Repeated extensions to a notice period do not automatically defeat a constructive dismissal claim

In *Kinch v Compassion in World Farming*, the Employment Appeal Tribunal (EAT) overturned an Employment Tribunal's decision to strike out a constructive dismissal claim. The Tribunal had said the employee "affirmed" her contract by extending her notice period several times – essentially meaning she had accepted the employer's breach of contract. However, the EAT said the Tribunal had not considered the full context of those extensions. It ruled that evidence needed to be heard before deciding whether the contract had been affirmed.

What happened in this case?

The Claimant was employed by the Respondent as its UK Financial Controller. In June 2022 she submitted a flexible working request asking to work from home due to personal circumstances. The request was rejected. On 26 August 2022, during a phone call with the Global HR Manager, she was told to return to the office for two days per week or face *"a sticky end".*

Four days later, on 30 August 2022, the Claimant resigned and agreed to serve three months' notice from home. This was more than her contractual notice period of one month and was agreed in order to support the team and allow a smooth handover. After this, two further extensions to the notice period were

agreed. During this extended notice period, the Claimant asked the Respondent to exercise its discretion to pay her occupational sick pay and also raised a grievance about the rejection of her flexible working request.

The Claimant's employment eventually terminated on 28 April 2023, some eight months after her resignation. She brought a constructive unfair dismissal claim in the Employment Tribunal, alleging there had been a repudiatory breach of the implied duty of trust and confidence, consisting of the refusal of her flexible working request and culminating in the "sticky end" comment by the Global HR Manager. She asserted that the extensions to her one-month notice period had been sought by the Respondent, save for the final extension which was at her request.

The Respondent denied that it had committed any repudiatory breach of contract but, if it had, the Claimant had accepted such breach and affirmed the contract by:

- continuing to work for them for eight months after her resignation;
- asking them to exercise their discretion to pay additional occupational sick pay to her;
- pursuing a grievance about the flexible working request after she had resigned; and
- seeking two extensions to the notice period for her own

benefit (namely, that her planned relocation overseas had been delayed).

The Respondent applied to have the claim struck out as having no reasonable prospect of success.

The Employment Tribunal considered the strike out application without a hearing. It found that the Claimant had affirmed the contract by requesting extensions to the notice period for her own benefit. It struck out the claim. The Claimant appealed to the EAT.

What was decided?

The Claimant argued that the Tribunal had been wrong to proceed on the basis that it was an agreed fact that she had sought the extensions, when this was, in fact, disputed. The Respondent resisted the appeal, arguing that the Tribunal may still strike out a claim where facts are disputed and, in any event, the core facts were not in dispute – she had worked for eight months after her resignation and had sought at least one of the extensions to the notice period.

The EAT held that the Tribunal had erred in striking out the claim. The Tribunal had proceeded on the basis that it was an undisputed fact that the Claimant had sought each of the extensions to the notice period for her own benefit. However, this was neither party's position and there was nothing before the Tribunal to justify the conclusion that the

whole of the additional seven months' notice had been requested by the Claimant and for her benefit.

In order to determine whether the Claimant had affirmed the contract it was first necessary to determine who had sought the various extensions. The Tribunal needed to hold a full hearing of the evidence on this issue, but it had not done so.

Accordingly, the strike out decision could not stand, and the case was remitted to a different Tribunal to hear evidence about the circumstances of the notice extensions.

What does this mean for employers?

This decision underlines a number of learning points for employers:

- **Don't assume giving notice rather than resigning with immediate effect means an employee cannot claim constructive dismissal**: the law is clear that employees who give notice remain entitled to claim constructive unfair dismissal, the logic being that an employee who is considerate enough to give notice should not be left worse off than one who leaves without notice.

- **Extending a notice period will not automatically mean that the departing employee has waived the repudiatory breach and affirmed the contract**:affirmation is highly fact sensitive and context dependent and requires an examination of all the circumstances of the case. Where a notice period has been extended, it will be relevant who sought the extension and why.

- **Where an extension to a notice period is agreed, keep clear and contemporaneous records**:keep accurate records detailing who sought the notice extension and why (and ask the employee to agree such records are accurate). If an employee later disputes the facts surrounding a notice extension these contemporaneous documents will undermine their position and improve the chances of succeeding in an application to strike out a constructive unfair dismissal claim.

Kinch v Compassion in World Farming

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Can independent HR consultants be liable for whistleblowing detriment claims as “agents” of the employer?

