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Employment Law MA/PGDip in HRM

—Level 7



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Employment Law

Topic 13—Employment Tribunal litigation

17.04.2024

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Agenda

- | | | | |
|----|---------------------------------|----|---------------------------------|
| 01 | When a claim can be made | 05 | The hearing |
| 02 | The process of bringing a claim | 06 | Costs |
| 03 | Responding to a claim | 07 | Appeals |
| 04 | Tribunal procedure | 08 | Practical side of ET litigation |

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When a claim can be made in the employment tribunal

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O1 Who can bring claims?

Employees

Workers, including:

- Casual workers
- Agency workers
- Freelance workers
- Seasonal workers
- Zero hours workers

Job applicants

O1 Other factors

What kind of claims?

- All employment claims
- Some contract claims (up to £25,000)

What about the business?

- It must be in the UK or
- The complaint must either take place in the UK (in full or in part) or
- there must be a 'close connection' to the UK

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How to bring a claim

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02 Time limits

Unfair and constructive dismissal

- 3/6 months less one day from the termination of employment

Breach of contract claims and unlawful deduction of wages

- 3 months from termination or the 'deduction'

Discrimination, equal pay

- 3 months less one day of the date of the act complained of or 6 months from termination

Redundancy, transfers and insolvency

- 3/6 months from termination / event

Written particulars (contract)

- 3 months from the date of termination

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02 ACAS Early Conciliation

Process:

- Individual must contact ACAS within the time limit
- ACAS will contact the business and try to reach an agreement (conciliate)
- Conciliation can last up to 6 weeks
- If unsuccessful, ACAS will issue a certificate
- The certificate will have a reference number
- That number must be used in the claim form
- There is a time limit from the date the certificate is issued for the individual to make the claim
- If successful = COT3 agreement, claim withdrawn

02 ACAS Early Conciliation

If conciliation is successful:

COT3:

- Only for actual/potential ET complaints
- The individual does not need to take legal advice
- ACAS will take the individual through the terms
- Binding when agreement made (verbal/email etc)
- ACAS automatically tell the ET the claim is settled

Compare with settlement agreements:

- Wider in application (no dispute needed)
- Individual must take legal advice
- No automatic notification to the Tribunal

02 The claim form

The screenshot shows the 'Claim form' (ET1) from the Employment Tribunal. The 'Your details' section includes the following fields:

- 1.1 Title:** Radio buttons for Mr, Mrs, Miss, and Ms.
- 1.2* First name (or names):** A text input field.
- 1.3* Surname or family name:** A text input field.
- 1.4 Date of birth:** A date picker with day, month, and year fields.
- Are you?:** Radio buttons for Male and Female.
- 1.5* Address:** A text input field.

At the bottom of the form, it says '© 2024 Capital Law Limited'.

Claim form = ET1

- ET1 provides space for the employee to write a statement about their claim
- Certain sections must be completed
- ACAS EC certificate number must be completed
- ET can reject ET1 if not properly completed
- If accepted, ET will send a copy to the Respondent
- Respondent must respond within 28 days

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The response

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03 The response

Considerations:

- What are the claims? Do you have enough info?
- Has the claim been brought in time?
- Have the eligibility criteria been met?
- Has the Claimant complied with ACAS EC?
- Who are your witnesses? Are they still employed?
- What is the value of the claim?
- Is it worth trying to settle now?
- Diarise the deadline for responding – do you need an extension?
- Have case management orders been made?

03 The response

Response form = ET3

- An ET3 is a response form in which a Respondent sets out their defence to the claim
- Certain sections must be completed
- Response must be received within 28 days of ET sending it to the Respondent
- If it is not received in time – the claim may continue without a defence

The defence should:

- Be clear / concise
- Avoid lengthy narrative
- Address the legal tests
- Include alternative arguments

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Tribunal procedure

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04 The sift

- An Employment Judge will consider all the documents it has and decide whether the claim or response, or any part of it, should be **dismissed**, either because there are no arguable complaints/defences, or for lack of jurisdiction.
- The Judge may also consider whether any **additional information** is required from either party.

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04 Case management

The tribunal has a wide discretion to manage cases in accordance with the **overriding objective** of dealing with cases fairly and justly (rule 2).

