# Employment law highlights from 2023

**What are the employment law highlights from the last 12 months? In this briefing, we reflect on some of the most interesting and important cases and developments for employers to remember as the year draws to a close.**

**Disability discrimination**

- **Requiring disabled candidates to go through a competitive interview process**: in Hilaire v Luton Borough Council, the EAT held that competitive interview processes could disadvantage candidates with disabilities, for example, those suffering with depression, meaning the duty to make reasonable adjustments was triggered. However, it was also held that it will not always be a reasonable adjustment to dispense with the interview process altogether. You can read more about this decision in our briefing here.

- **Withdrawal of a job offer to disabled candidate**: an Employment Tribunal exercised its discretion in favour of a disabled claimant to allow an out of time disability discrimination claim to proceed. In Mackenzie v The Chief Constable of the Police Service of Scotland, the claimant argued that it was discriminatory to have withdrawn a job offer on the

basis that she was taking anti-depressants at the time. Even though the claim was brought over two years late, the Tribunal allowed it to go forward. Most employers would be unable to justify such an approach, but the particular demands on probationary police constables are likely to be key when analysing justification in this case. You can read more about this decision in our briefing here.

- **Could anxiety about performing part of your job role mean you are disabled?** In Williams v Newport City Council, the EAT concluded that an employee who was severely anxious about performing one part of her job role was disabled. Although the part of the role in question was not a normal day-to-day activity, her anxiety about it substantially and adversely affected her ability to perform her other normal day-to-day activities. This meant that she was disabled, and reasonable adjustments should have been made. You can read more about this decision in our briefing here.

- **Disciplinary action for unacceptable behaviour by disabled employee**: in McQueen v General Optical Council, the EAT upheld a decision that an employer had not discriminated against a neurodiverse employee when it disciplined him in connection with his aggressive and disruptive behaviour at work. Despite the employee's own view, the medical evidence did not indicate that the

unacceptable behaviour arose out of his disability. If it had, then the disciplinary action may have amounted to discrimination. You can read more about this decision in our briefing here.

- **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 our briefing, we considered the key points for employers to note.

## Other types of discrimination

- **Dismissal of a newly pregnant employee**: in Alcedo Orange Limited v Ferridge-Gunn, it was held at first instance that the dismissal of a newly-pregnant employee on performance grounds was, in fact, significantly influenced by the employee's pregnancy and pregnancy-related sickness. On appeal, the EAT said that the case cried out for an analysis of whether the decision was taken by a sole decision maker, a sole decision-maker who had been heavily influenced by the employee's line manager or whether the decision-maker and line manager

were, formally, joint decision-makers. In doing so, the EAT underlined the importance of scrutinising dismissal decisions in discrimination claims. You can read more about the decision in our briefing here.

- **Failure to notify employee on maternity leave about reorganisation and new job role**: in Smith v Greatwell Homes, an Employment Tribunal held that an employer's failure to notify an employee on maternity leave about a business reorganisation, and the new roles within it, was an act of maternity discrimination. The Tribunal concluded that the employer's approach was rooted in "lazy and unfair assumptions" about women absent on maternity leave. You can read more about the decision in our briefing here.

- **Employer failed to take reasonable steps to protect employee from harassment:** in Fahmy v Arts Council England, an Employment Tribunal considered whether an employee suffered harassment related to her gender critical beliefs and whether her employer was able to avoid liability on the basis that it had taken reasonable steps to prevent it. The Tribunal concluded that the employee had been harassed by colleagues and her employer's Dignity at Work policy and training was out of date, meaning that it had not taken "all reasonable steps" to protect her. In our briefing here, you can read more about the decision and the practical

steps employers can take to manage the risk.

- **Performance management of an employee suffering with menopausal symptoms:** in Lynskey v Direct Line Insurance Ltd, the Employment Tribunal decided that poor appraisal ratings, a written warning and ceasing enhanced sick pay were all discrimination arising from Ms Lynskey's disability of symptoms of menopause. The Employment Tribunal awarded Ms Lynskey compensation in the amount of £64,645. You can read more about the decision in our briefing here. Separately, this year the Government rejected recommendations to expand discrimination law to cover menopause explicitly – you can read more about this in our briefing here.

## Day-to-day HR issues

- **Claims for underpaid holiday pay made easier**: in Chief Constable of the Police Service of Northern Ireland v Agnew, the Supreme Court ruled that a series of unlawful deductions from wages is not broken by gaps of three months or more between deductions, nor by the making of a lawful payment in between the unlawful payments. This decision makes it easier to succeed in claims where repeated deductions have been made from pay, for example, in underpaid holiday claims. You can read more about the Supreme Court's decision in our briefing here.

- **Consequences of refusing flexible working requests:** in Glover v Lacoste UK Ltd, the EAT said the rejection of a flexible working request on appeal resulted in a potentially discriminatory working pattern being applied to the employee. This was the case even though the employer had later changed its mind and the employee had not, in fact, ever had to work under the unwanted working pattern. Reversing the decision did not extinguish liability for indirect sex discrimination. You can read more about the decision in our briefing here.

- **Non-compete restrictions**: in Jump Trading International Limited v (1) Couture; and (2) Verition Advisors (UK Partners) LLP, the High Court held that an unusual non-compete covenant lasting for a period of up to 12 months at the employer's discretion could, in principle, be enforceable, even where the employee had already spent 12 months on garden leave. However, on the facts, the Judge declined to award an interim injunction due to the employer's excessive and unreasonable delay. You can read more about the High Court's decision in our briefing here. Separately, the Government has announced plans to legislate to limit non-compete restrictions to a maximum of three months – you can read about these proposals in our briefings here and here.

- **Employment contracts and bonus clawback provisions:** in Steel v Spencer Road LLP t/a The Omerta Group, the High Court ruled that provisions in an employment contract requiring repayment of a discretionary bonus where the employee resigned within three months of the bonus payment date were lawful and not a restraint of trade. The High Court also held that the lawfulness of such provisions is assessed in isolation, rather than looking at the cumulative effect of all restrictions within the contract, such as notice periods and post-termination covenants. The result was that the employee was obliged to repay a discretionary bonus of £187,500. You can read more about the High Court's decision in our briefing here.

