HR Hub – Legal Update

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Employment law in the news

BBC U-turn on Gary Lineker tweet

The recent controversy surrounding Gary Lineker's criticism of the Government's immigration policy, and the BBC's handling of the matter has thrown the use of social media into the spotlight. Many employers have social media policies which outlines appropriate uses of social media. The focus here however is how employers respond to breaches of these policies.

Matt Hancock's Whatsapp messages leaked to the press

One of the issues arising from this incident was the use of WhatsApp by government officials. The ICO commented that whilst this was not a matter for them to consider, they did highlight the risks that the use of WhatsApp and other private messaging channels bring around transparency. Employers should be aware of the use of WhatsApp in the workplace, whether this is for business purposes or private purposes. From a GDPR perspective, employers should be aware when personal data is processed via WhatsApp. From a HR perspective, employers should be aware of the use of private WhatsApp chats which, if used inappropriately, may be a forum for bullying and harassment.

The Spring Budget

In the spring budget, the Chancellor announced a range of reforms to address labour supply issues and remove barriers to help more people back to work. Some of the reforms include:

- Introduction of a new apprentice programme, called 'Returnerships' aimed at promoting accelerated apprenticeships, work placements and skills bootcamps to the over 50s to engage with the opportunity of a second career.

- Increase to the annual pension allowance from £40,000 to £60,000 from 6 April 2023 to encourage older workers to remain in work.

- Measures to support those with long-term health conditions back to work, including a supported employment programme to match participants with open market jobs, funding support and training.

- Extension of free childcare hours for working parents from 15 hours to 30 hours for 38 weeks of the year. The changes will apply to children from the age of 9 months until they start school and will be introduced in phases from April 2024 to September 2025.

Increasing delays in the Employment Tribunal – what can employers do?

According to recent statistics released by the Ministry of Justice, it takes 49 weeks on average for an employment tribunal case to reach its first hearing.

With such long delays, what can employers do to best protect their position and prepare their case?

Insurers

If an employer is insured, they should notify their insurer of the potential claim as early as possible. If the employer wants to use their own legal representatives (rather than the insurer's panel solicitors), sufficient time will need to be given to confirming this arrangement with the insurers.

Early case assessment

Employers are encouraged to assess the claim against them as soon as possible to identify their prospects of success. Legal advisor's will be able to review the relevant documentation and outline the level of risk to an employer. Early case assessments are also a useful document to share with insurers to outline the likely costs associated with defending a claim and the employer's prospects of success.

Documentary Evidence

Employers should collate as much documentary evidence as possible to assist their case. This will not only make any disclosure order an easier process but will also assist an employer's legal advisor to fully assess the merits of a case.

Witness Evidence

Employers should confirm who the relevant witnesses are at an early stage and obtain their consent to appear at a hearing if necessary. To avoid the risk of witnesses forgetting facts or moving jobs, employers should ask each witness to draft an initial witness statement as soon as possible after the event and obtain a personal commitment from them that they will assist the employer as necessary.

Four Day Week

In 2022, a 4-day working week trial was organised by the campaigning group, 4 Day Week Global.

2,900 employees took part in the trial. Of the 61 companies that participated in the trial, 18 said they would maintain the four-day working week on a permanent basis because of evidence of benefits from the arrangements. A further 38 stated they were going to continue with the trial.

Businesses adopted a range of approaches for the four-day week, including offering Friday off to staff and allowing staff to work 80% of their previous hours on a flexible basis.

Results

For employees:

- 39% of employees considered they were less stressed
- 40% of employees were sleeping better
- 54% of employees found it easier to balance work and home responsibilities
- 71% of employees reported lower levels of burnout

For employers:

- 65% reduction in employees off sick
- 57% fewer staff left the companies taking part in the trial compared with the same period a year earlier
- Revenue of the participating companies increased by 1.4% on average over the trial period and by 35% when compared to the same 6-month period in 2021

Key Questions

- **Is the trial still a novelty?** There are concerns that productivity may deteriorate once the revised arrangements are made permanent.

- **What is the long-term impact?** Whilst employee wellbeing appears to have increased and those reporting sickness and burnout decreased, is a 6-month trial long enough to draw definitive conclusions?

- **Is the 4-day week sustainable?** Whilst the 4-day week trial may have produced short-term results, is the 4-day week sustainable for your business?

ChatGPT in the workplace

What is it?