What happens in practice in the initial stages:

- The Tribunal will make some case management orders at the same as sending the claim to the Respondent
- The Tribunal will arrange a preliminary hearing for case management at the same time as sending the claim to the Respondent
- The Tribunal will wait for the response before considering case management

04 Case management

How a case is generally managed:

- The Tribunal will set deadlines for parties to comply with certain steps
- The Tribunal may arrange a **preliminary hearing** to deal with any discrete issues such as
 - is the Claimant disabled?
 - has an application been made?
 - are specific orders needed?

If there are issues a Tribunal may make **orders**.

The parties can also ask the Tribunal to do these things.

04 Standard case management – schedule of loss

The Claimant will usually be ordered to produce a **Schedule of Loss:**

- This sets out what the Claimant is seeking in terms of compensation.
- For an unfair dismissal claim, it will usually include a **basic award** and claim for **loss of earnings**
- For a discrimination claim, it will normally include a claim for **injury to feelings**
- **Other** losses include
 - loss of statutory rights
 - pension loss
 - aggravated damages
 - personal injury

04 Standard case management - disclosure

Standard disclosure

- All documents relevant to an issue in the claim in one party's possession/control must be disclosed to the other
- 'document' = anything where info is recorded
- Includes documents that support and harm
- Continuing duty
- Reasonable but not exhaustive search
- Privileged documents excluded
- Process = exchange lists, then documents

Specific disclosure

Requests for **further information**

04 Standard case management – the bundle

Good bundle practice:

- The bundle should be **limited** to the documents that are relevant to the issues in dispute
- Parties should try to **agree** the content of the bundle
- It should be **sensibly arranged** (pleadings first, chronological order, sections if necessary)
- Pages should be **numbered**
- The Respondent usually prepares **copies** for the hearing (some Judges still want physical copies)

If agreement cannot be reached, there may be **2 separate bundles**

04 Standard case management – witness statements

Good witness evidence:

- Decide who your witnesses will be at the start
- Prepare written 'first-person' account of what happened
- Chronological order with numbered paragraphs
- Refer to evidence in the bundle (by page number)
- Go through all issues in dispute
- Include a statement of truth
- Witnesses must know their statements!

Exchange of statements

Statements 'taken as read' on the day

Written statements only?

04 Other case management powers

Strike out (rule 37)

“a tribunal may strike out all or part of a claim or response [if it is] scandalous or vexatious or has no reasonable prospects of success”

Deposit order (rule 39)

“where any specific allegation or argument ... has little reasonable prospect of success, [the Tribunal] may make an order requiring a party ... to pay a deposit not exceeding £1000...”

Unless order (rule 38)

Costs orders / preparation time orders / wasted costs orders (rules 74-84)

Other orders – specific disclosure (rule 31), expert evidence, privacy orders (rule 50), adding/removing parties (rule 34), Scott schedule ...

The hearing

05 Typical running order

What happens on the day:

- General housekeeping
- Opening submissions (not always needed)
- Witness evidence
- Closing submissions
- Judgment
- Written reasons (most of the time)

05 Giving evidence

Witness evidence

- Who goes first? Whoever bears the 'burden of proof'
- Evidence in chief
- Cross-examination
- Re-examination (rare)
- Questions from the panel

05 Final submissions and decision

What are submissions?

- Closing arguments
- Deal with the law relevant to the claim (including case law)
- Remind the tribunal of the most important pieces of evidence
- Deal with the opponent's case
- Summarise your arguments

Judgment

- Can be oral or written
- Can be 'on the day' or 'reserved'

05 Costs

General principles:

- Rare to award costs
- No automatic "loser pays" rule
- When can a Tribunal order costs?
 - vexatious, abusive, disruptive or unreasonable behaviour
 - claim has no reasonable prospects
 - party in breach of an order
 - party asks for hearing to be postponed
- How much can someone be ordered to pay?

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Appeals

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06 Appeals to the Employment Appeal Tribunal

Appeals to the EAT:

- Main function of the EAT is to hear appeals from decisions made by employment tribunals
- An appeal from a tribunal can only be made on a question of law
- The request must be made in writing
- It must be submitted within the time limits
- It must explain why reconsideration of the original decision is necessary

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06 Appeals to the Employment Appeal Tribunal

The appeal process:

- Once the appeal is received, it goes through a sift process
- If the appeal application is successful, it is sent to the other party for a response
- There are strict time limits for responding

Different process for notifying the EAT of settlement

Thank you.

Any questions?

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Employment Law Updates

17.04.2024

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Employment Law Updates

Aims

To provide a general overview of recent updates to employment law.

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Agenda

What's changed?

