Government consults on reforms to working time rules, holiday pay and TUPE

On 12 May 2023, the Government published a consultation paper, setting out its plans regarding the future of retained EU employment law.

The consultation paper confirms the Government's intention to keep retained EU employment laws in the following areas without any change:

- Family leave rights (maternity, paternity, adoption and parental leave).
- "Atypical" workers' rights (part-time workers, fixed-term workers and agency workers).
- Information and consultation rights.

However, certain reforms are proposed in the areas of working time, paid holiday rights and rights upon the transfer of a business or an outsourcing. The Government says it has identified areas for reform of laws it considers are *"too onerous for business to be used effectively or too complex for workers to know, understand and use".*

It is seeking views on the following changes.

Changes to working time record-keeping requirements

In 2019, the ECJ ruled that the Working Time Directive (**WTD**) required employers to have a system in place to measure the daily working time of all workers. Importantly, that system had to go beyond merely recording overtime hours or drawing upon other sources of information which could be pieced together to identify daily working hours. The system of recording daily hours had to be objective, reliable and accessible.

The consultation says the Government believes that this requirement is *"disproportionate"* and *"damaging to relationships between employers and their workers"* (although it is not said exactly how it is damaging). The Government wishes to legislate to clarify that businesses do not have to keep a record of daily working hours of their workers.

In fact, the Working Time Regulations 1998 (**WTR**) (which implement the WTD) only require employers to keep adequate records to show whether the weekly working time limits (and night work limits) are being complied with. Currently, there is no requirement in the WTR to record daily or weekly rest breaks, or the actual number of hours worked overall each day. Therefore, the proposal does not involve removing anything from the WTR, rather it would mean adding a new provision stating that such records are not required.

Technically speaking, employers should have complied with the daily working time record-keeping obligation following the

ECJ's decision. Yet we suspect that many employers would not even have been *aware* of the ECJ's ruling and, even if they had been, would not have put in place such a system without it being required expressly by the WTR. In conclusion, this reform is unlikely to make much difference in the real world to the way that the majority of employers are managing their working time records.

Creation of a single annual leave entitlement of 5.6 weeks

Currently, the WTR provides that workers are entitled to 5.6 weeks' annual leave per year. However, this holiday entitlement is split into two allocations:

- 4 weeks' leave as required by the WTD (known as "regulation 13 leave"); and
- 1.6 weeks' leave which was granted by the UK Government on top of the minimum WTD requirement (known as "regulation 13A leave").

Different rules about pay apply to regulation 13 leave and regulation 13A leave. Workers should be paid their "normal pay" for regulation 13 leave, which may include things like commission, bonuses, allowances and some types of overtime payment. In contrast, workers are only entitled to be paid basic pay for regulation 13A leave.

The consultation says having these two types of leave causes administrative hassle for employers and confusion for workers. The proposal is to replace regulation 13 leave and regulation 13A leave with a new regulation creating a single statutory annual leave entitlement of 5.6 weeks. Therefore, the amount of leave per year will not increase or decrease, rather this is a "behind the scenes" change to make the management of such leave more straightforward.

In terms of pay for the new single pot of annual leave, the consultation says that the new regulation would set out the minimum rate of holiday pay. The consultation seeks views on what that rate of pay should be. Ultimately, if the Government decided that only basic pay should be paid for the whole 5.6 weeks this will represent a cut to the holiday pay of workers who are normally in receipt of additional elements of pay such as commission and overtime.

Additional changes are also proposed in relation to the accrual and carry-over of annual leave.

On the accrual of leave the proposal is that workers should accrue their annual leave entitlement at the end of each "pay period" (rather than each month as is currently the case) until the end of the first year of their employment. The aim is to provide workers with a steady amount of holiday entitlement as they work and to simplify the calculation of holiday entitlement for employers.

On the carry-over of unused leave the proposal is to remove the regulations which permitted workers to carry over their regulation 13 leave into the following two annual leave years where it was not reasonably practicable to take it during the

coronavirus pandemic. The consultation notes that these regulations are no longer needed. Apart from this change, the rules on carry-over would not change (i.e. 4 weeks' annual leave *could not* be carried over unless the worker was unable to take it in certain scenarios and 1.6 weeks' annual leave *could* be carried over where there was a written agreement between the worker and employer).

Introduction of rolled-up holiday pay

"Rolled-up" holiday pay is a system where no holiday pay is paid when a worker actually takes annual leave, but, instead, an additional amount of pay is added to their pay for periods of work. In other words, the additional pay represents a payment in lieu of holiday pay. In 2006, the ECJ ruled that the practice of rolled-up holiday pay was unlawful and that workers should be paid holiday pay at the time that the annual leave is taken. The UK Government did not amend the WTR in line with the ECJ's ruling, however, it updated non-statutory guidance to provide that rolled-up holiday was not permitted.

The consultation proposes that rolled-up holiday pay be introduced as an option for all workers. Employers could choose between paying holiday pay when the worker takes the annual leave or "rolling up" holiday pay with wages and not paying anything during periods of annual leave. It is said that this system would make life simple for employers as the calculation of holiday pay would be a straightforward enhancement to every pay slip. The consultation proposes that the default enhancement rate is 12.07% of the worker's pay (which is the result of 5.6 weeks' annual leave divided by 46.4 working weeks of the year).

This reform will be welcomed by employers of workers who work irregular hours or part-year arrangements as it will simplify the calculation of holiday pay significantly.