ChatGPT is an artificial intelligence chatbot created by developer, OpenAI. The AI has been programmed to have advanced conversational capabilities and creates text output based on the user's input. It can write emails, speeches, essays and even poetry, creating detailed and convincing responses across a huge array of topics.

How may employers utilise ChatGPT in the workplace?

- Recruitment
    - AI could be used to screen CVs and applications from job applicants based on a set criteria

- Employee Support
    - AI can be used as an internal chatbot to answer employee's frequently asked questions, for example, questions relating to benefits and holiday

- Writing company policies and procedures

- Drafting letters, emails, job descriptions and interview guides

Potential risks

Data Protection

As ChatGPT was developed using a significant range of data available on the internet, it is likely this data will contain the personal data of individuals. By using ChatGPT, employers may be inadvertently processing other's personal data without a lawful basis, in breach of GDPR obligations.

Confidentiality

OpenAI, the developer behind ChatGPT does not agree to keep the questions posed to the machine confidential and instead expressly reserve the right to use these questions for their own purposes. Employers should be wary of disclosing its own confidential information, and especially that of third parties, to ChatGPT in response to data privacy concerns.

Bias and Discrimination

An AI system is created by a range of individuals who each have a part to play in its development. From those writing the code, inputting the instructions, supplying the dataset on which the AI system is trained and managing the process, there is significant scope for bias to be introduced. If for example, a bias towards recruiting men is included in the dataset, this is likely to be replicated in the AI decision. The more frequent this bias decision is produced, the more inherent the bias becomes.

Whilst OpenAI confirm they have taken steps to remove or minimise bias and discrimination, ChatGPT can produce output that is biased and/or discriminatory, particularly when prompted. Employers should be mindful of this risk and ensure any output is reviewed carefully.

Out of date information

ChatGPT does not analyse data on the internet when compiling its output but instead relies on the pre-existing data set it was trained on. Consequently, ChatGPT's data set is based on data correct as of September 2021. As it does not have access to real-time information, its output may not be accurate.

What do employers need to be aware of?

- Organisations utilising AI in the workplace need to ensure that the AI's output is always checked and verified by a human being.

- Employers should ensure relevant controls are put in place to provide clear guidance to employees on the permitted uses of AI, the prohibited uses and how any output should be subject to human review.

- Employers should also be wary that if they choose to use AI to create an article or social media post, the same output may be replicated for other users of the AI, which at the very least, could be embarrassing for the organisation.

General Case Law Update

1. Can a flexible working request be discriminatory if it was overturned on appeal?

Ms Glover v 1) Lacoste UK Ltd; 2) Mr R Harmon [2023] EAT

Facts

Ms Glover was employed as a full-time assistant store manager at Lacoste UK Ltd and worked five days flexibly, as set out in a rota.

Ms Glover went on maternity leave and subsequently made a flexible working request, asking to work 3 days a week. Ms Glover met with HR to discuss the request; however it was later rejected. Ms Glover was however offered the right to appeal.

At the end of her maternity leave, Ms Glover did not return to work but took annual leave and was then placed on furlough. Ms Glover appealed the rejection of her request. The appeal was upheld in part and offered Ms Glover the chance to work part-time 4 days a week, however the company required Ms Glover to work fully flexibly on any day of the week, including weekends. This arrangement was offered on a six-month trial basis. Ms Glover was not happy with this arrangement as the requirement to be fully flexible meant it was impossible for her to arrange childcare.

Ms Glover's solicitor wrote to Lacoste asking them to reconsider her request, otherwise she may have no option but to resign and claim constructive dismissal. Lacoste agreed to Ms Glover's original request, and she returned to work on this basis.

Ms Glover presented a claim for, amongst other things, indirect sex discrimination asserting that a PCP had been applied that required fully flexible working and she had been disadvantaged.

Decision

The ET rejected Ms Glover's claim on the basis the PCP requiring fully flexible working was not applied to Ms Glover (as Lacoste agreed to her original request on appeal) and therefore she had suffered no detriment. Whilst the Tribunal accepted the thought of having to resign may have been distressing for Ms Glover, she was not in practice required to resign.

On appeal, the EAT held that the determination of a flexible working request *may* constitute the application of a PCP and could result in disadvantage or detriment. Once a flexible working application is determined, the PCP is applied even if the employee has not returned to work or attempted to work under the new arrangement.