- **Israel-Gaza conflict: what rights do employees have to express their political views on social media?** In this detailed briefing, we considered why the discussion of the Israel-Gaza conflict by employees on social media is potentially a problem for employers, the rights that employees have to express their political views and what measures employers can take in practice to manage the objectionable expression of views by employees.

- **Divorce and the workplace: what can employers do to support employees?** It is widely acknowledged that divorce is one of the most stressful life events that a person can ever go through. Given that most of those who

divorce are of working age, employers should take care to understand the needs of divorcing employees and the potential risk areas. In this briefing, we considered recent developments in this area, the ways in which divorce may affect an employee at work and what employers can do to help.

## Dismissals

- **Employee unfairly dismissed for refusing to put intrusive work app on her personal phone**: in Alsnih v Al Quds Al-Arabi Publishing & Advertising, an Employment Tribunal ruled that a journalist was unfairly dismissed for refusing to install an "intrusive" work-related app on her personal phone, which would have left her unable to separate her work and home life. The employer should have considered alternatives such as providing her with a work phone or installing the app on her laptop. The Tribunal awarded compensation of almost £20,000 for the unfair dismissal. You can read more about the decision in our briefing here.

- **Redundancy dismissal was unfair because employer failed to give meaningful consideration to alternatives**: in Lovingangels Care Ltd v Mhindurwa, the EAT upheld a decision that a dismissal was unfair because the employer failed to give proper consideration to placing

the employee on furlough as an alternative to redundancy. Although the furlough scheme is long gone, this case reminds employers of the need to give careful consideration to alternatives to redundancy before proceeding to dismiss. A failure to do so may mean the decision falls outside the range of reasonable responses, with the result that the dismissal is unfair. You can read more about the decision in our briefing here.

- **Holding an employee to a heat of the moment resignation may amount to a dismissal**: in Omar v Epping Forest District Citizens Advice, the EAT set out detailed guidance on how resignations should be assessed and whether they bind the employee. Here, the EAT said the Employment Tribunal had been wrong to conclude that an employee who had resigned in anger for the third time in three weeks really intended to resign. You can read more about the decision and the takeaways for employers in our briefing here.

- **Dismissal of long-term sick employee:** in Garcha-Singh v British Airways plc, the EAT ruled that an Employment Tribunal was entitled to find that the dismissal of a long-term sick employee was fair. The fact that the dismissal was postponed seven times over the course of a year was to the employee's advantage and it could not be said that the employer had acted unreasonably. You can

read more about the decision in our briefing here.

- **Dismissal of employee who refused to attend work over Covid concerns**: in Rodgers v Leeds Laser Cutting Ltd, the Court of Appeal upheld a decision that an employee was not automatically unfairly dismissed on health and safety grounds when he was dismissed for refusing to attend work during the first Covid lockdown. The employee did not believe that he was exposed to danger within the workplace, and, even if he had, it would not have been a reasonable belief given all the precautions the employer had taken. You can read more about the wider implications of the decision in our briefing here.

## Settlements

- **Are settlement offers always without prejudice?** In Scheldebouw BV v Evanson, the EAT upheld a 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. By contrast, in Garrod v Riverstone Management Ltd the EAT held that a settlement offer made to an employee after she had complained about discrimination, but before she

had started legal proceedings, was without prejudice because a dispute was in existence by that point, and the employer's behaviour was not "unambiguously improper". As a result, the employee was unable to refer to the settlement offer in her legal claim. You can read more about these two decisions here and here.

- **Is it possible to settle future claims in settlement documents?** The general rule is that unknown future claims may not be validly waived in settlement agreements. However, two decisions this year illustrate that there are circumstances in which an employee may validly waive future claims. in Arvunescu v Quick Release (Automotive) Ltd the Court of Appeal ruled that a claimant could not proceed with a victimisation claim which had already arisen by the date he had entered into a COT3 settlement agreement with his employer. The broad waiver wording (which is permissible in COT3s but not settlement agreements) was sufficient to settle potential claims in existence as at the date of the COT3 agreement. In Clifford v IBM UK Ltd an Employment Tribunal Judge ruled that a waiver of future claims contained in a settlement agreement was effective in circumstances where it was made clear that the claimant could not bring future claims which arose out of similar matters to those that had been settled in the settlement agreement. You can read more about these two decisions here and here.

**Employment law reforms ahead**

*From 1 January 2024*

- **Working time and holiday:** on 1 January 2024, changes will be made to working time law. The law will be amended to: clarify record-keeping rules, specify what counts as "normal pay" and stipulate the circumstances in which annual leave may be carried forward into a new holiday year. Further, from **1 April 2024**, employers will be permitted to calculate the accrual of annual leave for certain types of workers on an "accrue as you go" basis and pay "rolled up holiday pay" throughout the year. You can read more about these reforms in our briefing here.

- **Informing and consulting about TUPE transfers**: also on 1 January 2024, changes will be made to TUPE. The law will be changed to permit employers to inform and consult directly with employees where it has up to 49 employees or where it is proposing a transfer of up to nine employees. This option will be available where there are no existing representatives available to consult with and it is intended to streamline the consultation process by avoiding the need to elect representatives. You can read more about this reform in our briefing here.

- **Equality Act 2010 to be amended to reflect EU discrimination law principles:** also on 1 January 2024, the Equality Act 2010 will be amended to reflect certain EU discrimination law principles which would otherwise have been lost as a result of Brexit. The changes relate to pregnancy, maternity and breastfeeding, indirect discrimination, making discriminatory statements, equal pay claims and the definition of disability. In our briefing, we explain the current position and how the legislation will change next year.

*From 6 April 2024*

- **Flexible working requests to become a Day 1 right and process to be enhanced:** on 6 April 2024, the Flexible Working (Amendment) Regulations 2023 will come into force and make the right to request flexible working a Day 1 employment right (rather than needing 26 weeks' service as is currently the case). Separately, the Employment Relations (Flexible Working) Act 2023 will introduce further reforms to the flexible working regime by way of secondary legislation expected to come into force in the first half of 2024 (on a date yet to be confirmed). These reforms are as follows:
    - Employees will no longer be required to explain what effect they think the requested change would have on their employer and how that effect might be dealt with.
    - Employees will be permitted to make two flexible

working requests per year rather than one.

