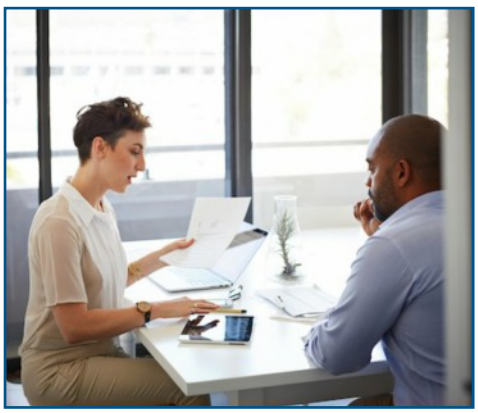
Nash&Co Solicitors

NASH KNOWLEDGE

September 2023

British Fireworks Championships, Plymouth, August 2023



CONTENTS

Contact the Employment team on 01752 827081 or email employment@nash.co.uk

Or click to visit us at https://nash.co.uk/business/employment-law-team/

Skin Map and Agile Love – A Reminder of The Importance of a Fair Procedure

Besides sounding like dodgy 80's tribute bands, you might be wondering what the connection between 'Skin Map' (which just sounds gross, doesn't it?) and 'Agile Love' is – the recent case of NatWest v Ahmed delves into a data analyst's exploits in the world of sex work and sensual massages and we will connect the dots all in good time…

Mr Ahmed was employed by NatWest since March 2018, and, although early in on in his employment he received commendation for good work, there was a strained relationship between employer and employee. Apparently, Mr Ahmed was 'difficult to manage' and had issues with communicating with others – to the point where it was agreed that Mr Ahmed had to double check his emails to ensure that they were appropriate and there was 'no risk of upsetting anyone'.

Over a period of months, various other issues were raised both by and against Mr Ahmed – issues included: Mr Ahmed calling his manager a 'big baby', Mr Ahmed alleging that he was being bullied, and allegations that Mr Ahmed left a colleague 'cowering' after an unpleasant interaction.

In February 2020, Mr Ahmed was suspended following a meeting with his line manager to discuss his poor performance, the fact that Mr Ahmed was often late, that he left the office to go home during working hours, that he failed to deliver on his work activities and that he was failing to log into the system when working from home. Helpfully, Mr Ahmed responded to each question asked during this meeting with 'no comment'.

In May 2020, a further disciplinary matter arose. Mr Ahmed, who used an alias online, utilised websites called 'Skin Map' and 'Agile Love' (*see, I told you the dots would connect – although I wouldn't Google these on your work computer if I were you*) to advertise explicit photos of himself and "sensual massages" – at only £25 a pop. Mr Ahmed had links to Agile Love on his LinkedIn profile and had also used NatWest's address on a third business website 'Agile Business Development', so understandably, NatWest weren't best pleased.

As a slight aside, it was also thought that, from around this time, Mr Ahmed was living in a campervan in the NatWest car park – although this wasn't actually determined by the Tribunal, I certainly can't imagine a less relaxing place for a massage.

Long story short, after further meetings and allegations about his behaviour, Mr Ahmed was sent a dismissal letter in October 2020. No meeting was held, no specific allegations were put to him – it seems, ultimately, they just got a bit tired of dealing with him.

Mr Ahmed brought a claim for unfair dismissal. Despite all of Mr Ahmed's objectively unacceptable alleged behaviours, his claim was upheld by the Tribunal on the basis that NatWest had made significant flaws in the disciplinary process – including the fact that they did not meet with Mr Ahmed, nor was Mr Ahmed given the opportunity to appeal the decision.

While this was a close call for NatWest, who got away relatively unscathed as a result of the Tribunal's decision to reduce the compensation by 100% (common sense often prevails), it acts as an important reminder to make sure that a fair process is followed when bringing an end to someone's employment for misconduct.