Changes to TUPE consultation requirements

The Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**) protect employees' rights when the business or undertaking for which they work transfers to a new employer, either when the business changes owner or a service transfers to a new provider. Currently, before such a transfer, the outgoing employer must inform and consult with representatives of the affected employees. These can be existing representatives (e.g. trade union representatives) or ones that are elected just for this purpose. However, outgoing employers with up to nine employees may inform and consult with affected employees *directly* if there are no existing representatives in place.

The consultation proposes that the option of consulting with affected employees directly should be extended to businesses:

- with up to 49 employees; and
- with any number of employees where a transfer of up to nine employees is proposed.

However, this option would only be available where there were

no existing representatives. The aim is to help businesses avoid the administrative burden of holding elections for employee representatives. This reform will be welcomed by employers – albeit that consulting with, say, 40 employees may be more challenging than consulting with just three or four representatives.

What are the next steps?

The consultation closes on 7 July 2023. The Government will need to consider the responses and decide what changes, if any, it wishes to make to the law. Its position will be set out in a response paper, which we would expect to be published by the end of 2023. Legislation will then need to be passed, meaning that the reforms are unlikely to take effect before the latter part of 2024 at the earliest. However, we will continue to monitor this development and keep you updated.

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Polly Rodway presenting at

“Maternity & Pregnancy Rights Update – Case Law, Legislation & Future Developments” webinar

On 26 May 2023, BDBF Partner Polly Rodway will be presenting a webinar entitled “Maternity & Pregnancy Rights Update – Case Law, Legislation & Future Developments” in conjunction with MBL Seminars. In this session, Polly will discuss recent maternity and pregnancy discrimination claims, legislative changes and research and campaigns which may influence change in the future.

Register here.

Non-compete restrictions in employment contracts to be limited to three months

On 10 May 2023, the Government announced plans to reform the use of non-compete clauses in employment contracts. Legislation will be introduced which will limit such restrictions to three months. Other types of post-termination restrictions will not be affected.

What is the background to this proposal?

The reform of non-compete restrictions has been in the Conservative Government's crosshairs for some time. In May 2016 a call for evidence was launched which sought views on whether non-compete clauses stifled innovation and unfairly hindered workers from moving freely between employers. The responses to that consultation were fairly polarised with established businesses favouring the current law but new ones looking for more flexibility. The proposals were shelved by the Government at that time.

But it was back on the table again just a few years later. In December 2020, the Government launched a consultation on proposals for limiting, or potentially even banning, the use of non-compete clauses in employment contracts. The consultation was confined to non-competes and did not seek views on restricting the use of any other form of post-termination restrictive covenant such as non-solicitation clauses.

The consultation put forward two alternative proposals:

- The first proposal was that non-compete restrictions should only be enforceable where the employer compensates the employee for the length of the restriction. This would mirror the approach taken in a number of European countries such as Germany, France and Italy. In addition, the Government sought views on supplementing this proposal with a new limit on the maximum length of such restrictions. At present, there is no maximum, but the clause must be reasonable and go

no further than is necessary to protect the employer's legitimate interests. In practice, it is unusual to see non-compete restrictions exceeding 12 months and more usually they will sit around the six-month mark. The consultation sought views on whether the maximum limit should be three, six or 12 months.

- The second proposal was to ban non-compete clauses altogether, possibly with some exemptions. The consultation stressed the positive effect that such a ban could have on innovation and competition and pointed to California – where non-compete restrictions are void – as the home of the world's most innovative organisations.

What has the Government decided to do?

Despite the consultation closing over two years ago (on 26 February 2021), the Government has not yet published a response. Nonetheless, the Government has announced that it intends to legislate to limit the length of non-compete restrictions contained in employment contracts to three months. The announcement makes no reference to any requirement to compensate the employee for the length of the restriction, and so it appears that this part of the first consultation proposal has been dropped. It is said that the limitation will not extend to other types of post-termination restriction, such as non-solicitation clauses or confidentiality restrictions (and, presumably, other types of

restriction such as non-dealing clauses).

Otherwise the announcement is fairly scant, and the devil will be in the detail. For example, there are a number of important points that have yet to be made clear:

- **What is an "employment contract" for these purposes?** Will the law apply to contracts of employment only or also to other agreements which are collateral to the employment relationship e.g. shareholders' agreements, long term incentive plans (LTIP) or carried interest agreements? In Duarte v Black & Decker Corp [2007] EWHC 2720 (QB), the High Court held that restrictive covenants contained in an LTIP agreement separate from the employment contract was no bar to the LTIP agreement being treated as an "individual employment contract" for the purposes of deciding the governing law. It is possible that a similar approach will be taken in the new legislation.

- **Will "workers" be covered?** The announcement refers to "employment contracts" and "employees" only and makes no reference to individuals classified as "workers" who work under a contract to work or perform services for the employer. If it does *not* extend to workers then this would mean that longer non-competes could still be used for certain independent contractors or LLP members.

- **Will the law apply to existing employment contracts?** It is not clear whether the new law will apply retrospectively or only to new contracts. In the event that it applies retrospectively, employers will need to renegotiate non-compete restrictions which are in excess of three months (or simply accept that they are unenforceable). Thought should also be given to strengthening other terms to offset the reduction in the non-compete restriction. For example, notice periods, non-solicit and non-dealing covenants. However, in order to ensure the enforceability of any revised terms some form of "consideration" would need to be given to the employee in return for their agreement.

- **How will the new law work alongside garden leave clauses?** The Government's announcement says that the reforms will not affect an employer's ability to use paid notice periods or place employees on garden leave. However, the risk is that employers will respond to the loss of longer non-competes by extending periods of notice in order to place the employee on garden leave and keep them out of the market that way. This would undermine the stated intention of the new law and so it seems likely that the interplay of garden leave and non-competes will need to be addressed.