The case was remitted to the ET to assess whether Ms Glover had been subject to a detriment because of the application of the PCP.

Comment

This case highlights that successful appeal of an employer's decision to reject an employee's flexible working request does not cure any disadvantage or detriment suffered by the employee at the time of the initial rejection. This is the case even if the employee has not actually been required to work under the working pattern in question.

This case is likely to be particularly relevant to flexible working requests made by employees on maternity leave.

2. Can a letter marked 'without prejudice' constitute a dismissal letter?

Meaker v Cyxtera Technology UK Limited [2023] EAT

Facts

Mr Meaker was employed by CTUK Ltd in a manual role which required him to do lots of heavy lifting. He suffered back injuries and was subsequently off work for an extended period of time. It was agreed that Mr Meaker's injuries meant it was unlikely he would be able to recommence his heavy lifting role.

Mr Meaker and CTUK Ltd had some conversations in which it was suggested that CTUK were considering terminating Mr Meaker's employment. CTUK raised the possibility of a settlement agreement.

On 5 February 2020, Mr Meaker was sent a letter which was headed "without prejudice". This letter stated it had been agreed the employment relationship would end by mutual agreement and that Mr Meaker's employment would terminate on 7 February 2020. The letter attached a settlement agreement.

On 7 February 2020, Mr Meaker wrote to CTUK rejecting the settlement offer.

On 14 February 2020, Mr Meaker received a PILON payment and payment for untaken holiday.

On 19 June 2020, Mr Meaker brought an unfair dismissal claim in the ET.

Decision

At a preliminary hearing, the ET held Mr Meaker's claim was out of time.

Mr Meaker appealed to the EAT asserting that the letter of 5 February was not sufficiently clear and unambiguous so as to constitute a dismissal letter. Mr Meaker argued that even if the letter was an effective termination letter, it was in breach of contract as it did not give the required notice and it was only at the point the PILON payment was made that his employment was terminated in accordance with his contract.

The EAT held that in a case of summary dismissal, the effective date of termination is the date of the dismissal, even if there is a breach of contract.

The EAT also held that whilst the letter was marked "without prejudice", the Tribunal was entitled to read the letter of the 5 February as having two distinct parts: one dealing with termination and the associated payments and the other dealing with the proposal of a further payment pursuant to a settlement agreement. The fact the letter referred to a mutual termination and the Claimant objected to this, was irrelevant.

The letter gave a clear date for when Mr Meaker's employment would terminate, the amounts he would receive and the fact his P45 would follow. The EAT held the letter of 5 February was clearly communicating a termination which was not dependant on the settlement agreement being agreed.

Comment

Tribunals will take an objective view of documents and/or correspondence and will view this in the context of the circumstances known to the parties at the time.

Employers should ensure correspondence relating to any potential settlement is separate to a termination letter and clearly marked "without prejudice". Letters of termination should be clear and unambiguous, clearly state the effective date of termination and any payments due to the employee.

3. Can a Tribunal order an employer to grant a former employee access to their email inbox?

Khakimov v Nikko Asset Management Europe *[2023] EAT*

Facts

The Claimant in this case brought various claims against his former employer including: whistleblowing detriment, race and disability discrimination and unfair dismissal. The ET made various case management orders including that the Claimant provide further and better particulars. The Claimant had sought an order that the Respondent provide him with access to his emails and calendar (to allow him to prepare further and better particulars) but this was rejected by the Tribunal on the basis the Tribunal did not have such powers. The Claimant appealed to the EAT on the basis it could make such an order under its general powers of case management in ET Rule 29.

Decision

The EAT held a Tribunal has power to order the disclosure of documents under Rule 31, but there is no express power to order a person to give another person access to property for the purpose of obtaining documents. Whilst Rule 29 gives Tribunals a general power to make a 'case management order', the EAT held this was not sufficiently elastic to allow the order sought by the Claimant.

Comment

Employers should be reassured by this decision that Tribunals will not make an order for employers to give employees access to computers to look at emails and/or calendars to prepare their case. Employees will instead have to rely on the standard disclosure obligations and make applications for specific disclosure if required.

4. Can employers rush a dismissal to avoid financial consequences?

Cook v Gentoo Group Limited [2023] EAT

Facts

The Respondent was a social housing landlord that had charitable status. The Claimant was employed by the Respondent as Head of Compliance.

