Unusual and onerous non-compete restriction is potentially enforceable – but the employer's delay ruled out an interim injunction

The High Court has held that an unusual non-compete covenant lasting for a period of up to 12 months at the employer's discretion may, in principle, be enforceable, even where the employee had already spent 12 months on garden leave. However, the Judge declined to award an interim injunction due to the employer's excessive and unreasonable delay.

What happened in this case?

Mr Couture began working for Jump Trading International Ltd (**Jump**), a leading trading and investment firm, in June 2016. He worked as a quantitative researcher in Jump's London-based trading team. His employment contract contained a non-compete restriction preventing him from engaging in "competitive activity" during the "non-compete period". Unusually, the contract gave Jump discretion to set a non-compete period of up to 12 months within 20 days of notice of termination being given. Further, the contract bucked the trend of setting off time spent on garden leave against the non-compete period. Instead, the non-compete period would start *after* the end of the garden leave period.

On 23 March 2022, Mr Couture accepted a job offer from Verition Advisers UK Partners LLP (**Verition**). On 30 March 2022, Mr Couture resigned on notice, however, he did not tell Jump that he was intending to work for Verition. Jump told Mr

Couture that he would be placed on garden leave for the duration of his 12-month notice period.

On 31 March 2022, Verition received advice from its lawyers than the non-compete restriction in Mr Couture's contract was not enforceable. On the same day, Jump told Mr Couture that after his garden leave had ended he would be subject to a 12-month non-compete period, expiring on 30 March 2024. Mr Couture said this was not acceptable.

On 12 July 20222, Mr Couture told Jump that he intended to work for Verition after his garden leave had ended. Jump's position was that this would be competitive activity and breach the non-compete restriction. Attempts were made at resolving the dispute, but, ultimately, these fell flat.

On 17 November 2022, Mr Couture wrote to Jump stating that he would join Verition in April 2023, but that for the first 12 months he would be writing software rather than trading, which he did not believe amounted to competitive activity. Mr Couture also said that, in any event, he did not believe the non-compete restriction was enforceable. Jump eventually replied on 6 March 2023, reiterating its position that Mr Couture would be in breach of the restriction if he went to work for Verition.

On 14 April 2023, Jump sued Mr Couture for breach of the non-compete restriction and Verition for inducing Mr Couture to breach the non-compete restriction. Jump sought an interim injunction to prevent Mr Couture working for Verition pending the outcome of the full trial.

This briefing covers the decision of the High Court in relation to the interim injunction application only. The full trial is due to take place in either late June or early July 2023.

What was decided?

When deciding whether to grant an interim injunction, the Court has to address a number of key questions.

Was there a "serious issue" to be tried?

Employers wishing to obtain an interim injunction need show only, so far as its prospects of success in the full trial are concerned, that there is a "serious issue" to be tried. This is a relatively low hurdle to get over – the employer does not need to show that it is "likely" or "probable" that they would succeed at trial.

Here, it was agreed that Jump had legitimate interests to protect, and that Mr Couture had had access to confidential information. Given the difficulties of policing the use of confidential information, a non-compete restriction could, in principle, be justified. However, Mr Couture argued that the non-compete was unenforceable and so there was no serious issue to be tried.

First, it was argued that the uncertainty in the length of the restriction meant that it was unenforceable. However, the Court was persuaded that the clause itself provided a means for resolving that uncertainty (by allowing Jump to decide the length), albeit that this did not address the issue of certainty at the time the contract was entered into. The Judge said that *"…although the clause's temporal extent was not known at the time the contract was entered into, the fact that it had a maximum duration of twelve months and a mechanism by which the employee would know its extent once an election was made does not necessarily make it unreasonable for the purpose of the restraint of trade doctrine".* Acknowledging that there was no direct authority on the validity of this type of non-compete restriction, the Court said there was a serious issue to be tried.

Second, it was argued that a 12-month non-compete restriction on top of a 12-month garden leave restriction was

unreasonable. Jump argued that confidential information remained confidential for two years, therefore, justifying the overall amount of time that Mr Couture would be prevented from working for a competitor. The Court said there were issues about whether the length of the clause should be assessed in light of the garden leave period, or separately from it. The Court agreed that a 12-month non-compete coupled with a 12-month garden leave period seemed long, but, ultimately, this was a fact-specific issue and could not be resolved at the interim stage. Therefore, there was a serious issue to be tried.