In the recent case of Handa v Station Hotel (Newcastle) Ltd and others, the EAT held that independent HR consultants may be viewed as agents of an employer for the work they are instructed to do. However, here, the HR consultants were not asked to, and did not, decide whether to dismiss and so were not liable as agents in a whistleblowing detriment claim concerning the dismissal.

What happened in this case?

The Claimant was a director of a company operating in the hotel sector (the **Respondent**). After the Claimant blew the whistle on alleged financial impropriety, several members of staff raised grievances alleging that he had bullied and harassed them.

The Respondent instructed an independent HR consultant, Mr Duncan, to investigate the grievances. He upheld two complaints and recommended that disciplinary action be taken against the Claimant. A second independent HR consultant, Ms

McDougall, was instructed to conduct the disciplinary hearing. She produced a report which indicated that the Respondent was entitled to dismiss the Claimant for gross misconduct, but she did not go as far as recommending that it do so. The Respondent went on to suspend the Claimant and remove him as a statutory director of the company. A few days later he was summarily dismissed. His appeal was rejected.

The Claimant brought a whistleblowing dismissal claim against the Respondent. He also brought whistleblowing detriment claims against two of the Respondent's directors, and also against Mr Duncan and Ms McDougall, arguing that they were "agents" of the Respondent and, as such, liable for the detrimental treatment i.e. the dismissal. However, the Employment Tribunal struck out the claims against Mr Duncan and Ms McDougall on the basis that they were not agents of the Respondent, and the claims had no reasonable prospect of success. The Claimant appealed that decision.

What was decided?

The EAT held that an HR consultant tasked with investigating, reporting and concluding a grievance or disciplinary could, in principle, be an agent of the employer. Traditionally, it is understood that an agent usually has the power to affect the principal's legal relationships with third parties. However, this is not necessarily the case in the employment context. Here, the key question to ask is whether the services the person is contracted to provide relate to a significant aspect of the employment relationship, rather than the employer's business activities. Where a third party is instructed to run a process closely related to the employment relationship (such as a grievance or disciplinary process) there is no reason why they cannot be an agent of the employer, although the

assessment is fact-sensitive in each case.

However, in this case, neither Mr Duncan nor Ms McDougall had been contracted to make the decision about whether to dismiss the Claimant, and nor did they do so. The mere fact that the Respondent had relied upon their work to support its position that the dismissal was fair did not mean they were liable for the detriment of dismissal. Nor did the fact that their work was part of the chain of events which led to the dismissal decision mean they were liable for the dismissal.

The appeal was dismissed.

What does this mean for employers?

There are many reasons why an employer may wish to appoint an independent HR consultant to conduct a grievance or disciplinary process. For example, where a very senior member of staff is implicated in the complaint, an external person brings a neutral perspective and so reduces the risk of perceived or actual bias. It might also be desirable to appoint an HR consultant where there is no dedicated HR team or the team is overstretched and/or where specialist knowledge and experience is required.

This decision will be helpful to employers wishing to reassure HR consultants that they will not be on the hook for dismissals – provided that they do not, in fact, make or implement the dismissal decision. To protect the HR consultant, employers should take the following steps:

- **Be clear about the remit of the HR consultant's role**: spell out what they are being engaged to do, for example, advise on a process, conduct an investigation or chair a hearing.

- **Ensure the HR consultant's impartiality is protected**: ensure that the independence of the HR consultant is not compromised by being too closely aligned with management (e.g. by acting as an adviser to the business on the process *and* as an investigator). Consultants should be wary of cases where they feel they are being used to "rubber-stamp" a predetermined decision.

- **Retain decision-making responsibility**: ensure that the company, not the HR consultant, makes the final disciplinary or grievance decisions. HR consultants should be careful to stick to their remit and resist any pressure to tell the employer what to do.

- **Transparency and disclosure**: remember that any written communication with the HR consultant will need to be disclosed in litigation unless it is legitimately protected by legal privilege. Both parties should avoid

making comments that suggest bias or predetermined outcomes.

Even with all these safeguards in place, HR consultants should remember that they could be liable as agents of the employer in respect of the work that they have been instructed to do. For example, in this case, if the Claimant had argued that the handling of the grievance process or disciplinary hearing was detrimental to him (as opposed to complaining about the dismissal itself), the HR consultants could have been liable given that they were instructed to run those processes. Therefore, HR consultants must take care to act fairly and transparently. It would be wise to keep clear records of the entire process, separate to any fact-finding or recommendations, as this will help defeat any claims attacking the process.