The Claimant was made redundant shortly before his 55th birthday. According to the rules of his pension scheme, once a member reached the age of 55 and was either made redundant, or had their employment terminated on grounds of business efficiency, they were entitled to immediate payment of their retirement pension, crucially, without actuarial reduction.

The Respondent curtailed the redundancy process in order to ensure that the Claimant was made redundant before reaching 55 years old. After an initial consultation, the Claimant went off sick and was not able to attend subsequent consultation meetings. The Respondent terminated the Claimant's employment in May 2019. Had the Claimant's employment been terminated shortly after, the Respondent would have been obliged to make a payment in the sum £80,000 into the Claimant's pension scheme.

The Claimant argued he was unfairly dismissed and that the curtailment of the redundancy process (to avoid the employee receiving an enhanced pension pension) constituted direct age discrimination.

Decision

The ET held that the Claimant had been unfairly dismissed. The curtailment of the redundancy process meant a fair process had not been followed. The ET also held that had a fair process been followed, the Claimant would still have been dismissed but this would have been after his 55th birthday.

In terms of the age discrimination, the ET held the Respondent had a proportionate means of achieving a legitimate business aim – that is, the aim of saving costs that would have been incurred by having to make a payment into the Claimant's pension scheme.

The general position prior to this case was that savings of costs alone, would not amount to a legitimate aim so as to justify age discrimination. If, however, cost saving was one part of a legitimate aim, this may be relied upon (the "costs plus" approach). The ET did not consider whether such an aim was proportionate, but later concluded they *"would have"* found the detriment to be proportionate on the basis the Claimant was receiving a payment of £47,000 in redundancy and he had access to a pension scheme that he chose to freeze.

The Claimant appealed.

The EAT held the Respondent's legitimate aim was "saving costs which would have been incurred in making the additional payment into the pension fund". The "plus" element was the "prior disapproval of the Regulator of Social Housing of the practice of windfall pension enhancements. The ET noted that the Respondent is a public sector employer and funds to pay the Claimant would have come from the public purse.

The Respondent was therefore able to rely on this legitimate aim. Whether or not this aim justified the Respondent's actions was an issue that was remitted to the ET.

Comment

Direct age discrimination can be justified if the employer has a legitimate aim and the way in which it is carried out is proportionate to achieving this aim. Employers should consider the conditions of specific pension schemes and the potential liabilities prior to any redundancy exercise.

5. Can a previously concluded disciplinary process be re-opened?

Lyfar-Cisse v Western Sussex University Hospitals NHS Foundation Trust [2022] EAT

Facts

The Claimant was Associate Director of Transformation at Western Sussex University Hospitals NHS Foundation Trust. During her employment, the Claimant held responsibilities for improving race equality in the organisation.

In 2016, three allegations of discrimination and bullying were upheld against the Claimant and she was issued with a final written warning. The Claimant denied any wrongdoing. At the same time, the Care Quality Commission were investigating the Respondent and identified a culture of bullying and discrimination.

In 2017, a neighbouring hospital trust began to take over management of the Respondent. The new management reviewed the Care Quality Commission's report and in light of this, the Claimant's disciplinary outcome. Management felt that when viewed together, the findings undermined the belief that the Claimant was a fit and proper person to act in her role (this was amplified by the fact she was responsible for improving race equality in the organisation).

The Claimant was subsequently dismissed on the basis her ability to perform her leadership role had been "fatally undermined".

The Claimant brought claims of unfair dismissal.

Decision

The ET dismissed the Claimant's claim on the basis the reason for dismissal fell within the 'some other substantial reason' category and that given the findings of the Care Quality Commission's report and the fact the Claimant denied any wrongdoing meant that the Respondent's decision was within the range of reasonable responses and the dismissal was fair.

The Claimant appealed the decision arguing the Respondent was bound by its initial decision of a final written warning.

The EAT held that the concept of 'double jeopardy' (that you cannot be tried twice for the same offence) does not apply to employers' internal disciplinary proceedings. Whilst employers could re-open a disciplinary decision and increase the sanction, the question for the Tribunal is whether this decision was fair. The EAT held the Respondent acted fairly in dismissing the Claimant.