Third, it was argued that the clause was too wide in scope. In particular, the definitions of "competitive activity" and "competitive entity" were defined in broad and non-specific terms. For example, "competitive activity" referred to "similar services" to the services that Mr Couture had provided to Jump, without explaining what this meant. However, the Court said the scope was not so obviously wide that it could conclude at the interim stage that there was no serious issue to be tried.

Overall, the Court concluded that there *was* a serious issue to be tried in respect of the enforceability of the non-compete restriction against Mr Couture. However, the Court said there was no serious issue to be tried in respect of the inducement to breach claim brought against Verition, on the basis that it had received legal advice that the non-compete clause was unenforceable. Following the Court of Appeal's decision in Allen t/a David Allen Chartered Accountants v Dodd & Co Ltd, this was sufficient to defeat a claim of inducement to breach. This was the case even though the advice Verition received was *"short and not unequivocal"*.

Would damages be an adequate remedy for either party?

In deciding whether to grant an interim injunction, the Court must also consider whether damages would be an adequate remedy

for the employer if it went on to succeed at trial. If damages would be an adequate remedy for an employer, then an injunction would not normally be granted. Here, the Court accepted that if the clause was enforceable and Mr Couture went to work for Verition, then an award of damages would *not* be an adequate remedy for Jump.

The Court must also consider whether an award of damages would be sufficient protection for the employee if an injunction was granted but not upheld at the full trial. If damages *would* be an adequate remedy for an employee in this situation, then this would weigh in favour awarding an injunction. Here, the Court said that if an injunction was granted which prevented Mr Couture from working for Verition, then damages would *not* an adequate remedy for him given the overall amount of time he would have been prevented from working and using his skills in such a "dynamic area".

What would be the "balance of convenience" if the injunction was granted?

The Court should then weigh into the mix other relevant factors such as any delay in seeking the injunction and the overall merits of the case.

Here, it held that Jump had known about Mr Couture's intentions since 12 July 2022. It had taken over nine months to issue proceedings and seek an injunction. Moreover, after Mr Couture had set out his detailed position in the letter of 17 November 2022, it took Jump over three months to even muster a reply and then another month and a half to seek the injunction. This delay was unreasonable and excessive and Jump simply had no explanation for it.

If Jump had moved more quickly, a speedy trial could have been ordered to take place before Mr Couture's intended start date with Verition. This would have avoided the need for an interim injunction application altogether. On top of this, Mr

Couture's employment contract contained an arbitration clause, meaning that the dispute could have been resolved via arbitration, which, again may have avoided an interim injunction application.

On the basis of the considerable delay, the Court decided it would be unjust to grant an interim injunction at such a late stage. However, it is worth noting that the Judge said that if it had been necessary to do so, he would have weighed into the balance the overall strength of the case, noting that the long duration and wide scope of the restriction indicated that Mr Couture's and Verition's arguments were stronger.

What are the learning points for employers?

It remains to be seen whether this unusual discretionary non-compete restriction with no provision for setting off time spent on garden leave will be enforced. If it is, this may embolden some employers to adopt a similar approach. However, it should be remembered that these cases tend to be fact-specific, turning on the nature of the employee's role, their seniority, the market practice in the industry they work in and the proposed role with the competitor employer. Further, the Government has recently announced plans to limit the length of non-competes to a maximum of three months. Therefore, even if upheld, this decision may be of limited value to employers wishing to follow suit.

The other very important learning point for employers who utilise post-termination restrictions is to act without delay where there is reason to believe that a restriction has been, or will be, breached. Here, the employer had known about the employee's detailed plans for almost five months before it applied for an injunction to restrain him. This was simply too long and meant it would have been unjust to award an interim injunction. The result is that the employer walked away without the injunction and, perhaps more importantly, without a precedent to be used to deter other workers from

doing the same thing. Instead, it is faced with preparing for a full trial in short order, no doubt with the Judge's comments about the relative weakness of their case ringing in their ears.