What are the next steps for employers?

The Government has said the legislation will be introduced *"when Parliamentary time allows".* At the time of writing, no timeline for the introduction of the new law has been given. With a General Election looming, it remains to be seen whether the proposal will ever make its way on to the statute books.

Nevertheless, it would be sensible for employers to consider auditing existing employment contracts now to ascertain which contain non-compete restrictions in excess of three months. Employers will also need to review relevant template contracts to make sure that any new contracts comply with the new rules if, and when, they are introduced.

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Managing Associate Tom McLaughlin (tommclaughlin@bdbf.co.uk), Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Policy paper: Smarter regulation to grow the economy

Settlement offer made in the

context of exit discussions was not without prejudice

In the recent case of Scheldebouw BV v Evanson, the EAT upheld an Employment Tribunal's decision that a settlement offer made by an employer in the context of amicable exit discussions was not "without prejudice" because there was no dispute between the parties at that stage. Accordingly, the fact of the offer could be referred to in Tribunal proceedings.

What happened in this case?

Mr Evanson worked for Scheldebouw BV as its Chief Risk Officer from January 2005 until his dismissal on 19 March 2019.

In 2018, the company decided that it no longer needed a Chief Risk Officer and so it initiated exit discussions with Mr Evanson. A meeting was held on 12 October 2018. Neither party asked that the meeting be held on a without prejudice basis. A "gentlemen's agreement" was reached on the majority of the exit terms, save for the sum to be paid in respect of accrued but untaken holiday.

In the meeting, the company offered to pay the sum of £68,000 in lieu of the unused holiday, yet Mr Evanson believed he was entitled to more. However, the parties were confident that the holiday pay issue could be resolved, and they agreed to enter into a settlement agreement. In December 2018, a draft settlement agreement was prepared and sent to Mr Evanson. However, a final agreement was not achieved, and the

company eventually dismissed him in March 2019.

Mr Evanson claimed unlawful deductions from wages in respect of the unpaid holiday. In his claim form, he referred to the company's initial offer of £68,000. The company applied to have this removed from the claim on the grounds that the offer had been "without prejudice" – meaning it was off the record and should not be before the Employment Tribunal.

What was decided?

The Employment Tribunal disagreed with the company, finding that the offer was not truly "without prejudice". In order for without prejudice privilege to apply, it is necessary for the parties to be attempting to resolve a "dispute". At the point that the offer of £68,000 was made, it could not be said that the parties were in dispute. The parties were confident that exit terms would eventually be agreed and did not contemplate (and could not reasonably have contemplated) that litigation would follow if an agreement could not be reached. It was only after the draft settlement agreement was rejected that a dispute arose.

The company appealed to the Employment Appeal Tribunal (**EAT**). However, the EAT upheld the Tribunal's decision and said the offer of £68,000 was not off the record and, therefore, could be referred to in Mr Evanson's claim. Importantly, the EAT found that the decision to enter into a settlement agreement was made for commercial reasons and did not indicate that litigation was in contemplation.

What are the learning points for employers?

In order for without prejudice privilege to be engaged, a settlement offer must be aimed at resolving an existing "dispute". A dispute will always exist once litigation has started. However, a dispute may also exist *before* litigation has started if the parties had contemplated (or might reasonably have contemplated) that litigation would follow if settlement was not forthcoming. It is not necessary for a threat of litigation to have been made in order for the parties to reasonably contemplate that litigation may follow.

However, where the parties did not contemplate (or could not reasonably have contemplated) that litigation would follow if the negotiations fell apart, then a dispute will *not* exist. Against this background, simply labelling a settlement discussion, letter or agreement as "without prejudice" will not be enough to engage without prejudice privilege.

Where there is no dispute, there remains the ability to have "pre-termination settlement discussions" under section 111A of the Employment Rights Act 1996. However, these discussions are off the record for the purposes of ordinary unfair dismissal claims only and could still be referred to in other types of claim, such as discrimination claims. Therefore, it is better to ensure that without prejudice privilege applies wherever possible, since this will protect the communications from disclosure in *any* proceedings.

If you are unsure about whether you are in "dispute" with a departing employee, it would be sensible to obtain legal advice before making any settlement offers.

Scheldebouw BV v Evanson

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Should employers only deal with formal bullying complaints which cross a certain threshold?

On 21 April 2023, Dominic Raab resigned as Justice Secretary and Deputy Prime Minister after an independent investigator found that he had bullied civil servants. In this article we consider the learning points for employers and how complaints of bullying should be managed.

Why is bullying in the news again?

Bullying in the upper echelons of Government has hit the headlines once again.

Back in December 2020 news broke that a Cabinet Office inquiry

had found evidence that the then Home Secretary, Priti Patel, had bullied staff and broken the Ministerial Code. It later emerged that she had a history of such behaviour when in previous roles. The alleged behaviour included shouting, swearing, belittling people and making unreasonable demands. The Cabinet Office inquiry found that Ms Patel was "action orientated", could be "direct" and felt justifiably frustrated with civil servants on occasions. However, this manifested itself in "forceful expression, including some occasions of shouting and swearing" which had upset staff. It concluded that her behaviour had breached the Ministerial Code, even if this was "unintentional".

Fast forward to 2023 and an independent investigator has concluded that Dominic Raab committed acts of bullying when he was Foreign Secretary and Justice Secretary. The report found that Mr Raab was "persistently aggressive" in meetings and had abused or misused his power in a way which could undermine and humiliate colleagues. It also emerged that he had acted in an "intimidating" manner, had described colleagues' work as "utterly useless" and "woeful" and had threatened disciplinary action. Mr Raab resigned in response to the findings. He apologised for any "unintended" stress or offence felt by colleagues but expressed concerns that the "threshold" for bullying had been set too low.