Comment

This is an interesting case as the expectation for employees is that once a disciplinary process has been concluded, that is the end of the process. This is a highly unusual case and is likely to be distinguished on its facts; however, it does highlight that in some circumstances, employers may be able to reopen a previous disciplinary decision. In this case, the fact that new management were involved, regulatory issues were identified, the Care Quality Commission's report raised issues and the Claimant continued to deny any wrongdoing are likely to be relevant. Given such a situation will be dependent on the facts, legal advice should be sought before taking action.

Neurodiversity & Dismissals

What is neurodiversity?

Neurodiversity is a term which refers to a range of neurological differences and can include autism, dyslexia, dyspraxia and attention deficit hyperactivity disorder (ADHD or ADD). Such conditions can often present concurrently as well as alongside mental health conditions such as anxiety and depression. According to People Management, one in seven people are neurodivergent.

What do employers need to be aware of?

Neurodivergent people may have a disability for the purposes of the Equality Act 2010, even if they are not formally diagnosed. This means that employers may be under a duty to make reasonable adjustments, must not discriminate against that employee directly or indirectly and must not treat them unfavourably because of something arising in consequence of their disability (unless the treatment is a proportionate means of achieving a legitimate aim).

Employers should:

- Speak to employees to better understand their condition and how it may affect them in the workplace.
- Consider what adaptations might be needed to the physical environment of the workplace, for example, some neurodivergent employees may find certain lighting and noisy environment over-stimulating.
- Raise awareness within your organisation of how others can acknowledge and support neurodivergent ways of working.
- Be mindful of an employee's disability and the effect it has on their behaviour and performance when considering disciplinary or capability proceedings.

1. Is an employee's conduct attributable to their disability?

McQueen v General Optical Council [2023] EAT

Facts

Mr McQueen had dyslexia, some symptoms of Asperger's syndrome and left sided-hearing loss. These conditions caused him to have some difficulty with his interactions in the workplace.

One such interaction took place where Mr McQueen challenged an instruction from a more senior colleague. Whilst the instruction had been reasonable, Mr McQueen had been rude in his language and tone and displayed aggressive gestures and body language. There were various other incidents of Mr McQueen not following instruction and responding in a confrontational manner. The company took disciplinary action against Mr McQueen because of these 'meltdowns' and their belief that any disability did not remove the need to behave appropriately.

Mr McQueen resigned and claimed, amongst other things, unfavourable treatment because of something arising in consequence of his disability under section 15 of the Equality Act 2010.

Decision

The ET dismissed Mr McQueen's claim on the basis that, after having considered the medical evidence available, whilst his conditions could cause him to have 'meltdowns', on the occasions where this happened, his behaviour was not the consequence of his disability but rather his short-temper and because he resented being told what to do. The ET did not accept that a need "not to be approached in a seemingly confrontational manner" or to "stand up and speak" arise from his disabilities. Mr McQueen appealed, arguing the ET had applied a too strict test of causation.

On appeal, the EAT held that it agreed with the ET and did not feel the ET had adopted too strict a test of causation when considering the effects of the employee's disabilities. The EAT concluded the ET had found the effects of the employee's disabilities had not played any part in the conduct that had led to the unfavourable treatment complained of.

Comment

Employers should review each case on its own facts. Where there are conduct or performance concerns with a disabled employee, employers should seek Occupational Health advice at an early stage to guide them as to the extent to which an employee's disability impacts their work.

2. Is an employee's conduct attributable to their disability?

Morgan v Buckinghamshire Council [2023] EAT

Facts

The Claimant was employed as a social worker in the fostering team. She was dismissed by the Respondent for gross misconduct for giving gifts to a child she was responsible for without the authority of her manager, and for an inappropriate case note she had written.

The Claimant argued, amongst other things, that she was dismissed for misconduct and that dismissal arose in consequence of her disabilities and that dismissal was not a proportionate means of achieving a legitimate aim.

Decision

The ET held that whilst they were inclined to accept the Claimant's claim that her dismissal was for conduct which was a result of her disabilities, the Respondent had a legitimate aim of ensuring social workers did not breach the boundaries of behaviour set by the Council. The fact that the Claimant had declined to agree to an Occupational Health assessment (at the suggestion of the dismissal appeal officer) meant the Respondent could not fully understand how her conduct may have arisen from her disabilities. In such circumstances, the ET held the dismissal was a proportionate way of achieving the Council's legitimate aim.

The Claimant appealed. The EAT agreed with the ET and held the Respondent had reasonably formed the view that the Claimant had breached professional boundaries and that it could not be confident that she would not repeat the conduct. The Claimant's claim for discrimination because of something arising in consequence of her disability, failed.