Handa v Station Hotel (Newcastle) Ltd

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Government calls for evidence on a raft of new equality law reforms

In April 2025, the Government published a Call for Evidence seeking views on a number of proposed equality law reforms. In this briefing, we consider the key areas of interest for private sector employers.

Background

The Government's flagship workplace law, the Employment Rights Bill, will take forward a number of the Labour Party's Election Manifesto commitments in the sphere of equality law, for example requiring large employers to publish equality action plans and strengthening the duty to prevent sexual harassment at work. You can read our detailed briefing on the Employment Rights Bill here.

However, the Labour Party's Election Manifesto and the subsequent Next Steps to Make Work Pay outlined plans for further workplace reforms – including more equality law reforms – to be taken forward separately from the Bill. Last month, the Government started the ball rolling on many of these further equality law reforms, when it issued a "Call for Evidence" seeking views and evidence on the proposals from various stakeholders, including employers. It also raises, for the first time, the prospect of new pay transparency laws.

This briefing considers the key areas of interest for private sector employers – but it is worth noting that the Call for Evidence also seeks views on compliance with the public sector equality duty and the implementation of the socio-economic duty by public authorities in England.

Expanding equal pay law

The Government states that it is committed to end pay discrimination at work and that it intends to take forward its previous commitments in this area. The Call for Evidence seeks evidence and views to help shape policy development in four areas.

Understanding the prevalence and patterns of pay discrimination

It is acknowledged that pay inequality persists for disabled and ethnic minority workers but that different groups may experience different types of pay discrimination. The example is given of disabled workers tending to face discrimination in respect of the criteria applied in performance-related pay or bonus schemes, whereas this is less common for ethnic minority workers. In order for its next steps to be effective, the Government says it wishes to fully account for the particular contexts and patterns of pay discrimination on the basis of race, disability and sex and seeks evidence on these issues.

Making the right to equal pay effective for ethnic minority and disabled people

Currently, sex discrimination in relation to contractual pay must be brought as an equal pay claim. However, someone who has experienced race or disability discrimination in relation to contractual pay is not able to bring an equal pay claim but must bring a discrimination claim – usually direct or indirect discrimination. However, the Government says it is only aware of a limited number of such cases being brought in comparison to *"thousands of equal pay claims brought each year"*, which could suggest that the equal pay regime offers a stronger form of redress.

The Government intends to give disabled and ethnic minority workers the right to bring equal pay claims in relation to contractual pay discrimination. However, it first wishes to understand the reasons why claims of pay discrimination on the basis of disability and race are so rare and so it is seeking views and evidence on this.

Commentators have been sceptical of this proposal due to the fact that equal pay claims are notoriously complex, and it is easy to see how claimants will get bogged down in questions of who the correct comparator is and whether work is of equal value. In a nod to this concern, the Government also seeks views on whether the procedural rules and use of job evaluation schemes could be simplified.

Including outsourced workers within the scope of equal pay comparisons

Currently, a worker wishing to bring an equal pay claim must be able to compare themselves to someone employed by the same or an "associated" employer. This permits a worker to compare their terms to someone employed by a company which is a

subsidiary of their own employer, or where both workers are employed by companies which are subsidiaries of a third company. However, outsourced workers who are employed by independent companies would not be able to compare their terms to “in-house” workers.

In response to evidence that outsourced staff are underpaid, the Government is considering allowing comparisons to be made between outsourced workers and in house workers in equal pay claims. The Government believes this will raise standards, stop undercutting and allow businesses to compete in a race to the top.

The Call for Evidence seeks views on the prevalence of pay discrimination suffered by outsourced workers, which practices should fall within the scope of the new law and where liability for such claims should lie – the direct employer, the end user or both?

Improving enforcement, including through the implementation of the Equal Pay Regulatory and Enforcement Unit

Under the current equal pay regime, workers must enforce their rights through the Employment Tribunal system. However, the complexity of such claims means achieving a resolution takes time. The Call for Evidence states that in the 10 years to March 2021 over 200,000 equal pay claims were made brought, but less than 1% were resolved by way of a full hearing. Of those that did, under one third were successful.

The Equality and Human Rights Commission (the **EHRC**) is already able to take action to enforce equal pay law, however, the

Government wishes to go further. It is considering improving the enforcement regime by establishing am Equal Pay Regulatory and Enforcement Unit, which could build on the EHRC's existing role or have new functions such as undertaking litigation, facilitating dispute resolution and providing training to employers. The Call for Evidence seeks views on the effectiveness of the existing framework and what more can be done.