Why is this of interest to employers?

What is interesting in these cases is that the senior perpetrators viewed their own behaviour as robust management rather than bullying. Further, the behaviours in question were tolerated by multiple colleagues for some time before formal investigations were triggered. It is easy to see how similar scenarios could arise in the workplace.

Unless perpetrators are made aware of the impact of their oppressive behaviour, they will be unable to take steps to correct it. Therefore, it is important for employers to support employees to come forward with bullying complaints. A frequent problem that employers face in these situations is that victims do not want to "rock the boat" – particularly where the perpetrator is very senior. If a victim *is* prepared to speak up, they tend to want to do so on an informal or "off the record" basis.

This puts an employer in a difficult position. On one hand, it is now on notice of the alleged bullying and may be exposed to risk if they do nothing. On the other hand, the victim does not want to take any formal action.

How should employers respond to informal complaints of bullying?

There is no "one size fits all" answer to the question of how an employer should respond to such a complaint. In practice, employers will need to grapple with a number of preliminary questions in order to decide upon a suitable response.

Is it bullying?

Dominic Raab said that the "threshold" for bullying had been set too low. Is there a threshold before behaviour qualifies as bullying? In contrast to the related concept of discriminatory harassment, there is no legal definition of bullying. The non-statutory Acas Guide for Managers and Employers on Bullying and Harassment at Work offers a wide-ranging definition of bullying as: "Offensive, intimidating,

malicious or insulting behaviour, an abuse or misuse of power through means that undermine, humiliate, denigrate or injure the recipient". It does not matter whether or not the perpetrator deliberately *intended* to bully. It is also not necessary for such treatment to be related to a protected characteristic under the Equality Act 2010.

Typically, internal policies will usually spell out what types of behaviour may be viewed as bullying and will often seek to distinguish this from behaviours associated with active management of staff. However, things like speaking in an aggressive and threatening way, shouting, swearing, mimicking, making comments that belittle or humiliate employees, levying excessive and undue criticism, and/or making unwarranted threats of disciplinary action will usually fall on the wrong side of the line.

Is it a grievance?

The statutory Acas Code of Practice on Disciplinary and Grievance Procedures (**Acas Code**) defines grievances as: "…concerns, problems or complaints that employees raise with their employer". This broad definition means that *any* disclosure by an employee that they are (or someone else is) being bullied at work would be viewed as a grievance for the purposes of the Acas Code.

Employers should not be tempted to avoid dealing with a complaint simply because it is felt that an overly sensitive employee is merely "venting" or looking for moral support. However, it may lead an employer to favour an informal response. Where matters are minor and/or the employee over-sensitive, resolution with the support of HR may be all that

is required to get things back on track.

Yet employers should exercise caution when making such assessments and ensure that they build up a full picture of what has happened. As the Acas Guide to Bullying highlights: "People being bullied or harassed may sometimes appear to overreact to something that seems relatively trivial, but which may be the last straw in a series of incidents". Indeed, in the case of Green v DB Group Services (UK) Ltd EWHC 1898 (QB) the High Court held that the cumulative effect of the alleged conduct had to be considered, rather than individual incidents. In that case, Ms Green was subjected to a long-term campaign of mean and spiteful behaviour which included actions such as blowing raspberries as she walked by, telling her she "stank", removing her image from the company intranet and hiding her work. In isolation, acts of this nature may seem minor but, together, they expose the employer to significant risk if no action is taken. Indeed, in Green, the bullying campaign led Ms Green to have a nervous breakdown and she was award £817,000 in damages.

In short, the learning point is that even an informal complaint about minor bullying may amount to a grievance requiring *some* form of response from the employer. In appropriate cases, it may be that the response is limited to informal resolution. However, what an employer should *not* do is turn a blind eye or hope that it blows over. Action of some sort will always be required.

What legal claims could the employee have?

Although there is no stand-alone legal claim for bullying, there are a suite of other legal claims available to an

employee who has been the victim of bullying including claims for:

- constructive dismissal;
- personal injury;
- failure to make reasonable adjustments (if disabled);
- discriminatory harassment (if the bullying relates to a protected characteristic such as sex, race, age, religion, sexual orientation);
- victimisation (if the bullying followed a protected act such as complaining of sexual harassment);
- whistleblowing detriment (if the bullying was as a result of the employee raising concerns about, for example, regulatory breaches); and/or
- harassment under the Protection from Harassment Act 1997.

When deciding on how to respond to an informal bullying complaint, employers should, as far as possible, consider their exposure to these legal claims. The more serious the alleged bullying, the higher the legal risk and the more likely it is that the employer will need to pursue a formal approach.

What other factors are important?

Employers should consider other issues such as compliance with internal policies and procedures, and also with a regulator's expectations, if applicable. By way of example, financial services employers subject to the Financial Conduct Authority's (**FCA**) Senior Managers and Certification Regime must assess senior managers and certification employees to be "fit and proper". The "fit and proper" test focuses on honesty, integrity and reputation amongst other things. Accordingly, allegations of bullying may mean that a Senior Manager or a Certification Employee is not fit and proper. Where such allegations are raised, it is imperative that the employer investigates to decide whether those allegations are well-founded and should be reported to the FCA.

Employers should also consider the wider consequences for their organisation of leaving bullying unchecked. The Acas Guide to Bullying highlights that the problem can fester and cause serious problems for the employer including poor morale and employee relations; loss of respect for managers and supervisors; poor performance; lost productivity; absences; resignations; and reputational damage.