Jump Trading International Ltd v (1) Damien Couture (2) Verition Advisors (UK Partners) LLP

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Pregnancy discrimination: employers should be prepared for scrutiny of dismissals to find out who decided to dismiss and why

In the recent case of *Alcedo Orange Limited v Ferridge-Gunn* the Employment Appeal Tribunal underlined the importance of scrutinising dismissal decisions in discrimination claims.

What happened in this case?

In this case, an employee was dismissed within her probationary period days after announcing her pregnancy. The chain of events unfolded as follows:

- On 27 January 2019, the claimant started working for the respondent employer and was subject to a three-month probationary period. On 14 February, the claimant met with Mr Boardman, the managing director of the respondent, and Ms Caunt, her manager. Mr Boardman and Ms Caunt raised some concerns about her performance.

- On 19 February the claimant announced that she was pregnant. On 21 February a second meeting was held to discuss the claimant's performance and it was accepted that there had been a degree of improvement.

- On 24 and 25 February the claimant was absent on sick leave as a result of morning sickness. When the claimant notified Ms Caunt, she asked whether it was contagious, how much time off she would need and that she was sorry to be unsympathetic, but she has never been pregnant before.

- During the claimant's absence on sick leave, Ms Caunt discovered that certain documents (such as references, DBS checks and training certificates) had not been uploaded to the respondent's IT systems. She told Mr Boardman that the claimant had misled them by saying that she had made progress in her performance targets.

- On 27 February – a mere eight days after announcing her pregnancy – the claimant was called to a meeting and dismissed. She was told that her performance was "below par" and things were "not working out".

The claimant brought claims in the Employment Tribunal alleging that her dismissal amounted to pregnancy

discrimination and that it was also an automatically unfair dismissal. The Tribunal found that the accusation that the claimant had deliberately misled Ms Caunt in the second performance meeting was unfair and that the claimant would have completed the outstanding tasks had she not been absent with morning sickness (and they were, in fact, completed shortly after she returned to work).

The Tribunal dismissed the automatic unfair dismissal claim, holding that the claimant was dismissed for performance reasons and her pregnancy was not the sole or principal reason for the dismissal. However, it upheld her pregnancy discrimination claim. In deciding to dismiss, Mr Boardman had relied upon Ms Caunt's views about having been misled by the claimant at the second performance meeting. However, Ms Caunt's views had been influenced by the claimant's pregnancy and sickness absence.

The respondent appealed to the Employment Appeal Tribunal.

What was decided?

The respondent argued that Mr Boardman was the dismissal decision-maker and had dismissed on performance grounds. Although Ms Caunt had supplied information to Mr Boardman, she was not a decision-maker and, as such, her motivations were not relevant to the dismissal decision.

The EAT acknowledged that the Tribunal had not been referred to the leading authority on this point, namely, the Court of Appeal's decision in *CLFIS (UK) Ltd v Reynolds* (**Reynolds**). The Court of Appeal in Reynolds held that the correct approach is to consider different acts separately. The Court said: "*supplying information or opinions which are used for the purpose of a decision by someone else does not constitute participation in that decision*".

If a person supplying information or opinions has discriminatory motives, but the dismissal decision-maker does

not, then the discriminatory act would be the supplying of the tainted information, not the dismissal.

In contrast, where it can be said that a decision has been made jointly, then a Tribunal should assess the motives of all the parties involved in that decision. A decision may be regarded as a joint decision where the appointed decision-maker has been heavily influenced by someone else, even if they have not been formally appointed as a decision-maker. A discriminatory motive held by one co-decision maker would be enough to taint the overall decision

The EAT said this case cried out for an analysis of whether Mr Boardman was a sole decision maker, a sole decision-maker whose decision had been influenced by Ms Caunt or whether he and Ms Caunt were joint decision-makers. The case was remitted to the Employment Tribunal.

What are the learning points for employers?

Previous cases have acknowledged that the "separate acts" approach endorsed in Reynolds presents a danger that unscrupulous employers could use unclear decision-making processes as a means of hiding discrimination. To counter this risk, Tribunals are prepared to scrutinise decision-making processes to identify anyone who has heavily influenced the "official" decision-maker and assess whether they should, in fact, be treated as a joint decision-maker and what their motivations were.