- Employers will be required to consult with employees before refusing requests.

- Employers will have two months to make a decision on a flexible working request rather than three, unless an extension is agreed.

- Acas has announced it will publish a new statutory Code of Practice to accompany the revised regime. You can read more about these reforms in our briefing here.

- **Right to request more predictable working patterns**: earlier this year the Workers (Predictable Terms and Conditions) Act 2023 became law. The Act gives workers (and agency workers) a statutory right to request more "predictable" working patterns. Although the Act has passed into law, its provisions have not come into force straight away and separate regulations are still needed. The Government's press release indicated that the Act and accompanying regulations will come into force by Autumn 2024. Acas has announced it will publish a statutory Code of Practice to accompany the new regime. Our briefing explains what the new right involves and the steps that employers will need to take to prepare.

- **Enhanced protection in redundancy processes during pregnancy and after return from family leave:** earlier this year, the Protection from Redundancy (Pregnancy and Family Leave) Act 2023 became law. In the last few weeks, the Maternity Leave, Adoption Leave and Shared Parental Leave (Amendment) Regulations 2024 have also been published. From 6 April 2024, the Act and Regulations provide for special protection for pregnant women and those returning from certain types of family leave in redundancy situations. In our briefing, we outline where things currently stand and what steps employers should take next.

- **Right to unpaid carer's leave:** earlier this year, the Carer's Leave Act 2023 became law. In the last few weeks, the Carer's Leave Regulations 2024 have also been published. From 6 April 2024, the Act and Regulations provide for new rights and protections at work for employees who have caring responsibilities, chiefly, a right to one week's unpaid leave. In our briefing, we outline where things currently stand and what steps employers should take next.

*Later or on a date to be confirmed*

- **Employer's duty to prevent sexual harassment at work:** earlier this year, the Worker Protection (Amendment of Equality Act 2010) Act 2023 became law. It is due to come into force by **26 October 2024** (one year since the Act passed). The Act will impose a duty on employers to take reasonable steps to prevent sexual harassment in the workplace. Where an employer breaches this duty, employment tribunals may uplift compensation in relevant claims by up to 25%. The EHRC may also investigate suspected breaches and take enforcement action where needed. In our briefing we discuss the new duty and what employers will need to do to comply.

- **Right to neo-natal leave and pay:** earlier this year, the Neonatal Care (Leave and Pay) Act 2023 became law. The Act provides the pathway to new rights and protections at work for employees who are parents of babies requiring neonatal care. The precise scope and mechanics of the new rights will be set out in separate regulations. It is expected that these rights will not be brought into force before **April 2025**. In our briefing, we outline where things currently stand and what steps employers should take next.

- **Government plans to relax paternity leave rules:** earlier this year, the Government announced plans to introduce legislation to make it easier for fathers to take

paternity leave. It is not yet known when these changes will come into force. In our briefing we outline what is currently known about the proposals.

**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 Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.**

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# Government confirms wide-ranging changes to the Working Time Regulations and TUPE from 1 January 2024

**Earlier this year, the Government published a consultation paper which proposed a number of reforms in the areas of working time, paid holiday rights and rights upon the transfer of a business or an outsourcing (the Consultation). On 8 November 2023, the Government published its response to the Consultation, setting out which reforms will be taken forward (the Response), together with a draft Statutory Instrument intended to bring the changes into effect. In this briefing, we remind you of the Government's proposals and explain what is and is not being taken forward.**

**1. 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 proposed to legislate to clarify that businesses would no longer have to keep a record of daily working hours of their workers.

The Government has decided to take this proposal forward. Regulation 9 of the Working Time Regulations (**WTR**) will be amended to clarify that businesses do not have to keep a separate record of the daily working hours of workers provided that they are able to *"demonstrate compliance without doing so."*

**2. One vs two pots of annual leave**

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 (**Regulation 13 leave**); and

- 1.6 weeks' leave which was granted by the UK Government on top of the minimum WTD requirement (**Regulation 13A leave**).

Different rules about pay apply to Regulation 13 leave and Regulation 13A leave. ECJ caselaw has made it clear that workers must be paid their "normal pay" for Regulation 13 leave. This may include things like commission, allowances and some types of overtime payment. In contrast, workers are only entitled to be paid basic pay for their Regulation 13A leave (although employers may elect to pay normal pay for Regulation 13A leave if they wish and, indeed, many do).

The Consultation proposed to replace Regulation 13 leave and Regulation 13A leave with a single leave entitlement of 5.6 weeks and sought views on what the applicable rate of pay should be.

The Government has decided not to take this proposal forward and, instead, will retain the two distinct pots of leave and their associated rates of pay. However, the WTR will be amended to spell out which types of payments count when determining pay for Regulation 13 leave. These are:

- payments, including commission payments, which are intrinsically linked to the performance of tasks which a worker is obliged to carry out under the terms of their contract;

- payments for professional or personal status relating to length of service, seniority or professional qualifications; and/or

- other payments, such as overtime payments, which have been regularly paid to a worker in the 52 weeks preceding the calculation date (it does not expressly state whether *voluntary* overtime payments should be included, however, if they are "regularly paid" to a worker then we think they will probably count).

This change is designed to reflect the existing rulings of the ECJ on this issue in our domestic legislation for the first time (and necessitated by Brexit). Employers should have already incorporated these types of payments into their calculation of Regulation 13 holiday pay. However, where this has not yet been done, action should be taken to regularise the position now.

**3. Accrual of annual leave**

On the accrual of leave the Consultation proposed that workers should accrue their annual leave entitlement at the end of each "pay period" until the end of the first year of their

employment.  The aim was to provide workers with a steady amount of holiday entitlement as they work and to simplify the calculation of holiday entitlement for employers.