Conclusion: what are the employer's options?

Employers should consider all of these preliminary issues in light of the complaint, including the severity of the alleged behaviour, the length of time it has been going on, the number of victims and the seniority of the perpetrator. They will then be in a position to form a view about what steps to take in response. There are four possible options.

- **Option 1 – Note the complaint and do nothing else:** this is a high-risk option and should be avoided in most cases.

- **Option 2 – Informal resolution:** where the complaint appears minor or a one-off, a better option for the employer would be to propose some form of informal resolution such as a supported discussion or mediation.

- **Option 3 – Formal procedure with the employee's participation:** in more serious cases a formal investigation should be undertaken. This is the only route by which the employer can reach a conclusion on whether the allegations are true or false and issue sanctions and take remedial action. The employer should apply the procedure set out in its own Grievance Policy.

- **Option 4 – Formal procedure without the employee's participation:** there may be cases where the employee is simply unwilling to pursue a formal complaint under any circumstances. This puts the employer in the difficult position of having to go against the employee's wishes. However, in serious cases the risk of doing nothing is too high. Inaction jeopardises the health and safety of the employee (and possibly other employees), fails to afford the perpetrator the chance to explain their behaviour and exposes the employer to legal risk and possibly regulatory censure.

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New Acas guidance on making reasonable adjustments for mental health conditions

For the first time, Acas has published specific guidance on how reasonable adjustments can be used for staff with mental health conditions. The guidance considers how adjustments should be agreed and the role that managers have in managing employees once adjustments are in place. In this article we summarise the key points to note.

What are reasonable adjustments for mental health?

Employers have a positive duty to make reasonable adjustments to the workplace to remove or reduce a disadvantage related to a person's disability. "Disability" covers both physical and mental impairments which have a substantial and adverse effect on a person's ability to carry out day to day activities. Examples of mental health impairments that may qualify as a disability include depression, anxiety, bipolar

disorder, ADHD and OCD.

The duty covers disadvantages caused by working practices, policies, physical features of the workplace or by the absence of an auxiliary aid. What is “reasonable” will depend on a number of factors including whether the adjustment is practicable, the financial and other costs of making the adjustment and the size and financial resources available to the employer. Importantly, the duty to make reasonable adjustments applies whether or not a disabled employee requests them.

The new Acas guidance highlights that employers and works should work together to agree and review reasonable adjustments over time. When it comes to mental health, the guidance underlines that what works for one situation or employee, may not work for another. Furthermore, what works at one point in time, may not work in the future if the mental health condition changes. In other words, a flexible approach needs to be taken. The benefit of doing so is that the right adjustments will help keep the employee in work, enabling them to work safely and productively.

Although the guidance is non-binding, it would be sensible for employers to follow it when dealing with employees with mental health conditions. Being able to demonstrate compliance with the recommendations will put employers facing claims of failure to make reasonable adjustments in the best possible position to defend them.

Examples of reasonable adjustments for mental health

The guidance sets out a non-exhaustive list of examples of adjustments that can be made for those with mental health conditions. These include:

- **Changing someone's role and responsibilities –** for example, reviewing tasks and deadlines to help someone have a reasonable workload while managing their mental health.

- **Reviewing working relationships and communication styles** – for example, agreeing a preferred communication method to help reduce anxiety such as avoiding spontaneous phone calls.

- **Changing the physical working environment** – for example, relocating someone's workspace to a quieter area to reduce sensory demands.

- **Policy changes** – for example, being flexible with "trigger points" for sickness absence management, so that someone is not disadvantaged by mental health related absence.

- **Providing additional support** – for example, providing regular check ins to help with prioritising work and structuring the working day.

Requesting reasonable adjustments for mental health

The legal duty to make reasonable adjustments requires employers to proactively identify and make adjustments to remove or reduce disadvantage for disabled people. Nevertheless, the guidance encourages employees to who feel they need an adjustment to open a discussion with their employer.

The guidance offers lots of tips on how employees can best prepare for such discussions. Before making a request, the guidance suggests that employees consider the following issues:

- **Think about how their mental health affects their work** – for example, are there times in the day or week that are better or harder?
- **Think about how work affects their mental health** – for example, are there some tasks that cause anxiety or worry?
- **Talk to a friend or family member** – this can help the employee to better recognise patterns in their own behaviour, especially when they are experiencing mental health problems. For example, the employee can ask for views on when they seem confident, settled and happy and when they do not.
- **Look through examples of reasonable adjustments** – looking through examples (including the examples contained in the guidance) may give the employee ideas of the kinds of things that might be possible and could help them.

- **Get advice from an occupational health professional** – occupational health professionals can provide expert advice on what adjustments might be suitable for the employee.

Having done this preparation, the guidance recommends that employees have a conversation and agree a plan with their employer. It also recommends that any adjustments are trialled and monitored over time and that a record is kept of any changes made. Beyond this, the guidance recommends keeping adjustments under review and holding regular follow up meetings to discuss how the adjustment is working for both parties. These meetings could be weekly, monthly or less frequently.

Responding to requests for reasonable adjustments for mental heath

The guidance also offers pointers for employers on how to respond to requests for reasonable adjustments for mental health. In terms of preparation, it recommends that the person having the discussion with the employee considers any relevant organisational policies relating to mental health, absence and reasonable adjustments. It also urges the person to reflect on how confident they feel talking about mental health at work (and consider undertaking training if necessary) and to try to put themselves in the employee's position and think about what is going on for them.