The practical takeaway for employers is to train decision-makers on equality law and the scope of their role. In particular, the need for them to make their decisions alone – or only in conjunction with any "official" co-decision-makers. Further, anyone supplying information or evidence to the official decision-maker/s should be asked to do just that and avoid pushing for a preferred outcome. Together, these steps should ensure that only the motivations of the official

decision-maker/s are taken into account when assessing whether the dismissal was discriminatory. Although this does not avoid the risk of a discrimination claim altogether, it should help to ensure the *dismissal* decision is unimpeachable.

It is worth noting that the position for discrimination claims is different to whistleblowing dismissal claims where, if a sole decision-maker is misled by someone acting from improper motives, the dismissal decision itself may be considered unfair (rather than the acts being treated as separate). You can read more about the position for whistleblowing claims here.

Alcedo Orange Limited v Ferridge-Gunn

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New law offering workplace rights to those with caring responsibilities

The Carer's Leave Bill received Royal Assent on 24 May 2023, becoming the Carer's Leave Act 2023. The Act provides the pathway to new rights and protections at work for employees who have caring responsibilities. In this briefing, we outline where things currently stand and what steps employers should take next.

What is the background?

The charity, Carers UK, estimates that that there is a 50:50 chance of a person in the UK having caring responsibilities before the age of 50 – long before retirement age. Caring responsibilities can take many forms. It may include caring for an elderly relative, but it may cover other scenarios such as caring for a child who has a disability, or a partner injured in an accident. It can extend to caring for those suffering with mental health impairments (such as dementia or depression) as well as physical health impairments.

Carers UK reports that caring is often "invisible" in the workplace, with many not identifying themselves as carers or feeling uncomfortable about raising personal matters at work. The result is that many carers struggle on in silence, attempting to juggle their unpaid carer's role with work. These pressures have led one in ten carers to consider reducing their working hours or giving up work altogether and over 200,000 people per year end up leaving the workplace.

To help address this issue, in September 2021 the Government confirmed that a Day 1 employment right to carer's leave would be introduced "as soon as Parliamentary time allowed". However, the legislation did not materialise. Instead, the Government chose to back a Private Members' Bill – the Carer's Leave Bill – which would allow regulations to be made to provide new rights and protections for carers.

What rights and protections will carers be given?

The Carer's Leave Act 2023 provides for the introduction of new rights and protections for carers including:

- a Day 1 right for employees to take at least one week's unpaid carer's leave in any 12-month period to provide care for, or make arrangements to provide care for, a dependant who has a long-term care need. In this

context, a “long-term care need” means:
    - an illness or injury (whether physical or mental) likely to require at least three months of care;
    - a disability under the Equality Act 2010; or
    - care needs relating old age (although “old age” is not defined).
- a right to benefit from the existing terms and conditions of employment that would have applied but for the leave (apart from terms and conditions about remuneration);
- a right to return to work to a job of a kind to be prescribed by the regulations;
- a right to claim compensation from employers who unreasonably postpone, attempt to prevent or prevent the taking of carer’s leave; and
- protection from detriment or dismissal as a result of having taken carer’s leave.

However, the precise scope and mechanics of the new rights will be set out in separate regulations. For example, the regulations will address:

- how much leave an employee may take (it must be at least one week in any 12-month period);
- when and how leave may be taken (e.g. continuously or discontinuously);
- the amount and form of notice to be given to the employer;
- what records employers will need to keep;
- whether, and in what circumstances, an employer is able to postpone the leave; and
- which activities count as “providing care” or “making arrangements to provide care”.

The Government has said that the regulations will be laid in due course, although it is expected that this will not be before April 2024.

What steps should employers take now?

With just under a year before these new rights come into force, employers should devise their approach to carer's leave now. Although employers will need to await the publication of the regulations to understand the finer detail of how the rights will work, employers should consider the following policy issues now:

- Who will have "ownership" of ensuring compliance with the new rules in your business (including things like preparing a staff policy, training line managers and managing any record-keeping obligations)?
- Will you enhance the amount of carer's leave available? If so, to what amount?
- Will you offer paid leave? If so, how much?
- Will you extend the rights to non-employees on a voluntary basis (albeit that any individuals benefitting from this would not be able to bring relevant claims before an Employment Tribunal as they would fall outside the statutory scheme)?
- If the regulations provide that leave may only be taken continuously, will you take a more flexible approach and allow the employee to take it discontinuously (e.g. a day at a time)?
- Will you relax any notice requirements provided for in the regulations? If so, what would be the minimum notice required? What form must it take (e.g. would verbal notice be sufficient)?