The Government has decided to change the position on accrual of leave for "irregular hours workers" and "part-year workers" only (and there will be new legal definitions of both categories of workers).  Further, the new position will apply throughout the employment relationship, not just in the first year as originally proposed.  There will be nochange to the accrual of leave for other workers, who will continue to accrue their 5.6 weeks' leave at the beginning of the leave year, save for in the first year of employment.

Under the new system, irregular hours and part year workers will accrue annual leave at the end each pay period at a rate of 12.07% of the number of hours worked in that pay period, up to a maximum of 28 days per year.  Special rules will apply if the worker is on sick leave or family leave.  Importantly, this new system will nullify the effect of the Supreme Court's decision in Harpur Trust v Brazel, which said that the holiday entitlement of part-year workers could not be pro-rated below 5.6 weeks' per year, no matter how many weeks they had actually worked each year.  The new system means that the annual leave entitlement of such workers will be proportionate to the number of hours they have actually worked.

The new accrual system for irregular hours and part-year workers will apply to leave years commencing on or after 1 April 2024 only.  Employers will need to decide whether it will allow such workers to book and take more holiday than they have accrued under the new "accrue-as-you-go" system.  Where this is to be permitted, employers should

ensure that they have a right to make deductions in respect of any holiday taken but not accrued when the employment relationship terminates.

**4. Carry-over of annual leave**

On the carry-over of unused leave the Consultation proposed 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 noted that those regulations were no longer needed.

The Government has decided to take forward this proposal. This means that from 1 January 2024, workers will not be able to carry over any accrued Covid-related Regulation 13 leave. Workers will have until 31 March 2024 to use up any Covid-related leave that was accrued before 1 January 2024.

On top of this, the Government has decided to amend the WTR to clarify when workers may carry over accrued leave in other circumstances. This change is designed to reflect the existing rulings of the ECJ on this issue in our domestic legislation for the first time (and necessitated by Brexit). The WTR will specify that workers may carry forward their accrued but untaken leave as set out in the table below.

| Circumstances? | What leave can be carried over? | For how long may the leave be carried over? |
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| Worker does not take annual leave (or takes it, but it is not paid) because the employer: denies the worker's right to paid annual leave (e.g. they maintain that the individual does not have worker status);does not give the worker a reasonable opportunity to take leave or encourage them to do so; ordoes not warn the worker that they will lose their leave if they do not use it by the end of the leave year. | Regulation 13 leave | Until the end of the first full leave year in which the employer is no longer at fault. |
| Worker unable to take the leave due to absence on sick leave. | Regulation 13 leave | 18 months from the end of the holiday year in which the leave arose. |
| Workers unable to take the leave due to absence on maternity, adoption, shared parental, parental, paternity or parental bereavement leave. | Regulation 13 and 13A leave | 12 months from the end of the holiday year in which the leave arose. |

**5. Introduction of rolled-up holiday pay**

"Rolled-up" holiday pay is a system whereby no holiday pay is paid during the weeks that a worker takes their annual leave entitlement, and, instead, their pay is enhanced during

periods of work.  In other words, the enhanced 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 their annual leave was taken.

The Consultation proposed that rolled-up holiday pay be introduced as an option for all workers.  It also proposed that the default enhancement rate be set at 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).

The Government has decided to take this proposal forward but only for irregular hours and part-year workers (and, as above, there will be new legal definitions of both categories).  Rolled-up holiday pay will not be permitted for other types of workers.  Where an employer elects to pay rolled-up holiday pay to an eligible worker, it must be:

- calculated at 12.07% of the worker's pay;
- paid at the same time as pay for work done; and
- itemised separately on the payslip.

Special rules will apply if the worker is on sick leave or family leave.  Rolled-up holiday pay will be permitted for

leave years commencing on or after 1 April 2024 only.

**6. 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* where there are no existing representatives in place.

The Consultation proposed 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 Government has decided to take this proposal forward in the form originally proposed.

**What are the next steps?**

As above, these reforms are due to come into force on 1 January 2024, save for the changes affecting irregular hours and part-year workers, which will apply to holiday years commencing on or after 1 April 2024. Some of these changes are fiddly and may necessitate to changes to employment contracts and Staff Handbooks, for example, clarifying when leave may be carried over and for how long, or introducing rolled-up holiday pay. We would recommend that employers conduct an audit of their existing holiday pay arrangements and then identify any necessary and desirable changes to be made. It is always a good idea to seek legal advice before making major changes to holiday arrangements.

Retained EU Law – Government Response, 8 November 2023

The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

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# Equality Act 2010 to be amended to reflect EU discrimination law principles.

**On 1 January 2024, the Equality Act 2010 will be amended to reflect certain EU discrimination law principles which would otherwise have been lost as a result of Brexit. In this briefing, we explain the current position and how the legislation will change next year.**

**What's the background?**

A large proportion of the UK's legal framework – including its employment law framework – was underpinned by the law of the European Union, primarily a type of law known as a "directive". EU directives had to be implemented into UK law, either as an Act of Parliament or a statutory instrument. Certain other forms of EU law were directly applicable in the UK without the need for any implementing laws – for example, the rights set out in EU Treaties had what is known as "direct effect". Decisions of the Court of Justice of the European Union were also binding on the UK.

Brexit required changes to be made to this legal framework. Acts of Parliament implementing EU directives remained in place. However, all the relevant statutory instruments were due to automatically fall away once the European Communities Act 1972 was repealed. To avoid legal chaos when Brexit happened, the Government decided to retain these statutory instruments and transfer them into UK law. It also chose to retain directly applicable EU law and decisions of the Court of Justice of the European Union made on or before 31 December 2020. Together, these laws and decisions were referred to as "Retained EU Law".

However, the Government decided that the time was right to look again at whether Retained EU Law should be kept or repealed, and the Retained EU Law (Revocation and Reform) Act 2023 was passed this year to implement further change. The Act provides that Retained EU Law contained in around 600 statutory instruments and all directly applicable Retained EU Law will expire on 31 December 2023. On top of this, the Act makes a number of other provisions which are aimed at downgrading the continued impact of EU law on UK law, for example, by making it easier for the Court of Appeal and Supreme Court to depart from previous ECJ decisions and domestic decisions that have been influenced by ECJ decisions.