Below are some of our top tips when carrying out a disciplinary relating to the conduct of an employee:

1. Channel Your Inner Sherlock Holmes:
Before considering dismissal, it's crucial to conduct a thorough and impartial investigation into the alleged misconduct. This should include gathering all relevant evidence, interviewing witnesses, and giving the employee an opportunity to respond to the allegations. Always remember your looking for evidence which both supports and undermines the allegations – you aren't on a witch hunt.

2. Disciplinary Procedure:
Every organisation should have a disciplinary procedure in place. Ensure that you follow this procedure closely, as failing to do so can render a dismissal unfair – if you don't have a disciplinary procedure (*you should!*) make sure you follow the Acas Code. This includes providing the employee with written notice of the allegations, a chance to attend a disciplinary hearing, and the right to appeal the decision. Do not, however, have an overly complicated disciplinary procedure – it may look pretty, but it will trip you up.

3. Consistency is Key:
Consistency in how you handle misconduct issues is essential. Treat all employees fairly and equally when it comes to disciplinary matters. If similar conduct issues have been addressed differently in the past, it can weaken your position and potentially lead to claims of unfair treatment – for example, don't see misconduct as an opportunity to sack your least favourite employee if you wouldn't do the same for your star employee.

4. Consider Mitigating Factors:
While misconduct may warrant disciplinary action, it's important to consider any mitigating factors. These could include the employee's length of service, previous disciplinary history, personal circumstances, and whether they have shown remorse or taken steps to rectify their behaviour.

5. Keep Records:
Make notes of *everything!!* Comprehensive record-keeping is vital throughout the disciplinary process – it also really makes a difference if the worst should happen and an Employment Tribunal claim falls in your lap.

Document all meetings, correspondence, and decisions made, including the reasons for the dismissal. The key to being prepared for a Tribunal is paper trail, paper trail, paper-trail.

Do you have any specific employment law questions that you want answers to?

In future editions of Nash Knowledge, we'll take at least one question that we've been sent, and we'll publish a full answer and explanation.

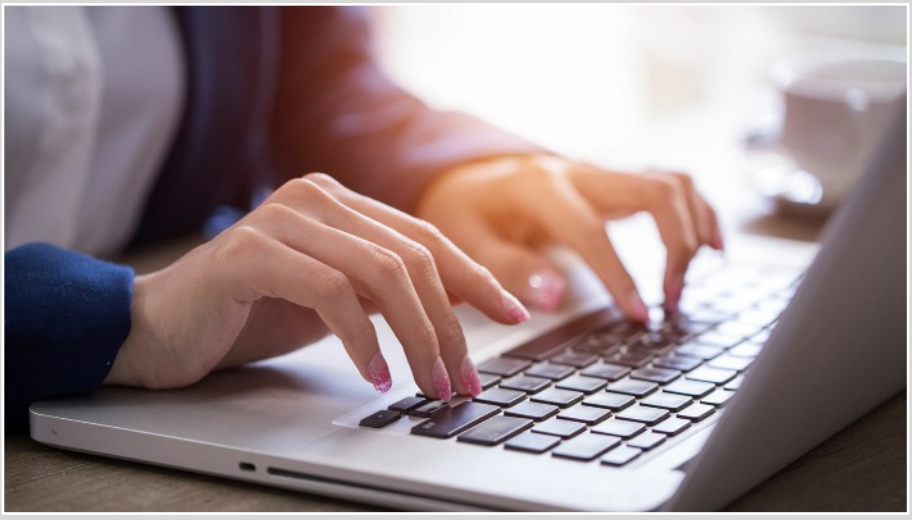
So, now's your chance to ask that employment law question that you've always wanted an answer for! We're happy to keep it anonymous if you prefer!

Just email us your question to **marketing@nash.co.uk** by the 20th of each month, and we'll pick the best one that we've been sent. The answer will be in the following month's edition!

#AskNash #AskUsAQuestion

The Controversy

The case of Higgs v Farmor's school has gained a significant amount of publicity and the latest stage of its litigation journey has now been completed with an EAT judgment.