Comment

This case highlights the need to carefully consider the facts of each case and the individual's specific circumstances, prior to dismissal. In this case, as the Claimant refused to agree to an Occupational Health assessment, the Respondent was able to rely on this to justify its decision to dismiss. Had the Claimant agreed to an Occupational Health assessment which supported her argument that her conduct arose from her disabilities, the outcome may have been different.

Immigration Update

On 9 March 2023, the Government published a statement of changes to the Immigration Rules.

Skilled Worker: Change to rates

- Skilled Worker is a point-based route, and an applicant needs to obtain 50 mandatory points and 20 'tradeable' points relating to salary. There are different ways of achieving these points, however the most common route provides the applicant's salary must be equal to (or exceed):
    - The general salary for sponsorship
    - The minimum hourly rate
    - The minimum going rate

- The general salary threshold has increased from £25,600 to **£26,200.**
- The minimum hourly rate has increased from £10.10 to **£10.75.**
- The going rate for occupations will now be based on a 37.5 hour week rather than a 39 hour week (employers will need to ensure they pro-rate applicants' salaries to ensure the going rate is met).

- These rates take effect on 12 April 2023. The old rates will continue to apply to applications where the Certificate of Sponsorship was assigned before 12 April 2023.

- These changes are not retrospective and therefore whilst employers don't need to change salary rates for existing sponsored workers, they will need to ensure salaries are complaint with the new thresholds on the worker's next visa extension or settlement date.

Extension of the Shortage Occupation list (SOL)

- The Shortage Occupation list is a list of jobs which the Government considers to be in short supply in the UK labour market. If a job is listed on the Shortage Occupation list, lower application fees and reduced salary requirements apply to the sponsored worker's visa application.

- Care workers and home carers are currently included on the shortage occupation list and are roles which otherwise would not be suitable for sponsorship. The recent Budget confirmed five construction occupations would be added to the shortage occupation list which will take effect this summer.

Considerations of employees working abroad

In summary, there are a range of considerations employers should take into account prior to deciding whether to employ someone based abroad. The main points to consider fall into three main areas: immigration, employment rights and tax.

Immigration Status

Employers need to ascertain an employee's immigration status and whether they have the right to work in the host country. Since the UK has left the EU, UK citizens no longer have an automatic right to work in the European Economic Area and so permission to work will be required on the same basis as other countries.

Employers should consult with a local lawyer in the host country to understand the local immigration laws and how they may affect the employment relationship.

Employment Protections

Regardless of the jurisdiction governing the employment contract, the employee may benefit from employment laws governing the host country. Practically speaking, this may mean that the prospective employee would gain greater protection than is afforded under the laws of England and Wales.

Employers should consult with a local lawyer in the host country to ensure they fully understands its employment law obligations.

Tax Implications

Employers also need to consider the potential tax implications of an employee being based overseas. Generally, the more fixed the presence of the employee in the jurisdiction the greater the increase in risk (as it may lead to the creation of a place of business or permanent establishment for tax purposes). Local tax specialists should be consulted on this point.

Data Protection

If the employee will be handling company and/or client data and will be based in the EU, they will be bound by both UK and EU data protection laws. Employers will need to ensure that it has policies and procedures in place to ensure that all data leaving the UK is properly secured and accesses managed.

Contractual Considerations

Where employees will be working outside the UK for longer than a month, section 1 of the Employment Rights Act 1996 requires additional information to be set out in the employment contract, for example, how the employee will be paid and in what currency and whether there are any arrangements for the employee to return to work in the UK.

Practically, employers will also need to consider how the employment relationship will operate in practice: how will the employee be supervised? How will the employee raise concerns?

Employers will also need to ensure that all relevant policies are updated to take into account employees working overseas, for example, health and safety policy, data protection policy and privacy notice.