Employers should also remember that employees taking carer's leave will remain entitled to other relevant forms of leave such as unpaid time off for dependant emergencies or unpaid parental leave. Eligible employees may also be able to request temporary or permanent flexible working arrangements.

In addition, where an employee is caring for someone with a

disability, they may also have rights under the Equality Act 2010. Although such employees are not entitled to have reasonable adjustments made for them, they are protected from less favourable treatment because of their association with a disabled person. Further, where an apparently neutral workplace policy or practice disadvantages such an employee, this may amount to indirect disability discrimination by association, unless the employer is able to justify its approach.

Carer's Leave Act 2023

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New rights and protections at work for parents of babies requiring neonatal care

The Neonatal Care (Leave and Pay) Bill received Royal Assent on 24 May 2023 becoming the Neonatal Care (Leave and Pay) Act 2023. The Act provides the pathway to new rights and protections at work for employees who are parents of babies requiring neonatal care. In this briefing, we outline where things currently stand and what steps employers should take next.

What is the background?

Currently, parents of a baby requiring neonatal care must use existing statutory leave entitlements to allow them to take time off work while their baby remains in hospital. For mothers, this means using up some of their 52-week maternity leave entitlement (the start of which is triggered on the day of the birth). For fathers, this would usually mean using up their two-week paternity leave entitlement, perhaps in combination with other leave rights such as unpaid parental leave, unpaid dependant emergency leave or annual leave. In some cases, the mother may exchange up to 50 weeks of her maternity leave for shared parental leave to share with the father. Doing this would enable the father to take a longer period of time off work, but would, in turn, reduce the amount of time off work that the mother is able to take.

Over the last ten years there have been calls to create special leave and pay rights for parents of premature babies in receipt of neonatal care. In 2015, two premature baby charities, Bliss and The Smallest Things, submitted a joint petition to Government on the issue. The aim was to create an entitlement to ringfenced rights which did not exhaust other forms of leave.

Back in 2019, the Government consulted on proposals to introduce new workplace rights to neonatal leave and pay. In March 2020, the Government responded to the consultation and committed to introducing such rights. However, the legislation did not materialise. Instead, the Government opted to back a Private Members' Bill – the Neonatal Care (Leave and Pay) Bill.

What rights and protections will affected employees be given?

The Neonatal Care (Leave and Pay) Bill received Royal Assent on 24 May 2023 and became the Neonatal Care (Leave and Pay) Act 2023. The Act provides for the introduction of rights and protections for employees who are parents of babies up to 28 days old who require neonatal care for at least one week

without interruption. The rights and protections include:

- a Day 1 right for employees to take leave where they are the parent of a baby who needs to spend at least one week in neonatal care;
- a right for employees with at least 26 weeks' continuous service and whose weekly earnings are at or above the "lower earnings limit" (currently £123 per week) to be paid statutory neonatal pay;
- a right to benefit from the existing terms and conditions of employment that would have applied but for the leave (apart from terms and conditions about remuneration);
- a right to return to work to a job of a kind to be prescribed by the regulations; and
- protection from detriment or dismissal as a result of having taken or sought to take neonatal leave.

However, the precise scope and mechanics of the new rights will be set out in separate regulations. For example, the regulations will address:

- the precise meaning of "neonatal care";
- how much leave an employee may take (this will be set at between one and 12 weeks);

- the period within which the leave may be taken (this will be at least 68 weeks from the child's birth);
- how leave may be taken (e.g. continuously or discontinuously);
- the rate and duration of statutory neonatal pay;
- the amount and form of notice to be given to the employer;
- the evidence of entitlement to be given to the employer;
- what records the employer will need to keep; and
- what will happen is special cases (e.g. where the parent has more than one child receiving neonatal care, or a child receives neonatal care on two or more separate occasions).

In response to written questions on 22 May 2023, Kevin Hollinrake MP stated that the new neonatal leave and pay entitlements are expected to be delivered in April 2025, with regulations to be laid in due course.

What steps should employers take now?