Background

Mrs Higgs, a Christian, was employed as a pastoral administrator and work experience manager at Farmor's School, found herself at the center of a controversy after engaging with social media. A parent of a student at Farmor's School sent an email to the school's head teacher, expressing concern over a Facebook post made by Mrs. Higgs. The post in question was a shared article, to which Mrs. Higgs added the caption, "Please read this! They are brainwashing our children!" The content of the article discussed the teaching of same-sex relationships, same-sex marriage, and the concept of gender fluidity in schools. The parent felt that Mrs. Higgs' post revealed her to have prejudiced views against the LGBT community.

Following this, the head teacher requested more evidence of such posts. The parent provided another post where Mrs. Higgs shared views that described gender fluidity as a "perverted vision" and criticized the promotion of LGBT perspectives in schools. The parent further expressed concerns that Mrs. Higgs' position seemed to be opposed to a minority group that included several students at the school.

The school's decision

Despite Mrs. Higgs' denial of holding any homophobic or transphobic views, the school decided to suspend her. After an internal investigation and hearing, she was dismissed for gross misconduct. The school believed she had violated their code of conduct and that her posts could potentially harm the school's reputation.

Mrs Higgs' position at Tribunal

Mrs. Higgs argued that she was being discriminated against based on her religious beliefs. She listed several beliefs she held, including opposition to gender fluidity, belief in traditional marriage, and the literal interpretation of the Bible. She felt that her posts were a manifestation of these beliefs.

The Tribunal's Decision

An employment tribunal acknowledged that Mrs. Higgs' beliefs were protected under the Equality Act 2010. However, they concluded that she was not discriminated against because of these beliefs. Instead, they believed she was disciplined due to the provocative language in her posts, which could be perceived as homophobic and transphobic.

Mrs Higgs' appeal

Mrs. Higgs appealed the Tribunal's decision. The Employment Appeal Tribunal (EAT) found that the initial tribunal had not adequately addressed whether Mrs. Higgs' posts were a manifestation of her beliefs. The EAT decided that the case needed to be re-evaluated, focusing on whether Mrs. Higgs'

posts were a direct expression of her beliefs and if the school's actions were justified.

The Importance of Proportionality
The EAT emphasized the need for a proportionality assessment. This means weighing the importance of Mrs. Higgs' rights to freedom of belief and expression against the potential harm her posts could cause. The tribunal had to consider if the school's actions were necessary for the protection of others' rights and freedoms.

Guidance for Future Cases
While the EAT was cautious about setting general guidelines, they did outline basic principles for handling similar cases. These principles highlight the importance of recognizing the foundational nature of freedom of belief and expression. However, they also stress that these rights can be limited if they infringe on the rights of others.

When deciding whether a limitation on rights of freedom of belief and expression are appropriate, the EAT Tribunal provided the following considerations:

- The content and tone of the manifestation of belief.
- The extent of the manifestation of belief.
- The perceived audience of the manifestation of belief.
- The potential intrusion on others' rights and any impact on the employer's operations.
- Whether the views expressed are personal or could be seen as representing the employer.
- Potential power imbalances, especially if the expression might impact vulnerable individuals.
- The nature of the employer's business and potential impact on clients or service users.
- Whether the limitation imposed is the least intrusive measure available.

By emphasizing the importance of context and proportionality, the EAT is seeking to ensure that each case is evaluated on its merits, taking into account the unique circumstances and potential impacts and is a step in the right direction to give employers guidance in how to approach these very sensitive topics.

Where are we now?
Mrs. Higgs' case serves as a reminder of the delicate balance between individual rights and the broader interests of society. In an era where social media blurs the lines between personal beliefs and public expression, it's crucial for institutions and individuals to navigate these waters with care and understanding.

The outcome of Mrs. Higgs' remitted tribunal hearing is eagerly anticipated, as it will further shape the discourse on freedom of expression in the workplace – we will be watching out for the next instalment.