Improving pay transparency

The Government is considering introducing new pay transparency measures to help end pay discrimination and tackle the gender pay gap. The Call for Evidence says that possible measures include requiring employers to:

- provide the specific salary or salary range on a job advert or prior to interview;
- not ask candidates their salary history;
- publish or provide employees with information on pay, pay structures and criteria for progression;
- provide employees with information on their pay level and how their pay compares to those doing the same role or work of equal value; and
- identify actions that they need to take to avoid equal pay breaches occurring or continuing.

The Government seeks views and evidence on the impact of increased pay transparency to help it decide whether additional pay transparency measures would be proportionate and effective.

Views are also sought on the effectiveness of separate regulations which allow Tribunals to order employers who lose equal pay claims to conduct equal pay audits and whether they should be expanded to cover race and disability in due course.

Introducing combined discrimination protection

The Government has committed toenact the combined discrimination protections which already exist under section 14 of the Equality Act 2010, but which have not yet been brought into force. Enacting the dual discrimination provisions would mean that workers may complain about discrimination arising out of the combination of two protected characteristics, rather than one as is presently the case. The Government considers this will help ensure that the "full reality of claimants' experience is recognised" and that discrimination law can better address disadvantage.

The Call for Evidence seeks views and evidence on the prevalence of combined discrimination including across different sectors and region and also whether section 14 is fit for purpose.

Clarity on sexual harassment at work

Effective steps to prevent workplace sexual harassment

Last year, the mandatory duty on employers to take reasonable steps to prevent sexual harassment at work was introduced. Under the Employment Rights Bill (currently on its passage through Parliament), this duty will be extended to require *all* reasonable steps to be taken. Added to which, employers will become liable for all forms of discriminatory harassment of their workers committed by third parties.

The Government says it plans to publish regulations which will specify the steps that employers must take to prevent sexual harassment, however, it will only do this if there is a clear evidence basis supporting the use of particular steps (in light of the fact that a Government report from 2021 had concluded that evidence does not support a clear understanding of "what works" to reduce and prevent sexual harassment at work). Therefore, the Call for Evidence seeks input on what steps are effective and how best practice may differ according to employer size, sector or other factors.

Scope of protections against sexual harassment

Workplace protection from sexual harassment extends to employees, workers, apprentices and others, however, it does not cover volunteers. The Government believes that volunteers should be protected while recognising that the wide range of volunteering activity may pose difficulties in implementing a blanket arrangement. The Call for Evidence seeks input on the question of expanding protection to volunteers, in particular, whether it should be extended to all or just certain types of volunteer and whether some types of organisation would be more likely to be adversely affected by the change than others.

Next steps?

The Call for Evidence closes on 30 June 2025 and so interested employers should submit responses on areas of interest before then (it is not necessary to respond to every question). Separately, the Government has issued a Consultation paper on the introduction of mandatory ethnicity and disability pay gap reporting. You can read our briefing about that Consultation here.

The responses to the Call for Evidence and Consultation will shape the forthcoming Equality (Race and Disability) Bill. However, it seems unlikely that these reforms would come into force before late 2026 or early 2027 at the earliest, given that employers have the immediate (and significant) challenge of complying with the Employment Rights Bill and given that the new Bill will need to complete its passage through Parliament.

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Government gears up to launch mandatory ethnicity and disability pay gap reporting

A consultation on mandatory ethnicity and disability pay gap reporting for employers with 250 or more employees has been launched. The plan is to use a similar reporting framework for ethnicity and disability pay reporting to the one that is already in use for gender pay gap reporting. The consultation closes on 10 June 2025.

The Government's Next Steps to Make Work Pay , issued alongside the Employment Rights Bill last October, set out plans to take forward its remaining Manifesto commitments on workplace law reform. A new Equality (Race and Disability) Bill was promised which would, amongst other things introduce ethnicity and disability pay gap reporting for employers with 250 or more staff.

In advance of publishing the Bill, the Government has launched a consultation seeking views on the following proposals:

- **Geographical scope:** the proposal is to follow the same approach as gender pay gap reporting, namely, mandaring reporting by large private and voluntary sector employers in Great Britain, large public sector bodies in England and certain public authorities across Great Britain.

- **Pay gap calculations:** the proposal is to require in-scope employers to report the same set of pay gap measures for ethnicity and disability as for gender, namely, mean and median hourly pay gaps and bonus gaps, the percentage of employees receiving bonus pay and the percentage of employees in four pay quartiles, ranked from highest to lowest hourly pay. In addition, the proposal is to make it mandatory for employers to report on the overall breakdown of the workforce by ethnicity and disability and the percentage of employees who declined to disclose their personal date on their ethnicity and disability. The aim here is to give context to the employer's disability and ethnicity pay gap figures and help build a clearer picture about an employer's overall commitment to inclusiveness.

