

A person wearing a blue suit jacket and a black watch is holding a brown leather briefcase. The briefcase has a gold-colored clasp and handle. The background is a light, textured surface.

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COVID update

The Government has extended some of the provisions in the Corporate Insolvency and Governance Act 2020 ('CIGA'). As you may recall CIGA introduced *special measures during the pandemic*. The extensions include the suspension of wrongful trading laws until 30th June to protect directors that continue to trade a company through the pandemic with uncertainty as to whether their company may be able to avoid insolvency in the future. The prohibition on termination clauses is also extended until 30 June.

Automatic extensions to most Companies House filing dates however came to any end on the 5th April.

The Home Office has updated its guidance on the [right to work](#) check confirming that temporary measures that allowed for the remote checking of work status will end on the 16th May.

As businesses are now returning or planning the return to the work-place, ACAS has issued new [guidance](#), primarily about consulting with staff.

Corporate & Commercial

Limiting liability in business contracts

A recently published Northern Irish decision¹ has ruled that a supplier that supplied a defective adhesive to kitchen component business was not able to enforce its terms that limited its liability to the price of the goods it had supplied. The Court ruled that the terms *did not meet the requirement of reasonableness* under the Unfair Contract Terms Act. This decision seems to conflict with an earlier Court of Appeal² case which allowed a supplier to limit its liability in a similar way, however there were some differences particularly that the supplier in that case had alerted its customer to the availability of insurance to cover such losses and offered to provide the insurance.

Restoring trust in audit and corporate governance

The government, has issued a consultation document: [Restoring trust in audit and corporate governance](#). The proposals are focused on the UK's largest companies with the aim to restore confidence in the way that these companies are run and scrutinised. The consultation is open until 8 July.

New green model clauses and model laws published.

The Chancery Lane Project (TCLP) has published 21 new *model clauses designed to combat climate change*. The new additions include model clauses for use in corporate transactions, supply agreements and construction procurement. The model clauses can be found on [TCLP's website](#).

Data Security

Cyber breach survey

The Government has published its 2021 [cyber breach survey](#) showing the *highest ever risk level* and is urging organisations to follow the [National Cyber Security Centre's guidance](#).

The report did find that cyber security is a high priority for Boards and more businesses are taking out cyber insurance, however there were concerning gaps:

- fewer businesses reported deploying security monitoring tools or having up to date malware;
- most businesses do not have policies for home working or using personal devices for work;
- only a third have a virtual private network (VPN) for remote working;
- only 14% of businesses train their staff on cyber risks;
- only 12% review risks posed by suppliers; and
- 32% of large businesses are using unsupported versions of Windows.

Meanwhile, a [recent BBC report](#) has highlighted a lesser-known, but potentially devastating cyber-threat for medium to larger businesses - a hack into their computer firmware.

Make reasonable enquiries before using confidential information.

The Court of Appeal⁵ has ruled that companies that recruit staff from competitors bringing customers lists or other confidential information must not simply turn a 'blind eye' and will be *bound by a duty of confidentiality* if it was reasonable for them to have made enquiries as to the confidential nature of the information, but failed to do so.

Advertising & Marketing

Colin and Cuthbert wars

The story of Marks and Spencer's 'Colin the Caterpillar' cake and whether Aldi's 'Cuthbert the Caterpillar' cake has infringed its trademarks has grabbed the headlines in the mainstream and legal media. Marks and Spencer will need to show that their trademarks have a distinctive character, but as other supermarkets are known to also produce similar cakes, we think this will be an uphill task. Other brands have tried and failed to stop Aldi selling similar products.

ASA sends warning on social media marketing.

A [recent study by the UK Advertising Standard's Authority \(ASA\)](#) has found that the majority of social media influencers and the associated brands are continuing to breach consumer and advertising laws by not disclosing that they are marketing advertisements. The ASA has provided [guidance](#).

Employment

Equal pay claim

The Supreme Court has ruled⁵ that 35,000 claimants, predominantly female employees working in retail, can use male employee counterparts working in distribution centres as *comparators for the purposes of an equal pay claim*. This is a huge step in this claim, but there is still a long way to go. The claims will now proceed to determine whether the work done by the claimants is in fact of equal value to that of their comparators.

Changes to the post-employment notice pay.

New rules were implemented in April requiring employers to calculate Post Employment Notice Pay in a specific way. The changes are to fix some unintended consequences from reforms made in 2018. Further information can be found on [the Government website](#).