**What does this mean for discrimination law in the UK?**

UK discrimination law was not affected by the loss of Retained EU Law contained in certain statutory instruments. In fact, as far as employment law is concerned, only a handful of somewhat niche statutory instruments will be lost (you can read more about this in our briefing here). However, the loss of directly applicable rights and case law

principles *would* have an impact on discrimination law.

To avoid uncertainty, the Government has taken action to ensure that existing EU discrimination law rights and principles are reflected in the Equality Act 2010 from 1 January 2024. Therefore, it is the form rather than the substance of the law that will change. Having these principles written down in the Equality Act 2010 should provide clarity to both employers and employees.

However, it is important to remember that EU law principles on discrimination law will continue to develop after 1 January 2024 and those new principles will *not* apply in the UK, nor be reflected in the Equality Act 2010. Therefore, a point will come where UK discrimination law begins to diverge from the position in EU member states.

**What changes will be made to the Equality Act 2010?**

The table below summarises the changes that will be made to the Equality Act 2010 on 1 January 2024:

| Area | EU discrimination law principles to written into the Equality Act 2010 |
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| **Pregnancy, childbirth and maternity – special treatment (s. 13(6)(b))** | Currently, the Equality Act 2010 provides that special treatment may be afforded to women in connection with pregnancy and childbirth and this will not amount to discrimination against men. This will be amended so that special treatment may be afforded to women in connection with pregnancy, childbirth and maternity. |
| **Pregnancy, childbirth and maternity – unfavourable treatment after the protected period (s.18(2))** | Currently, the Equality Act 2010 provides that protection from pregnancy and maternity discrimination extends beyond the end of the "protected period" only where the treatment relates to the implementation of a decision taken *during* the protected period. It does not extend to protection from unfavourable treatment which occurs after the protected period, but which is because of the pregnancy or pregnancy-related illness and relates to the protected period. This will be amended so that women are also protected from unfavourable treatment after they return from maternity leave where that treatment is related to the pregnancy or a pregnancy-related illness occurring before their return. |

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| **Pregnancy, childbirth and maternity – protection during maternity leave under equivalent schemes (s.18(6) and new 18(6A))** | Currently, where a woman who does not have a statutory entitlement to maternity leave but has an entitlement to maternity leave which is equivalent to compulsory, ordinary and/or additional maternity leave arising in law, the protected period during which she is protected from pregnancy and maternity discrimination is limited to two weeks (e.g. an LLP member who is entitled to 52 weeks' maternity leave under the LLP Members' Agreement). This will be amended so that the protected period covers the whole of the equivalent maternity leave period. |
| **Breastfeeding mothers (deletion of s.13(7))** | Currently, the Equality Act 2010 does not protect breastfeeding women from less favourable treatment at work (and, in fact, expressly excludes it). This will be amended so that less favourable treatment at work because a woman is breastfeeding may constitute direct sex discrimination. |

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| **Indirect discrimination – same disadvantage (new s.19A)** | Currently, the Equality Act 2010 states that a claimant wishing to bring an indirect discrimination claim must possess the relevant protected characteristic. This will be amended so that a claimant wishing to bring an indirect discrimination claim does not need to possess the protected characteristic, provided they can show that they suffered the same disadvantage arising from a discriminatory provision, criterion or practice as a person who has the protected characteristic. |
| **Discriminatory statements (new s.60A)** | Currently, the Equality Act 2010 does not make provision for discrimination to occur outside an active recruitment process and requires there to be an identifiable victim. This will be amended so that a statement about not wanting to recruit people with certain protected characteristics may give rise to a direct discrimination claim, even if there is no active recruitment process ongoing. The new section also provides that an employer may be vicariously liable for statements made by someone who is not its employee or agent where there are reasonable grounds for the public to believe that they are capable of influencing the making of a recruitment decision by the employer. |

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| **Equal pay claims (new s.79(4A) and s.79(4B))** | Currently, the Equality Act 2010 allows for comparisons with someone employed by the same or an associated employer either at the same establishment or at a different establishment where common terms apply.This will be amended so that an employee may compare their pay with an employee working for a different employer, where their terms of employment are attributable to a “single source” responsible for setting or continuing the pay inequality and which can restore equal treatment (or where the terms are governed by the same collective agreement). |

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| **Definition of "disability" (Schedule 1, new paragraph 5A)** | When evaluating "normal day-to-day activities", the Equality Act 2010 definition of disability refers only to work-related activities which are general, common and frequent (e.g. sending emails, interacting with colleagues). This will be amended so that a person's ability to participate fully and effectively in working life on an equal basis with other workers must be considered when deciding what is a "normal day-to-day activity". This will encompass activities which are infrequent (e.g. applying for a job or sitting an examination for promotion) as well as activities which are not common to the majority of jobs, but which are common across different types of employment (e.g. heavy lifting or night working). |

The Equality Act 2010 (Amendment) Regulations 2023

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# Holding an employee to a "heat of the moment" resignation may amount to a dismissal

**In *Omar v Epping Forest District Citizens Advice* the EAT has set out detailed guidance on how resignations should be assessed and whether they bind the employee. Here, the EAT said the Employment Tribunal had been wrong to conclude that an employee who had resigned in anger for the third time in three weeks really intended to resign.**

**What happened in this case?**

Mr Omar worked as an Advice Session Supervisor for the Epping Forest District Citizen's Advice Centre. On 3 February 2020, the CEO of the Advice Centre wrote to Mr Omar regarding his timekeeping. Mr Omar was unhappy with the letter and verbally resigned to his line manager, Ms Skinner. Ms Skinner told him to calm down and that she would not accept his resignation. On 5 February 2020, Mr Omar became angry about something else and resigned for a second time. Again, Ms Skinner advised him to calm down and said she would not accept this resignation.