- The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023
- The Equality Act 2010 (Amendment) Regulations 2023 (SI 2023/1425)
- PLUS The Worker Protection (Amendment of Equality Act 2010) Act 2023
- PLUS New CIPD guidance on transgender and non-binary inclusion at work
- The Employment Relations (Flexible Working) Act 2023
- The Protection from Redundancy (Pregnancy and Family Leave) Act 2023
- Carer's Leave Act 2024
- Paternity Leave (Amendment) Regulations 2024
- Workers (Predictable Terms and Conditions) Act 2023
- Immigration Law
- A New Deal for Working People?

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What's changed?

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REULA: Retained EU Law (Revocation and Reform) Act 2023

- With effect from **1 January 2024**, this act disapplies certain principles of EU Law.
- Government abolished the automatic repeal of any retained EU law and the automatic expiry on 31 December 2023.
- To prevent EU-retained rights from being inadvertently lost, REULA gives the Government the power to review, revoke or integrate those EU-derived rights that we want to preserve in our domestic law.
- This allows the Government to maintain the current level of worker protection and ensure that employment rights will not be weakened by the repeal of EU law.

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The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

Overall, status quo has been maintained, however key changes to:

- **Status**
- **Holiday/Working Time Regulations**
- **TUPE**

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The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

- Status – **employee, worker or contractor** (self-employed).
- New “status” – **irregular hours** and **part-year workers** (new regulation 15F Working Time Regulations 1998)
- Relevant to holiday
- Mutuality of obligation? Are all workers irregular hours or part-year, in reality?

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The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

Holiday:

- **Rolled-up** holiday permitted for irregular hours and part-year workers.
- Holiday entitlement based on **12.07%** of the hours worked for irregular and part-time workers
- Holiday pay at **12.07%** of pay received
- These rules on holiday pay apply to holiday years starting on or after **1 April 2024**.

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The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

Further changes to Working Time Regulations (“WTR”) 1998:

- Removal of the **record-keeping requirements**.
- Workers can **carry-over** annual leave if they have been unable to take it due to family/sick leave.
- **Use it or lose it provision:** Requirement on employers to remind/encourage staff to take their holiday at regular intervals and that if they do not take it, it shall be **lost** at the end of the holiday year (subject to above carry-over rules).

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The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

TUPE:

- From **1 July 2024**, the exemption from informing and consulting with elected employee representatives when consulting about a TUPE transfer will be **extended** from businesses with fewer than 10 employees to **fewer than 50 employees**, or where there is a **transfer of fewer than 10 employees**.
- This will simplify the consultation process, saving companies time and money in the process.

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The Equality Act 2010 (Amendment) Regulations 2023 (SI 2023/1425)

— As a result of REULA, amendments to the Equality Act 2010 also came into force from **1 January 2024**.

These Regulations retain the following protections against discrimination:

1. Direct discrimination related to **maternity** and **breastfeeding**.
2. Indirect discrimination **by association** (without a protected characteristic).
3. Discriminatory statements **outside** an active recruitment process
4. Single source test in relation to equal pay.
5. Wider definition of disability.

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The Worker Protection (Amendment of Equality Act 2010) Act 2023

— This Act received Royal Assent on 26 October 2023, and will be coming into force in **October 2024**.

Changes:

- This introduces a duty on employers to demonstrate that they have taken **reasonable steps to prevent sexual harassment** of their employees in the workplace.
- Gives Employment Tribunals the power to uplift sexual harassment compensation by **25%** if an employer is found to have **breached** the new duty to prevent sexual harassment.
- Employees should attend regular discrimination/harassment training. Clear policies should be put in place for reporting and handling incidents.

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Transgender and non-binary inclusion at work

— CIPD published guidance on **5 September 2023**.

In a nutshell, key areas include:

- **UK Employment Law:** the legal considerations and protected characteristics of gender reassignment under the Equality Act.
- **Policy:** ensuring internal EDI policies support transgender and non-binary inclusion within the workplace.
- **Workplace culture:** creating a safe and equal workplace where everyone can thrive.
- **Employee lifecycle:** inclusivity throughout employee tenure including recruitment, onboarding and progression.

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Transgender and non-binary inclusion at work

- **Inclusive language:** encouraging employers to think 'additively' when referring to typically gendered areas of policy. Adding people in rather than taking anyone out.
- **Managing different views:** recognising the right for people to hold and express different beliefs while drawing boundaries between acceptable and unacceptable behaviour.
- **Supporting a transition at work:** how to support colleagues through their individual journey.
- **Data management:** ensuring privacy is paramount and that personal data is not shared unless there is explicit agreement or instruction.