In terms of identifying the right adjustments, the guidance

recommends looking through examples of reasonable adjustments and seeking advice from an occupational health professional on what adjustments might be suitable. Possible adjustments should then be discussed in a meeting with the employee. The guidance offers a checklist of the things to be covered in any such meeting and recommends that the employee be allowed to bring a trusted person with them to take notes if desired. Once adjustments are agreed, the employer should confirm them in writing and keep them under review.

Managing employees with reasonable adjustments for mental health

Helpfully, the guidance offers specific advice to managers of employees who have reasonable adjustments in place for their mental health. This includes a checklist of practical steps that can be taken to support someone access the support they need – these are:

- Check in with the employee, ask how they are and if they need help.
- Learn to recognise changes in their behaviour.
- Try to understand how their mental health impacts them.
- Understand that adjustments might not work the first time and may need to be changed over time.
- Be flexible in your approach and respond to changing needs.

- Show ongoing support throughout any fluctuations in mental health and put in place adjustments as needed.

- Consider the needs of the employee and their team in case anything needs to change.

- Know when to ask for help from others such as HR and occupational health.

Further guidance is given on how to handle conversations about adjustments sensitively and on the follow up steps that should be taken by managers.

Reviewing policies with mental health in mind

Finally, the guidance encourages employers to review relevant policies (such as absence policies) to make sure that they are suitable for employees with mental health problems. For example, by ensuring they use clear, accessible and empathetic language. Such policies should be clear on what needs to be done by who and when and be well understood by managers and implemented consistently by them.

It is also recommended that employers have a policy which specifically addresses reasonable adjustments for mental health. This will help make it clear how adjustments can be accessed, how managers will deal with requests and keep them under review. Such a policy could also signpost other sources of support, such as employee assistance programmes or mental health champions and outline the organisation’s overall

wellbeing strategy.

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Acas – Reasonable adjustments for mental health guidance

Claire Dawson speaking at 2023 ABA Meeting in Amsterdam

BDBF Partner Claire Dawson will be attending and speaking at the 2023 ABA International Labor and Employment Law Committee Midyear Meeting in Amsterdam (30 April to 4 May).



Sexual harassment at work: What employers need to know? – Lunchtime Webinar –

Tuesday, 25 April 2023

In this 50-minute webinar, BDBF's Managing Associate Emily Plosker and Associate Rebecca Rubin examine the legal framework and consider the steps employers need to take when faced with allegations of sexual harassment at work. This webinar was originally delivered on 25 April 2023 and reflects our understanding as of that date. Do get in contact with either of the speakers if you would like to discuss any of the issues raised.

To view the PDF webinar slides please click on the image below, or view the recording of the webinar:



Please contact Emily Plosker (EmilyPlosker@bdbf.co.uk), Rebecca Rubin (RebeccaRubin@bdbf.co.uk) or your usual BDBF contact, for further advice.

Thinking about leaving an LLP? Read on.

If you are thinking of leaving a Limited Liability Partnership (LLP) you will be disposing of your interests and assets in the LLP for good. Having advised many partners over the years, we know how vital it is for departing partners to have a clear understanding of their entitlements and obligations before, during and after their departure.

Departing partners should satisfy themselves that they understand the financials, process and long-term implications of an exit before taking any decisive steps.

This article signposts the key considerations LLP members should have in mind when planning an exit and what to expect during the process.

Understand the financial implications and plan accordingly

Ordinarily, the financial and non-financial terms of your exit will be set out in a retirement deed. This provides certainty and avoids any unwelcome surprises. Reaching an amicable

agreement is not always feasible. Either way, you should get ahead and make sure you understand your financial obligations to the LLP and its obligations to you. A good starting point is the LLP’s management and profit and loss accounts.

Once you have reviewed the LLP’s accounting documents, you should aim to address the following financial points with your fellow members at an early stage:

1. The level of earnings you will receive during your notice period. This is likely to be made up of a fixed draw, together with some variable pay or profit.

2. Your profit share distribution. You may already have an idea of what your share of the LLP profits may be. However, if the LLP’s profit share distribution will be decided after your proposed departure date, you should prepare your estimates and the reasons and evidence which support your calculations behind the same.

3. The capital you hold in your account and what drawings you expect to make.

4. Whether you need to make any repayment of capital or satisfy any loans.

5. The level of any relevant tax reserve account.

You may also be asked to sign a settlement agreement which

requires you to waive claims against the LLP. Given you are waiving important and potentially valuable rights, you must take advice on the terms and effect of a settlement agreement before entering into the agreement.

How do you leave?

Your first port of call is your governing document. The LLP's governing document (usually known as a Partnership Deed or Membership Agreement) will deal with exit arrangements and will usually cover:

- the different ways a member may leave the LLP;
- the period of notice a member must give, or is entitled to receive, when leaving the LLP; and
- the process to be followed when a member leaves the LLP.

Type of exit

Subject to the terms of the governing document, a member may retire at their own election or they be compulsorily retired or expelled by the other members of the LLP.

LLP members are not employees and, therefore, do not have protection from unfair dismissal. If you are being exited

against your will by expulsion or compulsory retirement, you should seek legal advice on other legal protections you may have as worker, such as protection from discrimination or whistle blowing detriment.

Notice, garden leave and suspension

LLP members are usually subject to a notice period set out in the LLP's governing document.

Subject to the reasons for your exit, and any agreement you enter into with the LLP regarding the same, you may be required to continue to carry out your duties as normal until the end of your notice period. Alternatively, the LLP may place you on garden leave or suspend you (which usually involves a member's exclusion from the workplace and management of the LLP) for all or part of your notice period.

Process

The process by which notice of your exit needs to be given should also be set out in the governing document.

If you have elected to retire, it is likely you will need to provide written notice of this to the LLP.