On 19 February 2020, Ms Skinner questioned holiday dates that Mr Omar believed he had booked, but which were not showing up on the staff leave database. Mr Omar responded by shouting that Ms Skinner knew full well that he had booked leave. He then said he was *"done with the organisation"* and that Ms

Skinner should *"tell who you need to but I'm off because I've had enough".* Ms Skinner reported that he also said: *"these are fucking bullshit* [sic]*….that's it, from today a month's notice".*

Later that day, Ms Anyanwu, the CEO of the Advice Centre, met with Mr Omar and Ms Skinner to discuss what had happened. Mr Omar said he had "blown up" because he was still upset about the timekeeping letter and because he was under pressure outside work, helping to care for his mother who had dementia. Mr Omar alleged that Ms Anyanwu had asked whether he and Ms Skinner could continue working together and that she had offered him an alternative role (implying that his resignation had not been accepted). The Advice Centre's account of that meeting was that Ms Anyanwu had asked the pair whether they could continue to work together over Mr Omar's notice period only. Further, it said no alternative role was offered. It was noted that Mr Omar was emotional in the meeting, but he did not attempt to withdraw his resignation.

On 21 February 2020, Mr Omar met with Ms Anyanwu again. She told him that Ms Skinner had confirmed that she could no longer work with him. Mr Omar said he was then told that, therefore, his resignation would stand. The Advice Centre's case was that Mr Omar said in response that he could not work with Ms Skinner either and that, therefore, his resignation would stand. In any event, at this meeting Mr Omar agreed to put his resignation in writing. However, Mr Omar did not do that. Instead, on 23 February 2020 he sent an email to Ms Anyanwu stating that he wished to retract his resignation as it was given in the "heat of the moment". He suggested that they allocate him to work from a different office. The Advice Centre refused to accept the retraction of the resignation and treated his employment as having terminated on 19 March 2020, one month from the resignation date.

Mr Omar claimed that he had been unfairly dismissed. The Employment Tribunal decision was very brief and concluded that Mr Omar *had* resigned, and that the Advice Centre had not offered him an alternative role. As he had resigned, there was no dismissal and the claim failed. Mr Omar appealed to the EAT.

**What was decided?**

The EAT overturned the Tribunal's decision, finding that it was *"substantially flawed"*. It had failed to make the necessary findings of fact to support its decision. Further, it had not applied the correct legal principles to the case, although this was *"understandable"* because no previous cases had drawn together all the principles governing the interpretation of resignation statements.

That being the case, the EAT reviewed all the legal authorities and set out a comprehensive statement of the principles governing notices of resignations (and, importantly, which apply in the same way to notices of dismissal given by an employer):

1. There are no "special cases" where the principles do not apply. The same rules apply in all cases where notice of resignation given in the employment context.

2. A notice of resignation cannot be unilaterally retracted by the employee.

3. Words of resignation (or words which potentially

constitute words of resignation) must be construed objectively in light of all the circumstances and should be judged from the position of a "reasonable bystander" in the position of the employer.

4. The uncommunicated subjective intention of the employee is *not* relevant (i.e. it does not matter what was going through their mind when they said the words) – what matters is what was said. However, if they later tell the employer what their intention was, this may be a relevant factor to be taken into account when assessing whether they had really meant to resign.

5. What the employer understood by the resignation words *is* relevant (as it suggests what a reasonable bystander would have thought), but it is not determinative.

6. All of the circumstances that the parties knew, or ought to have known, may be taken into account when construing the words of resignation.

7. What must be apparent to the reasonable bystander is that the words of resignation or notice of resignation were intended to have *immediate* effect – an employee should not be taken to have resigned where he or she merely expresses an intention to resign in the future.

8. It must also be apparent to the reasonable bystander that the employee genuinely intended to resign and that they were in their right mind when they did so. That does not mean the resignation has to have been a reasonable thing to do. A resignation will be effective if it is unreasonable but genuinely intended. However, if the employee is behaving irrationally then this would

suggest that the words were not really intended.

9. The assessment of whether the words were genuinely intended should be made at the time that they were said. However, evidence about what happened *afterwards* may cast light on whether the resignation was really intended at the time. That evidence may lead to the conclusion that the resignation was not really intended – if so it will not be effective. On the other hand, such evidence may suggest that the resignation*was* really intended, but the employee has simply had a change of heart – in which case the resignation will stand. The distinction between these two situations *"is likely to be very fine"* and it is a matter for Tribunals to decide on the particular facts.

10. There is no limit on the period of time after the resignation which may be considered but the longer the time that elapses, the more likely it is that the evidence will be evidence of the employee's change of heart.

11. The sorts of circumstances that might suggest a resignation was not really intended include where the employee is angry, is behaving out of character, has a relevant mental impairment, is immature or is under extreme pressure from another party. Although none of these factors will necessarily mean that the employee did not intend to resign. Again, this is something for a Tribunal to decide on the facts.

12. These rules apply to written notices of resignation in the same way as verbal notices. However, a written notice will usually indicate a degree of thought and

> care by the employee which would make it less likely that a reasonable bystander would conclude that the employee did not mean to resign.

The EAT remitted the case to a fresh Employment Tribunal for a full rehearing, noting that it was a *"finely balanced case".*

**What does this mean for employers?**

Where a resignation is given in a calm and measured way, and not in response to something which has angered or upset the employee, employers will usually be safe to take it at face value. However, where an employee blurts out words of resignation in a pressured situation, for example, after an argument with a colleague, during a disciplinary process or after a flexible working request has been rejected, employers should pause to assess whether it is reasonable to rely on the resignation.

In these situations, the line manager who received the resignation should make a note of precisely what was said and what they understood by those words. An employer may wish to ask anyone who witnessed the resignation to make a statement of what they saw and understood to have taken place. In some cases, the safest course of action may be to ask the employee to take some time to reflect and, if they still wish to resign, to provide written notice of the same.

Where an employee seeks to retract a heat of the moment

resignation, an employer should have regard to the comprehensive guidelines issued by the EAT in this case and seek advice if necessary. Even where it is concluded that a resignation is *not* effective, an employer may still be able to fairly dismiss the employee for their conduct in connection with the "resignation". For example, in this case, Mr Omar's repeated threats of resignation and the fact that he shouted and swore at his line manager would have justified disciplinary action, potentially up to dismissal.

Omar v Epping Forest District Citizens Advice

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# Employee who was anxious about performing part of her role was disabled.