Although employers will need to await the publication of the regulations to understand the finer detail of how the new rights will work, employers should consider the following policy issues now:

- Who will have “ownership” of ensuring compliance with the new rules in your business (including things like preparing a staff policy and updating related policies, training line managers and managing any record-keeping obligations)?

- Will you enhance the amount of neonatal leave available? If so, to what amount?

- Will you enhance the rate of neonatal pay? If so, to what level and for how long?

- Will you extend the rights to non-employees on a voluntary basis (albeit that any individuals benefitting from this would not be entitled to statutory pay and would not be able to bring relevant claims before an Employment Tribunal as they would fall outside the statutory scheme)?

- If the regulations provide that leave may only be taken continuously, will you take a more flexible approach and allow the employee to take it discontinuously (e.g. a day at a time)?

- Will you relax any notice and evidence requirements provided for in the regulations? If so, what would be the minimum notice required? What form must it take (e.g. would verbal notice be sufficient)?

Neonatal Care (Leave and Pay) Act 2023

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City of London. If you would like to discuss any issues relating to the content of this article, please contact Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

New law offering greater protection in redundancy processes during pregnancy and after return from family leave

The Protection from Redundancy (Pregnancy and Family Leave) Bill received Royal Assent on 24 May 2023, becoming the Protection from Redundancy (Pregnancy and Family Leave) Act 2023. The new law will protect pregnant women and those returning from certain types of family leave in redundancy situations. In this briefing, we outline where things currently stand and what steps employers should take next.

What is the background?

Currently, employees absent on either maternity, adoption or shared parental leave are afforded special protection in redundancy situations. The law provides that before making a woman who is on maternity leave (or an employee on adoption or shared parental leave) redundant, an employer must offer a suitable alternative vacancy to them, where one is available. In other words, the employee moves to the front of the queue for such roles, ahead of other colleagues and has a right of

first refusal of such a role. If an employer fails to comply with its obligations in this respect, the employee may be able to bring an automatic unfair dismissal claim.

In 2019, the Government consulted on extending this protection to pregnant employees and those who had recently returned to work following a period of maternity, adoption or shared parental leave. The Queen's Speech delivered at the end of 2019 outlined plans for a new Employment Bill which would introduce these new rights. However, the Employment Bill did not materialise. Instead, the Government backed a Private Members' Bill – the Protection from Redundancy (Pregnancy and Family Leave) Bill – which aimed to deliver these changes.

What rights and protections will employees be given?

The Protection from Redundancy (Pregnancy and Family Leave) Bill received Royal Assent on 24 May 2023 and became the Protection from Redundancy (Pregnancy and Family Leave) Act 2023. The Act is due to come into force on 24 July 2023 and allows for regulations to be made which would give:

- pregnant employees who are at risk of redundancy priority for any suitable alternative vacancy that is available from the point that they notify the employer of their pregnancy;

- employees returning from maternity, adoption or shared parental leave who are at risk of redundancy priority for any suitable alternative vacancy that is available following their return to work. It is anticipated that returners from maternity or adoption leave will be protected for six months after their return to work, but that the protected period may be different for shared parental leave given that it may be taken in discontinuous blocks; and

- employees the right to claim automatic unfair dismissal claim where an employer fails to comply with its obligations regarding offering suitable alternative vacancies and the employee is dismissed as a result.

In practice, this will mean that a woman who notifies her employer of her pregnancy at the three-month stage and then takes 12 months' maternity leave would be protected for a total of 24 months (i.e. six months' protection during pregnancy plus 12 months' protection during maternity leave plus a further six months' protection upon the return to work). At present, such a woman would be protected for the 12-month maternity leave period only.

However, the precise scope and mechanics of these new rights and protections will be set out in separate regulations. It is not yet known when these will be laid before Parliament, although the next General Election must take place by the end of January 2025.

What steps should employers take now?

Although employers will need to await the publication of the regulations to understand the finer detail of how the rights will work, employers should consider the following policy issues now:

- Who will have responsibility for updating any relevant staff-facing procedures and internal guidelines on how to manage a redundancy process?

- Who will deliver training to members of HR and managers who have responsibility for redundancy processes? These groups will need to understand the new rules, know how to apply them and be clear about the consequences of

non-compliance.

Protection from Redundancy (Pregnancy and Family Leave) Act 2023

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