- **Action plans:** the Employment Rights Bill contains provisions which will require employers to produce annual "equality action plans" setting out the measures being taken to close their gender pay gap. This consultation seeks views on whether employers should have to produce action plans for ethnicity and disability pay reporting – the intention is that reporting practices should be supported by initiatives to increase workplace equality. It is also said that employees will be able to use the plans to understand the actions the employer is taking and to hold them to account.

- **Additional reporting requirements for public bodies:** the Government intends to set higher threshold for public bodies (such as NHS bodies and schools) for reporting ethnicity information to drive transparency and accountability. The additional information required would be ethnicity pay difference by grade or salary band and data relating to recruitment, retention and progression. It is said this data will help public bodies identify where racial inequalities persist. Views are also sought on whether this additional information should capture disability.

- **Dates, deadlines and reporting:** again, the proposal is to mirror the gender pay gap reporting regime and ask private sector employers to use a pay snapshot date of 5 April each year to collect their pay data, with results to be reported within 12 months (and by no later than 4 April the following year). Different snapshot and reporting dates will be used for public sector employers. It is also proposed that the data is reported online in the same way as gender pay information is reported on the Government's gender pay gap service.

- **Enforcement:** the proposal is that ethnicity and disability pay reporting is enforced by the Equality and Human Rights Commission, in the same way as gender pay gap reporting.

- **Ethnicity and data collection:** it is proposed that employers collect ethnicity data using the detailed ethnicity classifications used by the Government Statistical Service for the 2021 Census. In England and Wales, this presents 19 different categories, plus an option of "prefer not to say". Using a harmonised standard will ensure employers are consistent with their calculations across different time periods and assists comparisons between employers.

- **Ethnicity and data reporting:** in terms of how ethnicity data is reported, all employers will be required to report on a binary basis comparing White British (or, alternatively, White employees or those in whichever is the largest ethnic group) with all other ethnic minority groups combined. Added to which, the Government says it will "encourage" employers to show pay gap measures for as many ethnic groups as they can since this will provide a much richer picture and better inform action plans. However, to protect employee privacy, it is proposed that data should only be reported for an ethnic group where there is a minimum of 10 employees in that group. Employers will be permitted to aggregate some ethnic groups to meet this threshold of 10. Alternatively, if an employer has small numbers of employees in different ethnic groups, they can report on a binary basis only, but this should be kept under review, with the aim of reporting on more ethnic groups in future.

- **Disability and comparing pay across employee groups:** the proposal is to require employers to report on the disability pay gap on a binary basis by comparing the pay of disabled employees with non-disabled employees (as opposed to reporting the gaps between employees with different types of disabilities and non-disabled employees). For these purposes, the definition of "disability" used in the Equality Act 2010 will apply to ensure a consistent definition of disability across equality-related measures. Employees will not be required to disclose their disability if they do not wish to do so. Again, to protect employee privacy, it is proposed that data should only be reported where there is a minimum of 10 employees in each group (i.e. disabled and non-disabled).

Next steps?

Employers with 250 or more employees (or those close to that threshold) should consider submitting their views on the consultation proposals. Responses may be submitted online, by email or by post by 10 June 2025.

Separately, the Government has issued a Call for Evidence seeking views on a wide range of additional equality law proposals. You can read our briefing on the Call for Evidence here.

The responses to the Consultation and the Call for Evidence will shape the forthcoming Equality (Race and Disability)

Bill. However, it seems unlikely that these reforms would come into force before late 2026 or early 2027 at the earliest, given that employers have the immediate (and significant) challenge of complying with the Employment Rights Bill and given that the new Bill will need to complete its passage through Parliament.

In the meantime, in scope employers should begin to consider the following questions:

- Who will have ownership of the data collection and reporting processes within the business? Is additional resource needed? Will relevant staff need training?

- Are systems in place to collect and hold the relevant data securely? It should be remembered that ethnicity and disability data will constitute "special category data" for the purposes of data protection laws.

- How and when will you inform staff about the exercises and who will do this?

- Would a "dry run" of collecting and analysing the data

be desirable to test the robustness of the process and to understand the likely results?

Equality (Race and Disability) Bill: mandatory ethnicity and disability pay gap reporting – Government Consultation

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