If the LLP is compulsorily retiring or expelling you, the governing document will set out a procedure the LLP members must follow for taking such a decision. This is usually by

way of a vote of the members at a members' meeting, or by passing a written members' resolution.

Announcements

An internal announcement is typically made by the LLP after notice of the exit is given by either party. Subject to the terms on which you are leaving the membership, you may wish to agree the wording of the announcement in advance, and agree who will be told and when. Our clients often consider this to be important to protect their reputation.

Non-financial obligations following your exit

It's not all about the money and you should make sure you understand the nature and duration of any post-termination restrictions that apply following the termination of your membership. Why? They may impact your future plans and could stop you earning in future.

Information on your post-termination restrictions and obligations will normally be set out in the governing document and may include:

- non-compete and non-poaching or soliciting of clients and/or staff for a set period. These restrictions could lead to issues if your future plans are to work for a competitor or take clients or staff with you to your new venture (including those you brought to the LLP you are leaving);

- restrictions on your future use of the LLP's property, for example its intellectual property; and/or

- confidentiality obligations.

These terms may be negotiable. We are often called upon to provide legal advice on the above and to negotiate adjustments to post-termination restrictions.

If you need advice on any of the considerations set out in this article, including on strategy and negotiating the terms of your exit, we can help. You can read more about our expertise in this area here.

BDBF is a leading law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Paula Chan (PaulaChan@bdbf.co.uk) and Melvyna Mumunie (MelvynaMumunie@bdbf.co.uk) or your usual BDBF contact.

The King's Coronation bank holiday: are workers entitled

to have the day off work?

A national bank holiday will take place on Monday, 8 May 2023 to mark the Coronation of King Charles III. Do workers have the right to have the day off work? If so, does it need to be paid? The short answer is: it depends on what the employer's contracts and policies say.

What does the law say?

- The Working Time Regulations 1998 entitle workers to a minimum of 5.6 weeks' paid leave per year. For full-time workers, this equates to 28 days' paid leave per year.

- Contrary to widespread belief, bank holidays do not have special status and there is no statutory entitlement to time off work for bank holidays. However, employers may choose to include bank holidays as part of a worker's overall leave entitlement.

- When drafting employment contracts employers have freedom in how the minimum annual leave entitlement is distributed – this can be done in several ways with different consequences.

What do the contracts and policies say?

As a starting point, employers should check the drafting of relevant policies and contracts. This will determine whether workers are entitled to leave, and pay, for this additional bank holiday.

Some possibilities of how the contract might set out the 5.6 weeks' annual holiday entitlement include:

- **"Four weeks plus eight standard bank holidays" (and in some cases, the bank holidays may even be specified).** In this scenario, there would be no automatic entitlement to have the Coronation bank holiday as an additional day off, but if the worker had some of their annual leave entitlement remaining then they may request to take it as a day's leave in the normal way.

- **"Four weeks plus all bank holidays".** This wider drafting suggests that workers would be entitled to have the Coronation bank holiday as an additional day off. This means that full-time workers would get a minimum of 29 days' paid leave this year instead of 28. If the employer needed the worker to work on the Coronation bank holiday it could offer the worker a day off in lieu at a later date instead.

- **"5.6 weeks inclusive of the eight standard bank holidays".** This drafting means that there is no

entitlement to have the Coronation bank holiday as an additional day off, since the leave entitlement is ultimately capped at 28 days for a full-time worker (i.e. a full-time worker would not get a 29th day of paid annual leave). However, as above, if the worker had some of their annual leave entitlement remaining then they may request to take it as a day's leave in the normal way.

- **"5.6 weeks inclusive of all bank holidays".** There would be no entitlement to have the Coronation bank holiday as an additional day off. Again, this drafting means the leave entitlement is ultimately capped at 28 days for a full-time worker. However, the worker could ask to take it off in the normal way. Further, this drafting would, in fact, allow employer to require that the day be taken as a day's leave (whether the worker wants to or not) out of their usual paid leave entitlement.

What practical issues should employers consider?

In addition to checking what contracts and policies say, employers should also think about the optics of their decision – both internally, in terms of impact on staff morale, as well as externally. Many workers will be expecting to have the day off, regardless of the strict legal position. Indeed, the Government has said that the Coronation bank holiday would *"give people across the United Kingdom the opportunity to come together as families and communities to welcome His Majesty to the throne as we mark this important day in our*

nation's long history".

It should also be remembered that schools will close on the Coronation bank holiday, and this will have a direct impact on workers with children. Employment Tribunals continue to recognise that decisions impacting childcare have a disproportionate impact on women. Employers should be mindful of indirectly discriminating against mothers with childcare responsibilities. Where a worker's contract does not entitle them to have the Coronation bank holiday off, and the employer needs them to work, it should consider allowing parents of school age children to either:

- work from home on the day;
- take the day off and make up the lost working hours later in the week;
- take paid annual leave on the day (assuming they have paid leave entitlement available);
- take unpaid parental leave on the day; or
- take unpaid time off to provide emergency care for dependants on the day (whether or not this type of leave is engaged will depend on the circumstances).

Employers should also consider what to do if a worker makes a request to have the day off where they have already used up their paid annual leave entitlement. Would you be prepared to let them take it as unpaid leave?

Some workers may actually prefer to work on the Coronation bank holiday. Can employers force workers to take the day off, and take the leave out of their annual entitlement? Can workers ask to take a different day off at some other time? Again, the answers will be found in the employment contract and relevant policies.

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BDBF Reveals New Branding in its Tenth Year



BDBF has today announced the launch of its new branding and refreshed logo, which is launched at the same time as its new website.