Duty to make further enquiries of disabled job applicants

Does an employer need to expressly know the details of a disabled person's substantial disadvantage before being expected to make reasonable adjustments?

No, held the EAT in *Aecom Ltd v Mallon [2023] EAT 104*
In this case, the EAT upheld the ET's finding that an employer was under a duty to make reasonable adjustments where reasonable enquiries would have made the employer aware that the applicant was placed at a substantial disadvantage by the on-line application process.

Facts
To apply for a role, candidates needed to complete a short online application form, creating a personal profile (by providing their email address and creating a username and a password consisting of eight digits including a special character).

The Claimant emailed the Respondent, informing them that he had dyspraxia and requested, in bold capitals, that he be allowed to make an oral application because of his disability. He asked that this be organised via email and said he would supply a telephone number if the Respondent emailed him.

The Respondent's HR manager told the Claimant that he needed to complete the online form, but that he should let them know if he was struggling with any aspect of it.

The Claimant reiterated that he was happy to complete the application over the phone and would prefer to put forward an oral application.

The Respondent's HR manager, who accepted before the ET that it would have been a sensible step to call him, did not call the Claimant because she was not directly involved in the recruitment process.

ET
The Claimant's claim of disability discrimination, arguing that the Respondent had failed to make reasonable adjustments, was upheld.

The Respondent was held to have applied a 2-part PCP:

- candidates were expected to create an account, by providing a username and password, in order to access the online form; and
- candidates were expected to answer the questions raised by inserting the information and answers on the online application form in the spaces provided.

The Claimant was put to a substantial disadvantage as a result of these PCPs, as he found it particularly difficult to express his thoughts in writing.

The ET found that the Respondent knew that, due to the Claimant's dyspraxia, he would find it difficult to complete the application form. Whilst the Respondent was only aware that he would find it difficult (as the Claimant had not identified any detailed reasoning as to why completing an online application form was particularly difficult) the ET found that the Respondent ought to have known that the Claimant was put at a substantial disadvantage. This was because, if it had wanted further clarification of the reasons why he found it difficult to complete the online application form, the Respondent should have telephoned him.

The Respondent's appealed that:

- the ET had erred by failing to assess the Respondent's knowledge of the disadvantage by reference to the substantial disadvantage that the Claimant was put to by the specific PCPs;
- the ET had erred in its approach to the burden placed on an employer to make enquiries into an employee's disability; and
- the ET had erred in finding that it had not been reasonable for the Claimant to have been expected to explain his difficulties by email.

AT

The above grounds of appeal were dismissed.

The EAT held that the ET had answered the right questions: there was no good reason why someone could not have spoken to the Claimant to discover his particular difficulty with the online application that, for whatever reason, he had been reluctant or unable to explain in an email.

Given that the ET had found that, had the Respondent made reasonable enquiries by telephoning the Claimant, the Claimant would have given the specific details on the phone, it inevitably followed that it would, in so doing, have had the requisite knowledge of his particular difficulties to place it under a duty to make reasonable adjustments.

The EAT said the ET was open to conclude that an employer acting reasonably, when faced with an individual with dyspraxia requesting an adjustment to avoid filling in an online form, but who failed to respond in writing to a reasonable question, would have picked up the phone to speak to that individual in order to understand their situation.