The importance of regular equal opportunities training

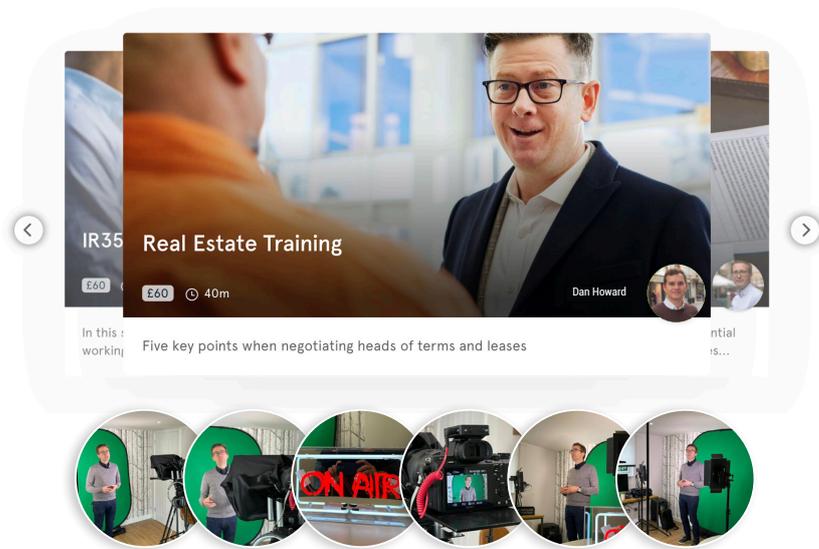
A recent Employment Appeal Tribunal (EAT) decision⁶ has sent a reminder to employers of the importance of *keeping equal opportunities training up to date*.

Under the Equality Act, an employer can be liable for discriminatory actions of their employees. Employers can defend such claims if they can show that they have taken 'all reasonable steps' to prevent the employee from the discriminatory act.

The employer in this case claimed it had taken all reasonable steps – it had an equality and diversity policy in place, and it had provided training, but the tribunal rejected its defence stating it was clear that the training was 'stale' and the employer should have implemented refresher training.

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Employment Appeals Tribunal starts to diffuse the holiday pay time bomb.

You may recall the *King v Sash Windows*⁷ case that we have previously reported. In that case a salesperson challenged his employment status – successfully arguing he was a worker and not self employed and therefore entitled to holiday pay he should have received in his 13 years of service. The EAT has however now ruled in the *Smith v Pimlico Plumbers* case⁸ that there is a distinction between compensation for the unpaid holidays willingly taken and compensation for holiday that a person has been deterred from taking or been refused. If the holiday has been willingly taken but not paid then the claimant must comply with strict time limits (three months). In Mr Smith's case he had not been deterred from taking holiday and was therefore out of time for almost all of his claims for holiday pay.

New employer guidance – providing financial support to employees.

The Financial Conduct Authority ('FCA') has produced an [updated guide](#) for employers warning of the need to be *cautious when providing financial guidance to employees*.

Employers can help employees with general questions about their pension arrangements, but any specific guidance on matters such as what investment fund they should choose or providing any promotional materials for a particular product could amount to making a 'financial promotion', which should only be made by individuals or organisations authorised by the FCA.

Workers gain new health and safety protection.

Amendments to the Employment Rights Act will come into force on 31 May and provide workers with the same protection as employees to not be subjected to a detriment if they leave their workplace (or refuse to return to their workplace) because they reasonably believe they are in serious or imminent danger.

Consumer

Limiting liability in consumer contracts

The High Court has ruled³ that BetFred *was liable to pay out a customer's £1.7 million winnings* on a bet allegedly caused by a software defect, despite Betfred's claim that its consumer terms excluded liability for such defects.

The Court ruled that the exclusion clauses:

- did not adequately describe the type of software defect that was applicable;
- had not been sufficiently brought to the attention of the customer; and
- did not meet the Consumer Rights Act fairness and transparency requirements.

Bribery & Corruption

UK Government launches modern slavery statement registry.

The Government has launched a [new modern slavery statement registry](#) for large businesses required to publish a slavery and human trafficking statement.

For now, the Government-run registry is voluntary, but in the future, it will be mandatory although the timing on that obligation is not yet clear.



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Cases, laws, decisions referred to in this Bulletin

1	B A Kitchen Components Ltd v Jowat (UK) Ltd [2021] NIQB 3
2	Goodlife Foods Limited v Hall Fire Protection Limited ([2018] EWCA Civ 1371)
3	Green v Petfre (Gibraltar) Ltd (t/a Betfred) QBD EWHC 842 (QB) 7 Apr 2021
4	Travel Counsellors Ltd v Trailfinders Ltd [2021] EWCA Civ 38
5	Asda Stores Ltd (Appellant) v Brierley and others (Respondents) [2021] UKSC 10
6	Allay (UK) Ltd v Gehlen UKEAT/0031/20/AT
7	The Sash Window Workshop Ltd v King A2/2014/4294, ECJ C-214/16
8	Mr G Smith v Pimlico Plumbers Limited UKEAT/0211/19/DA

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