Recognised as one of the leading specialist employment law firms in London for high stakes and high value cases, the rebrand reflects BDBF's growth and vision.

Gareth Brahams, Managing Partner at BDBF said:

"From when we launched ten years ago to now, we have been one of the 'go to' firms for clients with high value/high stakes employment law disputes. It has always been a collective drive and I am proud of the team of 25 people (including six partners and 11 associates) we have built to deliver on that ambition.

This iteration of our brand reflects how we have evolved as a firm but how the vision remains constant. It's about putting our clients' and our own experience to work to get the best outcomes for clients, whether that is through negotiation or winning cases.

But it is also about who we are as a firm and our culture of pulling together with exuberance, fearlessness and spirit.

Our new branding captures our essence: this is a great place to work, and these are great people to work with to get the best outcomes in the big moments in people's working lives."

BDBF is a leading law firm based at Bank in the City of London specialising in employment law. If you would like to discuss an employment related issue, please get in touch with your usual BDBF contact or email info@bdbf.co.uk.

Government starts the ball rolling on reform of UK whistleblowing laws

On 27 March 2023 the Government announced the launch of a review of the current UK whistleblowing legal framework. In this briefing we take stock of what we know so far and what it means for employers.

The last of overhaul of the UK's whistleblowing framework took place in 2013, when a number of major changes were introduced, including:

- the requirement that disclosures would only qualify for protection where the worker reasonably believed the disclosure to be in the "public interest";
- the removal of the requirement that disclosures had to be made in "good faith" (but with provision for reduced compensation if the disclosure was not made in good faith);
- employees and agents became personally liable for detriments against whistleblowers and, in turn, employers and principals could be vicariously liable for this; and
- the inclusion of various NHS contractors in the definition of "worker" for whistleblowing purposes (and a power to bring further categories of people within that definition).

In the decade since these changes, there have been calls for further upgrades to the framework. In 2021, Protect, the whistleblowers' charity, launched the "Let's Fix Whistleblowing Law" campaign, in which it called for the expansion of the scope of whistleblowing protection to the self-employed, non-executive directors, trustees and governors, volunteers and job applicants. It also called for the introduction of a requirement for employers to have internal speak-up arrangements (currently only employers in

certain regulated sectors are obliged to have such procedures) and the extension of time limits for whistleblowers to bring claims in the employment tribunal.

Also in 2021, the Office of the Whistleblower Bill 2021-22 was introduced to Parliament. The Bill incorporated the recommendations made in a 2019 report by the All Party Parliamentary Group on Whistleblowing. The Bill made provision for the creation of an "Office of the Whistleblower" which would have various powers including to maintain a fund to support whistleblowers and provide financial redress to individuals whose whistleblowing had harmed the individual's employment, reputation or career. However, as a Private Members' Bill, it did not complete its passage through Parliament. However, another Private Members' Bill – the Protection for Whistleblowers Bill 2022 -23 – is currently on its passage through Parliament and seeks, amongst other things, to introduce an Office of the Whistleblower, and to make the mistreatment of whistleblowers a criminal offence.

What is the purpose and scope of the review?

The purpose of the review is to take stock of the existing whistleblowing framework and consider whether it is meeting its original objectives, namely to:

- provide a route for workers to blow the whistle about certain types of wrongdoing;
- protect those who have blown the whistle from detrimental treatment and/or dismissal, and provide a route of redress where it does happen; and

- support wider cultural change, in which the benefits of whistleblowing are recognised and promote action by employers and others.

The terms of reference of the review state that the review will look at the following core questions:

- How the whistleblowing framework facilitates disclosures.
- How the whistleblowing framework protects workers (and the review will also consider the definition of “worker” for whistleblowing purposes).
- Whether information about whistleblowing is available and accessible to workers, employers, prescribed persons and others.
- What have been the wider benefits and impacts of the whistleblowing framework on employers, prescribed persons and others.
- What best practice looks like in terms of responding to disclosures.

To some extent, these questions dovetail with some of the calls for further reform, such as the extension of protection to further categories of people and the need for mandatory internal whistleblowing procedures. However, no mention is made of the introduction of an Office of the Whistleblower or the introduction of a new criminal offence.

What are the next steps?

It is said that the review will be led by the Department for Business and Trade (**DBT**) and will "investigate the roles and perspectives of the actors involved [in whistleblowing] such as workers, employers, regulators and tribunals". This suggests that employers will be given the opportunity to submit their views on the core research questions, and their wider thoughts on the whistleblowing framework. However, it is not yet clear how the DBT intends to gather this information. Ordinarily, interested members of the public would be able to submit responses to the questions raised by way of an online form or by email. We will provide further updates about this in our future newsletters.

The findings of the review will provide an up-to-date evidence base to inform Government policy in this area. Yet no commitments are made regarding future legislative reforms. Indeed, it is uncertain whether any such reforms could be achieved before the next election. The review is expected to conclude by Autumn 2023. It will then take several months to consider the findings and decide upon next steps. Before any new laws are introduced, it is highly likely that a public consultation on any proposed reforms would be needed, which could take anything from six to twelve months to conclude (judging by the Government's recent track record on responding to consultations on employment law matters).

Therefore, it seems unlikely that any new legislation would be presented to Parliament before Autumn 2024 at the earliest. With the next General Election taking place by no later than 28 January 2025 (and widely expected to take place earlier than this), it is not at all clear whether legal reforms could be achieved in time. That said, the findings may lead to

reforms after the election, whichever party assumes power. For now, employers should monitor this development and consider submitting their views, but there is no need to change internal practices or procedures just yet.

Review of the whistleblowing framework – terms of reference

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