**In the recent case of Williams v Newport City Council, the EAT concluded that an employee who was severely anxious about performing one part of her job role was disabled. Although the part of the role in question was not a normal day-to-day activity, her anxiety about it substantially and adversely affected her ability to perform her other normal day-to-day**

**activities.**

**What happened in this case?**

Ms Williams worked as a senior social worker in the Council's Fostering Team. The Fostering Team was responsible for assessing the suitability of a person to foster a child. These "viability assessments" were open to challenge in the Family Court. In practice, Ms Williams did not carry out viability assessments, but other members within her team did. However, in January 2015 she was asked by her manager to attend a Family Court hearing concerning a viability assessment which had been conducted by another team member. Ms Williams was unable to answer the Judge's questions which led to the Judge being deeply critical of her. Indeed, Ms Williams recorded that one of the barristers had described her as having been treated like *"a human punch bag".*

After this incident, Ms Williams carried on with her role and did not attend Court again. However, in March 2017, her manager retired, and she was told that she would now need to carry out viability assessments and attend Court if they were challenged. Ms Williams was upset at this prospect given what had happened in 2015. She was signed off sick with stress and remained off sick for 18 months. While she was absent, several occupational health reports were obtained, all of which said she was unfit to work. By July 2018, she was feeling much better, and she submitted a Fit Note from her GP which said she would be fit to return subject to a phased return and the removal of Court work from her role. The Council refused and told her that, in the circumstances, she should obtain another Fit Note to certify her further sickness absence.

The Council then launched a capability process. At the hearing, the Council confirmed it did not consider that it was reasonable to remove the Court work from her role and that it had been unable to identify any alternative roles. The Council said that her absence could not be sustained, and it terminated her employment with effect from 24 September 2018. Ms Williams brought claims of unfair dismissal, discrimination arising from disability, indirect disability discrimination and failure to make reasonable adjustments. However, the Council did not concede that Ms Williams was disabled. The disability status question was considered by the Employment Tribunal at the outset of the hearing of her claims.

The Tribunal upheld Ms Williams' unfair dismissal claim but dismissed her disability discrimination claims on the basis that she was not disabled. The Tribunal found that she had a mental impairment (i.e. anxiety) from when she went off sick up to the dismissal decision. However, when the Tribunal came to look at the question of substantial impact on her normal day-to day-activities, it found that by the time of the dismissal she was able to undertake the normal day-to-day activities relevant to her professional life (e.g. getting ready for work, travelling to work, moving around premises, interacting with people, dealing with paperwork, using a computer etc). The one activity that she could *not* do was attend Court hearings. However, this was a specialised activity and not a day-to-day activity (whether in connection with her particular job role or in general) and, therefore, it was out of scope.

Ms Williams appealed to the Employment Appeal Tribunal.

**What was decided?**

The EAT held that the Tribunal had failed to consider the implications of its own findings that Ms Williams was still off sick when she was dismissed, and this was because the Council had rejected the suggestion of removing the Court work from her role. In other words, she continued to be unable to work because of her intense anxiety about having to return to a job which required her to attend Court. All of this was supported by medical evidence, and the Council had said it did not doubt the genuineness of her absence.

Furthermore, in the successful unfair dismissal claim, the Tribunal had observed that the employer had not really engaged with the question of whether it could have removed the Court work. Essentially, that claim had succeeded because the Tribunal considered that a reasonable employer would have removed the requirement and that would have enabled Ms Williams to have returned to work. In other words, unless and until it was removed, Ms Williams remained affected by anxiety to such a degree that she was unable to return to work at all.

Accordingly, the Tribunal should have concluded that Ms Williams' anxiety did substantially affect her normal day-to-day activities at the relevant time and that it was sufficiently long term.

Although the appeal had succeeded on this basis, the EAT went on to consider the question of whether attending Court should itself have been treated as a normal day-to-day activity. Ms Williams had argued that it was normal thing to do in a range of roles and was not specialised. The EAT accepted that attending Court was not unique to social workers but said that it did not necessarily follow that it was a "normal" activity. The EAT said the Tribunal was entitled to conclude

that such a requirement was not so commonly found among a range of other work situations as to meet that test (although it is possible that another Employment Tribunal might take a different view).

The EAT also said that it was not possible to approach the question by looking at the tasks involved in attending Court in isolation (e.g. reading documents, travel, public speaking, answering questions), which, by themselves, *would* be normal day-to-day activities. The EAT rejected this approach on the basis that *"such a reductive analysis would fail to capture the distinctive nature of the task…specifically in the context of contested litigation over an inherently highly-charged subject, in person to a judge in a Court hearing."*

The case was remitted to the Employment Tribunal to hear the disability discrimination claims.

**What does it mean for employers?**

The temptation for an employer in this situation is to assume that if an employee cannot perform a core part of their job role then a dismissal will be justified. In many cases, this will be right. However, where an employee is disabled, employers must pause to consider reasonable adjustments before moving to dismiss.

For example, could the problematic part of the job role be removed, whether on a temporary or permanent basis? Indeed, the EHRC's Employment Statutory Code of Practice states that altering a disabled person's duties, perhaps by transferring them to another employee, might be a reasonable

adjustment. In this case, Ms Williams had performed her role for around seven years and had only been asked to attend Court once, which suggests that it would have been reasonably possible to adjust the role in the way that she wanted. In another recent case – Churchman v Frazier & Deeter UK LLP – a depressed employee was dismissed after she had asked for direct client contact to be removed from her role on a temporary basis. The Employment Tribunal said the dismissal amounted to discrimination arising out of her disability, which could not be justified. Furthermore, the request was a request for a reasonable adjustment and a protected act, meaning that the dismissal was also held to be an act of victimisation.

Alternatively, it might be reasonable to redeploy a disabled employee to fill an existing vacancy, even if they are not the best candidate. Or it might be reasonable to create a new role for them altogether, although whether this is reasonable or not will be fact-specific. In one case, it was held that it would have been a reasonable adjustment where the employer effectively had a *"blank sheet of paper"* so far as job specifications were concerned. In another case, it was held that swapping a disabled employee's role with that of a non-disabled employee was a reasonable adjustment, even where the non-disabled employee was happy doing his job.

