments have favoured shorter qualifying periods, with the New Labour Government of 1997 favouring a one-year continuous employment period.

On the other hand, Conservative Governments have preferred longer qualifying periods, with the Conservative led coalition of 2010 electing to put the qualifying period back up to two years.

So, with Labour on track to form a new Government in a year's time, we could expect to see a shorter qualifying period, or even, an abolishment of the qualifying period altogether. Scraping the requirement for two years continuous employment was included in Labour's most recent policy paper "A New Deal for Working People", although whether it will make it into the party's manifesto remains to be seen.

There could be potential issues with the complete abolishment of the qualifying period, most notably how to deal with employees who fail their probationary period and the requirement to change the existing legislation, taking up precious parliamentary time.

It therefore seems more likely that a new Labour government would set a six-month qualifying period, in an attempt to avoid these issues. Regardless of whether it's a day one right or just a shorter qualifying period, employers should anticipate changes to the qualifying period which will strengthen employment protection rights in favour of employees.

Artificial Intelligence in Employment Law

In August, the UK House of Commons published a briefing paper on artificial intelligence ("AI") and employment law. The briefing considers, amongst other things, the ways in which AI is used in the workplace and the interaction between existing employment laws and the use of AI.

Use of AI in the Workplace

The paper looks at algorithmic management, which means the use of AI or other algorithmic tools by employers to manage workers. The paper in particular notes that algorithmic management has been seen in three particular areas of employment:

1. Recruitment - to devise job adverts, source candidates and filter CVs. Some recruiters also use automatically scored tests as part of their recruitment process.

2. Task allocation and performance management - including scheduling shifts and evaluating worker performance.
3. Surveillance and monitoring of the workforce - tracking workers to monitor productivity or health and safety in the workplace.

Current Employment Law and AI

The paper notes that there are no specific laws that explicitly regulate the use of AI in the workplace. However, there are several areas of law that potentially restrict the use of some types of workplace AI in practice or cause legal risks. These are:

- **Common law:** In particular, the duty of mutual trust and confidence between an employer and employee. This requires an employer to be able to explain its decision making around, for example, recruitment, pay, promotion or dismissal, and for these decisions to be reasonable and made in good faith. The paper notes that this may be made more difficult in circumstances where an employer has relied on AI systems to make or inform such decisions.
- **Equalities Act 2010** - The Equality Act 2010 prohibits discrimination by employers on the grounds of a protected characteristic (such as sex, age, race or disability). The paper notes, however, there is the potential for bias and discrimination when using AI systems, which may replicate existing discrimination, and that it is harder to objectively justify or establish accountability in respect of any discriminatory decisions. Existing protections from discrimination continue to apply to all forms of AI used in employment and employers will need to ensure that any AI systems used are not in breach of those protections.
- **Employment Rights Act 1996** – In unfair dismissal, the Employment Rights Act requires that an employer must that the dismissal was for potentially fair reasons and that, given all the circumstances, the dismissal decision falls within the range of reasonable responses. However, AI decisions are difficult to comprehend because the workings of decision algorithms are hard to explain. This will pose problems when attempting to explain or justify why a dismissal was made.
- **European Convention of Human Rights** – Article 8 of the ECHR places restrictions on the use of surveillance tools to monitor workers. This would include AI technologies.
- **GDPR and Data Protection Act 2018** – These impose restrictions on data processing, on solely automated decision-making and provide employees with the right to object. Employers must ensure that the use of any AI tools to collect and process employee data is compliant with the data protection legislation.

Policy Development and Future Regulation

The paper also summarises the UK government's approach to the regulation of AI in the Government March 2023 white paper "A pro-innovation approach to AI regulation".

Rather than introduce new legislation, the UK government aims to strike a balance by proposing a system of non-statutory principles which will be overseen and implemented by existing regulators.

In particular, the UK Government wants AI regulation to be context-specific, meaning that regulation will be based on the outcomes that the AI produces and this will vary depending on what the AI was designed for.

These five key non-statutory principles that the Government would like implemented are:

1. **Safety, security, and robustness:** Prioritising the safety and security of AI systems while ensuring their reliability and resilience.
2. **Transparency and explainability:** Making AI systems transparent and explainable to enable users and affected individuals to understand the reasoning behind decisions.
3. **Fairness:** Designing and using AI systems in a way that avoids unfair bias or discrimination and promotes equal treatment and opportunities.
4. **Accountability and governance:** Establishing clear lines of responsibility and accountability for AI systems, including appropriate governance mechanisms.
5. **Contestability and redress:** Ensuring mechanisms are in place to challenge and rectify AI-related decisions or actions that may have adverse effects.

This light touch approach can be contrasted to the more interventionist and strict approach proposed by the EU, which includes the implementation of an Artificial Intelligence Act, and also the USA, which is yet to set out any clear picture on AI regulation.

Other News

Employers should monitor how they use AI within their own workplace and continue to keep abreast of developments in this area.

Most recently, the TUC had launched a new AI taskforce, whose objective will be to fill the current gaps in UK employment law by drafting new legal protections to ensure AI is regulated fairly at work for the benefit of employees and employers.

The taskforce aims to publish an expert-drafted AI and Employment Bill early in 2024 and will lobby to have it incorporated into UK law.

To demonstrate how AI has developed so rapidly, we asked Chat GPT what it thinks will be the biggest problem with AI in employment law. It's answer can be seen below.

Chat GPT Response to "What will be the biggest problem with AI in employment law"

The biggest problem with AI in employment law is likely to be the potential for bias and discrimination. Here's why:

Algorithmic Bias: AI systems, including machine learning models, can inherit biases present in the data they are trained on. If historical employment data contains biases related to race, gender, age, or other factors, AI algorithms may inadvertently perpetuate these biases when making hiring, promotion, or other employment-related decisions.

Lack of Transparency: Many AI algorithms are complex and operate as "black boxes," making it challenging to understand how they reach specific decisions. This lack of transparency can be problematic in employment law cases where it's essential to determine why a particular decision was made.

Legal Liability: Determining legal liability when biased or discriminatory decisions are made by AI systems can be a complex legal challenge. It can be unclear whether the responsibility lies with the employer, the AI system developers, or both.

Regulatory Framework: Existing employment laws and regulations may not be well-equipped to address the unique challenges posed by AI. Governments and legal systems may need to adapt and create new frameworks to ensure fairness and compliance in AI-driven employment practices.

Data Privacy: AI often relies on the collection and analysis of vast amounts of data, including personal and sensitive information about employees. Ensuring the privacy of this data and compliance with data protection laws is a significant concern.

Unintended Consequences: The use of AI in employment law can have unintended consequences, such as the potential for mass unemployment due to automation or the creation of new types of employment relationships that don't fit neatly into existing legal categories.

Addressing these challenges will require a multifaceted approach, including the development of fair and transparent AI algorithms, regular audits of AI systems for bias, updates to employment laws, and robust regulatory oversight. Additionally, ongoing education and awareness among employers, employees, and policymakers will be essential to navigate the evolving landscape of AI in employment law successfully.