Future Developments

Rate Changes: Increase in statutory payments and maximum Tribunal awards

A WEEK'S PAY		
	A week's pay (used to calculate SRP and other payments)	**£643** (up from £571)
TRIBUNAL COMPENSATION		
From 6 April 2023	Maximum basic award for Unfair Dismissal	**£19,290** (up from £17,130)
From 6 April 2023	Maximum compensatory award for Unfair Dismissal	**£105,707** (up from £93,878)
From 6 April 2023	Vento guidelines for Injury to Feelings	**Lower band: £1,100 - £11,200** **Middle band: £11,200 - £33,700** **Upper band: £33,700 - £56,200**
STATUTORY BENEFITS		
From 2 April 2023	Statutory maternity, paternity, shared parental and adoption pay	**£172.48** (up from £156.55)
From 6 April 2023	Maximum Statutory Redundancy Payment	**£19,290** (up from £17,130)
From 6 April 2023	Statutory Sick Pay	**£109.40** (up from £99.35)
NATIONAL MINIMUM WAGE		
From 1 April 2023	Ages 23+ Age 21-22 Age 18-20	**£10.42** per hour (up from £9.50) **£10.18** per hour (up from £9.18) **£7.49** per hour (up from £6.83)

	Age 16-17 Apprentice rate	**£5.28** per hour (up from £4.81) **£5.28** per hour (up from £4.81)

The Strikes (Minimum Service Levels) Bill – the anti-strike bill?

- The Strikes (Minimum Service Levels) Bill would allow the Secretary of State to make minimum service level regulations for strikes in relevant services including health, transport, education, fire and rescue, border control, nuclear decommissioning, and radioactive waste management services.

- The Bill is currently going through the House of Lords.

- Where a minimum service level has been set, an employer would be able to serve a work notice to its recognised trade unions setting out which employees are required to work during a strike, to ensure those minimum service levels are met.

- The Bill would also amend unfair dismissal rights, so that any worker identified in a work notice who takes part in the strike (in conflict with the notice) will lose their automatic protection from dismissal.

- The Government's reported aim is to ensure *"striking workers don't put the public's lives at risk and prevent people getting to work, accessing healthcare, and safely going about their daily lives".*

- Reactions from the unions have been, unsurprisingly, negative. The Bill has been called "cynical", "draconian", and an "assault on the right to strike".

- The Bill only concerns strikes, not other forms of industrial action short of a strike and so there is concern that the Bill could lead to greater use of other actions short of a strike.

Flexible Working: a day one right?

- The Employment Relations (Flexible Working) Bill amends the rights of employees and other workers to request variations to their terms of employment relating to working hours, times and locations.

- The Bill is currently going through the House of Lords.

- The government has recently responded to a consultation launched in 2021 to reform the current flexible working request regime. The government's response to the consultation has supported the following proposed changes:

    - Employees will have the right to request flexible working from the first day of employment (rather than after 26 weeks continuous service)

    - Employees will be permitted to make two requests per year (rather than one)

    - Employers will be required to consult with their employee, as a means of exploring the available options, before rejecting their flexible working request

- Employers must respond to an employee's request within 2 months (rather than 3)

- Employees will not be required to set out how the effects of their flexible working request might be dealt with by the employer

Predictable working patterns for workers: a new statutory right to request predictable working patterns

- The Workers (Predictable Terms and Conditions) Bill proposes new provisions in the Employment Rights Act 1996 which would give certain workers, agency workers and employees a new statutory right to request a predictable working pattern. The framework is set to mirror that of the flexible working regime.

- The Bill is currently going through the House of Lords.

- Under the Bill, a worker may apply for a change to their terms and conditions of employment with the purpose of obtaining a more predictable working pattern if:

  a. they have been employed by the same employer (whether or not under the same contract) for a prescribed period – the "prescribed period" will be set by regulations but may reflect the requirement for 26 weeks' employment within the current flexible working regime;

  b. there is a lack of "predictability" in relation to the work that they do for their employer and in respect of any part of their working pattern; and

  c. the change sought relates to their "working pattern" - hours, days, fixed-term contract period, or any other aspect that could be set out in further regulations.

- The Bill would also allow a worker on a fixed term contract of less than 12 months, to request that the term is extended so that the contract is longer than 12 months or becomes permanent.

- Employers would be required to deal with applications in a reasonable manner and, like the flexible working regime, would only be able to reject an application on one or more specified grounds.

- Eligible workers would be allowed to make up to 2 applications in any 12-month period.

- An unreasonable failure to comply with the rules would allow workers to bring a claim in the Employment Tribunal which could result in the employer being ordered to reconsider the request and/or pay compensation.

Worker Protection Bill: Employer liability for harassment by third parties

- The Worker Protection (Amendment of Equality Act 2010) Bill seeks to reintroduce employer liability for third party harassment, for example, where an employee is harassed by a customer, client, visiting contractor or member of the public. This

would introduce a positive duty on employers to take all reasonable steps to prevent sexual harassment of its employees in the course of their employment.