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The Employment Relations (Flexible Working) Act 2023

- The Flexible Working Bill received Royal Assent in July 2023. It came into force on **6 April 2024**.

Changes:

- Employees have a "**day 1 right**" to make flexible working requests (instead of the previous 26 weeks' service).
- Employers are required to **consult** with the employee (within 3 months of receipt) if they are considering rejecting a request and discuss **alternatives**.
- Employees can make **two requests in a 12-month period** (instead of the previous 1 request).

ACAS Code of Practice:

- ACAS has issued a draft Code of Practice on how to deal with Flexible Working requests

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The Protection from Redundancy (Pregnancy and Family Leave) Act 2023

- This Act received Royal Assent on 24 May 2023, and was implemented on **6 April 2024**.
- This protects those returning from maternity, adoption and shared parental leave in a redundancy situation for at least **6 months** after they return to work.
- The new protection applies from the point the employee informs the employer that she is pregnant, ending **18 months after birth**.
- **Future planning:** Employers need to offer suitable alternative employment to this extended category as part of any redundancy process.

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Carer's Leave Act 2024

- From **6 April 2024**.
- This introduces a flexible **day-one** entitlement to all employees of **one week's unpaid leave every year** to those who are making arrangements for or caring for a dependant with a long-term care need.
- The minimum period of Carer's Leave is **half a day**.
- The employee is protected from dismissal or any detriment as a result of having taken time off.
- Carer's Leave policy.

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Paternity Leave (Amendment) Regulations 2024

- The Government has published draft legislation in the form of these Regulations, which came into force on **6 April 2024**.

Changes for employees:

- Can take their two-week paternity leave entitlement as **two separate one-week blocks** (rather than having to take just one week in total or two consecutive weeks).
- Can take paternity leave **at any time in the 52 weeks** after birth (rather than the 56 days following birth).
- Only need to give **28 days' notice** of their intention to take paternity leave (reduced from the previous position that required notice to be given 15 weeks before the Expected Week of Childbirth).

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Workers (Predictable Terms and Conditions) Act 2023

- This Act will come into force in **September 2024**.
- Workers who work irregular or unpredictable hours will have a new right to apply for a **more predictable working pattern**.
- Qualifying period of **26-weeks'** service.
- Eligible workers will have the right to submit **two requests** in any 12-month period.
- There are a limited number of business reasons to refuse (same as flexible working act) a request and a decision must be given within **one month**.
- **Future planning:** if your staff do not work set days/hours or are on zero-hours contracts, you could receive many requests. Put a written policy in place to ensure consistency in dealing with requests.

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Immigration Law

- With an aim to reduce the level of net migration into the UK, many changes are expected in 2024.
- **11 March 2024:** Care workers are no longer permitted to bring dependants with them to the UK and care providers who sponsor migrants will have to register with the Care Quality Commission.
- **4 April 2024:** the minimum salary requirements for Skilled Workers coming into the UK increased to £38,700 (except for roles under the Health and Care worker route).
- **Preventing illegal working:** Fines have tripled for employers failing to conduct Right to Work checks! This came into force on 13 February 2024 and is a £60,000 penalty per illegal worker (previously £20,000).

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Preparing for Change: **A New Deal for Working People?**

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Preparing for Change in 2024 *Labour's Plan for Employment Law*

1. Creation of a “single status” of Worker. There will become 2 categories of employment status:
 - a) **Workers**
 - b) **Self Employed.**
2. ALL Workers will have the same basic rights and protections including the right to bring a claim of unfair dismissal.
3. A **day one right** to unfair dismissal protection for ALL workers (changing from the current two-year limit).
4. Extended time limits for bringing claims to an Employment Tribunal.
5. Removal of current limits on compensation for Unfair Dismissal.

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Preparing for Change in 2024

Labour's Plan for Employment Law

6. Prohibition on use of dismissal and re-engagement ("Fire and Rehire") for making changes to contracts of employment.
7. Ban on the use of zero-hours contracts.
8. Introduction of a legal right to disconnect from work outside of normal hours.
9. Increased Trade Union rights and protections.
10. Extended Family-Friendly rights and protections (some of these, such as redundancy protection for 6 months after Maternity Leave, have already been brought in).

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Thank You. Questions?

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