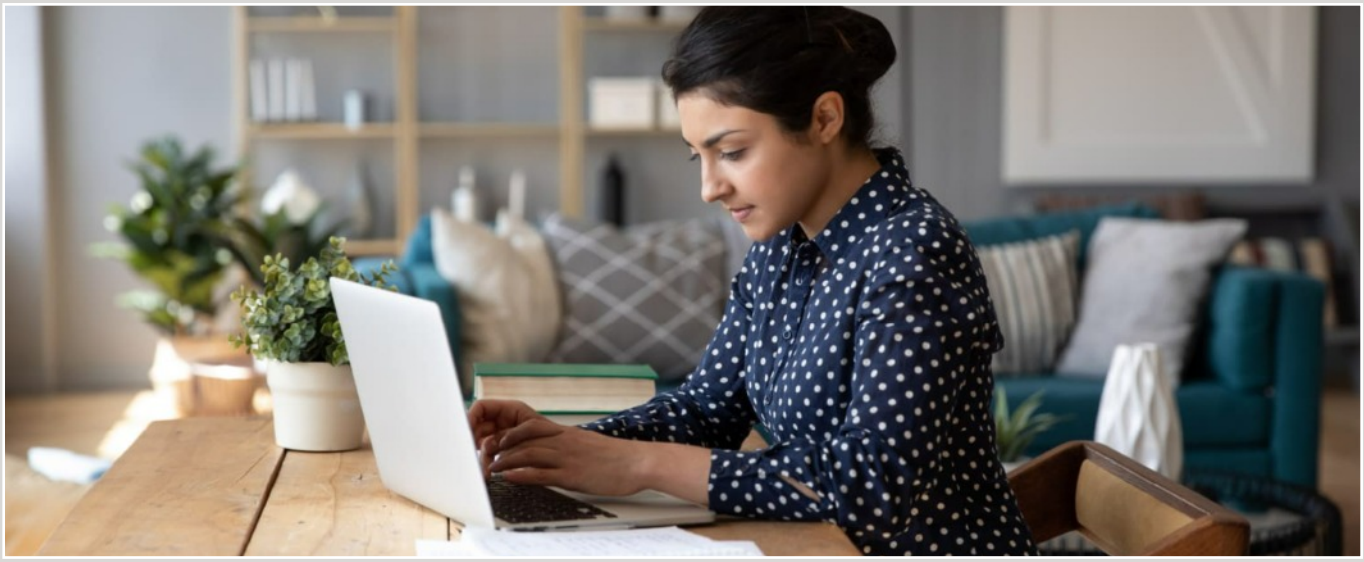
Summary

Whenever an employer is informed that a job applicant has a disability, it should ensure to take extra care to make reasonable enquiries of the effects of that disability to ensure that any reasonable adjustments are considered and made.

This case reiterates that an employer or potential employer cannot claim not to have knowledge of a disability, or the impact of that disability, if they could have acquired that knowledge by making reasonable enquiries. Essentially, the "I put my head in the sand" defence won't work.

Evolution of home working

The Covid-19 pandemic challenged the traditional 9-to-5 office model and brought about a change to people's expectations of work. Many businesses embraced the concept of working from home and some took the courageous step of shutting offices as they were no longer required in this brave new world.



As the world has returned to normal, however, the disadvantages of permanent home working are becoming more apparent, with high profile early adherents, such as Amazon and Twitter (or "X" as those in the know call it) seeking a return to the office and, almost ironically, Zoom joining the return to office rush.

These businesses are not, with the exception of X, seeking a full return to the office; rather they are seeking to embrace the best of both worlds: the flexibility and balance of home working, combined with the teamwork, culture and productivity of office working.

If you are thinking about moving to a hybrid arrangement, what might you consider?

1. The current contracts allow you to do

Most contracts may contain a general flexibility and/or mobility clause, and in some cases, can be relied upon in order to make changes.

Employees may seek to argue that they now have a right to work from home permanently even though their contract is office based; however, the usual position would be that they had a right to work from home during the exceptional circumstances of a pandemic – not an indefinite right to do so.

2. What if the change is intended to only be temporary?

If you intend for hybrid working to operate on a non-contractual and discretionary basis, then you should be aware of the possibility that the hybrid working arrangement may implicitly become contractual if it goes on for a long period of time.

We would suggest ensuring that any policy is clear it is non-contractual and that the employees are informed that it is kept under review and can be revoked at any time.

Whether there will be a minimum expected attendance at the workplace and, if so, whether these are set days or more flexible.

Expectations must be made clear and both parties should be aware of what the core hours are/when they must be available to work. If the change is expected to be permanent, then such information should be included in the employment contract.