- The Bill is currently going through the House of Lords.

- In 2008, the "three strike" rule was introduced which exposed employers to liability for third patty harassment where their employer knew about two previous instances in which harassment had occurred. This was revoked in 2013.

- Under the Bill as drafted, liability for harassment by third parties will arise without there needing to be a prior incident, unless the employer can show they took all reasonable steps to prevent the harassment taking place.

- "Reasonable steps" are likely to include ensuring all third parties are aware of and follow the employer's equality and anti-harassment and bullying policies and ensuring all employee complaints are investigated.

Calculating holiday pay after Harpur Trust v Brazel

- The Supreme Court in *Harpur Trust v Brazel* held that workers who were engaged on a permanent contract, worked irregular hours and only worked part or parts of the year were entitled to 5.6 weeks holiday pay, as with workers who worked the full year.

- As to calculating holiday pay, the Supreme Court rejected the previously accepted practice of paying 12.07% of holiday pay, per hour worked and instead held the calculation should be based on the average of the worker's pay over the previous 52 weeks worked (ignoring the weeks in which they did not receive pay).

- The Supreme Court acknowledged that anomalies may be produced by using the Calendar Week method in that someone working irregular hours part of the year may be paid more holiday pay than someone working regular hours for the whole year. Notwithstanding this, the Supreme Court held this risk was not inconsistent with the law.

- In January 2023, the Government launched a consultation into the calculation of holiday entitlement for part-year and irregular hours workers noting they were *"keen to address the disparity to ensure that holiday pay and entitlement received by workers is proportionate to the time they spend working"*.

- The Government's Impact Assessment concluded that as a result of the Supreme Court's decision, between 320,000 and 500,000 permanent term-time workers and zero-hour contract workers will receive more holiday entitlement. The assessment also estimated an annual cost to employers of increased holiday between £50 million and £250 million.

- The consultation period ended on 9 March 2023.

Consultation on dismissal and re-engagement practices

- Dismissal and re-engagement practices (or as it is more often known as, fire and re-hire) refers to the process by which employers change terms and conditions by dismissing workers and then re-engaging them on the new terms. It is common in

circumstances where employers are unable to obtain employee or trade union consent to the changes.

- In January 2023, the Government published a draft Code of Practice with the underlying purpose of ensuring employers take steps to explore alternatives to dismissal.

- The consultation ends on 18 April 2023, after which it is expected the finalised Code will come into practice once parliamentary time allows.

Key provisions:

- The Code will apply *regardless* of the number of employees affected, or potentially affected.

- Consultation under the Code is separate to, and in addition to, any other contractual obligations, collective bargaining arrangements and information and consultation requirements required by law.

- The Code does not apply where the reason for dismissal is redundancy.

- Employers are expected to consult and negotiate in good faith to try to seek a resolution.

- Employers should not use the threat of dismissal as a negotiating tactic when they are not contemplating dismissal as a means of achieving their objectives.

- The decision to dismiss and re-engage should be a last resort and only used if the employer considers it cannot achieve its objectives in any other way.

Information and Consultation

- The Code focuses on the employer providing information to, and consulting with employees or their representatives and emphasises this should be an ongoing process, rather than a single event.

- Employers should provide as much information as possible to employees of the proposed changes and the reasons behind these.

Dismissing and re-engaging

- If agreement cannot be reached between the parties, the Code provides employers must carefully consider:

    - whether it is necessary to impose the new terms on its employees in order to achieve its objectives.
    - if there are any alternative options;
    - if the changes could have a greater impact on one group of employees who share a protected characteristic, over others.

- The Code provides employers should re-engage employees as soon as possible and should not use re-engagement as an opportunity to break continuous employment.

- Where employers re-engage employees on more than one new term, the Code suggests employers should consider a phased introduction of changes and giving

employees as much notice as possible in order for them to make necessary arrangements.

Failure to follow the Code

- The Code does not impose any legal obligations and therefore a failure to follow the Code will not render the employer liable to legal proceedings. However, whether the Code has been followed is admissible in both Court and Employment Tribunal proceedings. As with the ACAS Code on Disciplinary and Grievance Procedures, Tribunals may uplift or reduce awards if either the employer or employee has unreasonably failed to comply with the Code.