What about people with childcare or caring needs – can they be required to return to the office

A couple of years ago, it would almost go without saying that working time and childcare time are separate and working from home is not there to provide child care; however, the pandemic blurred that line, especially when the schools closed on what appeared to be an ad hoc basis.

Whilst it is not appropriate for a worker to be a primary carer at the same time as they are working, it is reasonable for them to be the responsible adult in the home when older children are on school holidays for example.

Workers may also have got into the habit of collecting their children from school due to the flexibility that home working had given them.

Workers are likely to want to maintain these family friendly arrangements so any removal should be done sensitively and taking into account individual circumstances, especially with female members of staff who may be able to bring an indirect sex discrimination claim on the grounds that women are more likely to have child related responsibilities.

Hybrid working can offer employers the best of both worlds: a workforce with a good work life balance whilst also ensuring that the bonds developed by people working together in person remain strong. It is important, however, especially at this early stage of adoption, to retain flexibility and this should be reflected in any contractual or policy documentation – the world changed quickly in the pandemic and will no doubt continue to change over the coming years: no one wants to be tied down by contractual arrangements which were “a good idea at the time”.

If you need to get in touch…

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Interesting cases on the horizon

Higgs v Farmor's School

Heard by Employment Appeal Tribunal on 16 March 2023

The belief that an individual cannot change their biological sex is worthy of respect in a democratic society and, therefore, potentially protected under the Equality Act 2010. The case has been remitted to the Employment Tribunal. See article in this month's edition.

Accattatis v Fortuna Group (London) Limited

Due to be heard in Employment Appeal Tribunal 20 December 2023

Was the Tribunal right to hold that COVID-19 concerns alone may not justify a refusal to attend work under health and safety legislation if employers have reasonably tried to accommodate employees' concerns and reduce transmission risk?

Manjang v Uber Eats UK Ltd Employment Tribunal

Employment Tribunal Awaiting hearing date

Was Uber's decision to use a facial recognition system to verify the identity of their drivers indirectly discriminates on the ground of race?

Chief Constable of the Police Service of Northern Ireland and another v Agnew & others

Awaiting Supreme Court Judgment

Is a "series" of unlawful deductions from holiday pay interrupted by gaps of more than three months?

Kocur v Angard Staffing Solutions Ltd and anor

Due to be hearing by Supreme Court on 7 December 2023

Does the right of agency workers to be informed of vacancy extend to the right to apply for and be considered for those vacancies – the courts have so far said "no".

USDAW v Tesco Stores Ltd

Due to be heard by the Supreme Court on 24 and 25 January 2024

Is there an implied term preventing an employee from being dismissed and re-engaged when the term being removed is one which was promised to them?

Hope v British Medical Association

Due to be heard by the Court of Appeal

If an employee brings numerous vexatious and frivolous grievances and then fails to attend grievance meetings, could this amount to gross misconduct to release the employer from payment of notice.

Important legislation changes ahead

Strikes (Minimum Service Levels) Bill
A proposed bill requiring a minimum level of service in critical sectors during periods of strike. Currently being batted back and forth between the Houses of Parliament.

Retained EU Law (Revocation and Reform) Bill
The Bill would lead to EU laws either being put into domestic legislation or revoked, with a sunset provision automatically revoking any remaining EU derived law not in domestic legislation by the end of 2023; however, the government has said that they will be amending this so only specific laws will be revoked.

Employment Relations (Flexible Working) Bill
A bill to introduce a requirement for employers to consult with employees before rejecting a flexible working request; to allow two flexible working requests a year; to reduce the time to make a decision to two months and to simplify the method making a request. Awaiting a third reading.

Employment (Allocation of Tips) Act 2023
An Act to ensure workers receive 100% of their tips. Royal Assent received, but no in force date yet.

Neonatal Care (Leave and Pay) Act 2023
An Act to enable parents of babies who require specialist neonatal care to take up to 12 weeks' neonatal care leave. Such leave to be paid at the statutory rate. Likely to come into force in 2025

Protection from Redundancy (Pregnancy and family Leave) Act 2023
An act to extend protection from redundancy after pregnancy or maternity to cover the period from the date that the employer is informed of the pregnancy through to six months after the employee returns from maternity leave. Awaiting secondary legislation to implement

Worker Protection (Amendment of Equality Act 2010) Bill
This Bill would make provision to make employers liable for third party harassment. It may be that government withdraws support for the bill having realized the expansive nature of the obligations it proposes.

Carers Leave Act 2023
This Bill would make provision for unpaid leave for employees with caring responsibilities – will not be implemented until at least 2024

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RATES AND LIMITS (April 1st 2023-March 31st 2024)

National Minimum Wage from 1st April 2023

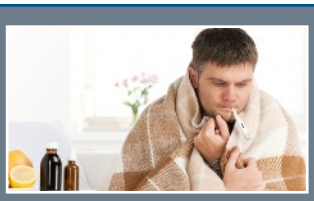
Workers aged 23 or over (the National Living Wage): £10.42 per hour
Workers aged 21 to 22: £10.18 per hour
Workers aged 18 to 20:£7.49 per hour
Workers aged 16-17: £5.28 per hour
Apprenticeships: £5.28 an hour
Accommodation offset limit (maximum daily deduction from NMW, per day): £9.10

Family Rights

From April 2023, the rates for Statutory Maternity Pay, Statutory Paternity Pay, Statutory Adoption Pay and Statutory Shared Parental Pay will increase to £172.48.

Sick Pay

From April 2023, the rate for Statutory Sick Pay will increase to £109.40 per week



Taxation: Scotland

In Scotland, for the tax year 2023/24:
Scottish Starter Tax Rate of 19% applies on annual earnings from **£12,571 - £14,732**
Scottish Basic Tax Rate of 20% applies on annual earnings from **£14,733 - £25,688**
Scottish Intermediate Tax Rate of 21% on earnings from **£25,689 - £43,662**
Scottish Higher Tax Rate of 41% on annual earnings from **£43,663 - £125,140**
Scottish Top Tax Rate of 46% on annual earnings above **£125,140**

Taxation: UK (Excluding Scotland)

In the UK (excluding Scotland), for the tax year 2023/24
Basic Tax Rate of 20% applies on annual earnings above PAYE tax threshold and up to **£37,700**
Higher Tax Rate of 40% applies on annual from **£37,701 to £125,140**
Additional Tax Rate of 45% applies on annual earnings above **£125,140**

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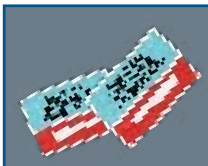
RATES AND LIMITS (Continued)

Limits

Maximum amount of a week's pay (used for calculating a redundancy payment or for various awards including the unfair dismissal basic award): **£643**

Limit on amount of unfair dismissal compensatory award: **£105,707**
Maximum guaranteed payment per day: **£35**



National Insurance

The lower earnings limits in respect of primary class 1 contributions is **£123 per week.**

The upper earnings limit for primary class 1 contributions is **£967 per week**

Auto Enrolment

The minimum contribution rates for defined contribution schemes, expressed as a percentage of a job holder's qualifying earnings, is **3% for employers and 5% for employees.**

automatic enrolment

Vento Bands

Injury to feeling and psychiatric injury:

Lower Band of £1,100 - £11,200 (Less serious cases)

Middle Band of £11,200 - £33,700 (cases that do not merit an award in the upper band)

Upper Band of £33,700 - 56,200 (The most serious cases), with the most exceptional cases capable of exceeding **£56,200**)

Statutory Minimum Notice

Statutory or Contractual Notice?
There are two types of notice period: statutory and contractual. Statutory notice is the minimum legal notice that can be given.

Length of Employment	Notice required from employer
Under 1 month	No statutory notice requirement
1 month to 2 years	1 week
2 years to 12 years	1 week for each completed year of service
12 years or more	12 weeks