The key take-away is not to assume that dismissal is safe in this situation. Reasonable adjustments must be considered first and may require you to go further than you might think. This will be fact-dependent, and it is always a good idea to seek legal advice in this situation. Once reasonable adjustments have been exhausted, then a fair dismissal should usually be possible, but a fair disciplinary/capability process should always be followed prior to dismissal.

Williams v Newport City Council

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# Equal Pay Day 2023

**22 November 2023 is Equal Pay Day.**

Equal Pay Day is a national campaign led by the Fawcett Society, a charity campaigning for gender equality and women's rights at work, at home and in public life in the UK. It marks the day in the year when, based on the gender pay gap, women in the UK stop being paid compared to men – or, to put it a different way: women work for free for the last 40 days of the year.

The gender pay gap is the difference between the average pay of men and women within a particular group or population. The Fawcett Society uses the mean, full-time, hourly gender pay gap for the UK to calculate the gender pay gap for Equal Pay Day which this year they calculate to be 10.7%, a tiny improvement from 10.9% last year.

The pay gap between men and women depends to a large degree on the sector and type of work being performed. For example, the

gender pay gap for barristers and judges is much higher than the average at 29.1% and for carers it is much lower at 0.7% (ONS 2023 figures).

Gender pay gap data from the Office for National Statistics for 2023 includes the following highlights:

- The median gender pay gap has declined slowly over time; and in April 2023 it stood at 7.7% for full-time employees.
- There remains a large difference in the gender pay gap between employees aged 40 years and over and those aged under 40 years. For groups aged under 40 years, the gender pay gap for full-time employees is 4.7% or below. However, for those aged 40 to 49 years and older, the gender pay gap for full-time employees is much higher, at 10.3% or higher.
- Compared with lower-paid employees, the gender pay gap among higher earners is much larger, however this difference has decreased in recent years.
- Fewer women in their 40s and 50s are in occupations such as managers, directors and senior officials, at an age when pay for these occupations typically increases.

**So more than 50 years after equal pay legislation was first introduced in the UK, what is being done to address the ongoing gender pay gap?**

**Transparency**

Back in March 2022 the Minister for Women launched a pilot scheme to mark International Women's Day, which sought to use pay transparency measures to tackle pay inequality. The scheme asked participating employers to include information about salary details in their job adverts and refrain from asking candidates to disclose salary history during the recruitment process. The aim of such measures is to be clear about the pay scale for the role and avoid perpetuating historic unequal pay between men and women.

It is a helpful starting point to tackle the issue of pay inequality at the point of recruitment, but we are yet to fully understand the outcome of the trial. Further, it is ultimately just a pilot scheme so of limited impact. Legislation along these lines would be needed for such measures to have a wider and more permanent effect.

In addition, transparency at the point of recruitment is not enough – measures such as transparent pay structures and awards, promotion processes and regular equal pay audits would be required to ensure there is transparency throughout the pay scale.

**Gender pay gap reporting**

Gender pay gap reporting for employers with 250 or more employees was first introduced in the UK in 2017.

Reporting on its own does not seem to be making serious inroads into the gender pay gap of individual organisations. When the rules were introduced in 2017, it was assumed that the mantra of "what gets measured get managed" would be enough to encourage action to close pay gaps. Reporting has certainly shone a light on the problem and has resulted in the naming and shaming of those organisations with a very significant

gap. However, the rules do not require employers to publish action plans to close their gap, let alone implement measures in practice. Many campaigners argue that the time has come to revise the rules to require employers to devise action plans to close the gap, implement those measures and report on outcomes. The Labour Party's New Deal for Working People (published on 12 September 2023) states that, if elected, Labour will enforce the requirement to report and eliminate pay gaps, with employers required to devise and implement plans to eradicate these inequalities.

**Positive action**

Factors contributing to the gender pay gap include occupational segregation and the fact that fewer women progress to the most senior roles in many organisations. To be empowered to take action to address this, employers need to understand what tools they can lawfully use. Here, it is imperative that employers understand what is permitted under the positive action provisions (s.157 and s.158 Equality Act) and when action will tip into unlawful positive discrimination.

Earlier this year, the Government published new guidance on positive action which is helpful, although understanding by employers on how the rules work and what is and is not permitted is still relatively low. For example, an inquiry found that RAF recruitment policies designed to boost diversity by fast-tracking ethnic minority and female recruits, discriminated against at least 31 men. Incorrect legal advice was said to be the reason for the campaign, which was intended to be positive action but, in fact, amounted to unlawful discrimination. Clearly, more upskilling needs to be done.

**Support for women of different ages and life stages**

The ONS figures referenced above show that the gender pay gap is widest for women over 50. The gender pay gap increases once a woman becomes a mum. And older women take a financial hit for balancing work alongside caring for older relatives as well as children and grandchildren.

In April 2022 the Fawcett Society published the results of what is believed to be the largest survey of menopausal women in the UK. The survey was commissioned by Channel 4 and sought the views of over 4,000 women aged between 45 and 55. According to the Fawcett Society's report, one in ten women have left a job due to their symptoms and 44% of women said that their ability to do their job had been affected by their symptoms. The Fawcett Society has called for there to be a requirement for employers to put in place gender pay gap action plans informed by guidance which makes it clear that actions to support women with the menopause are key to closing the gap.

For example, employers could:

- Offer better flexible working and parental leave options for all, to help counter the "motherhood penalty" suffered by mothers as a result of having primary responsibility for childcare.
- Take steps to attract and retain older women in senior positions. This should include measures to support women through the menopause, which typically occurs around the age of 50. In February 2023, the Labour Party announced plans aimed at supporting women's wellbeing at work, particularly surrounding menopause.

- Put in place measures to support those who care for elderly or disabled relatives. This could include an obligation to offer flexible working options to carers and a mix of paid and unpaid carer's leave. Currently. there is a statutory right to one week's unpaid carer's leave only and no right to take unpaid leave for any longer.

**Take an intersectional approach**

The biggest factor contributing to the "motherhood pay penalty" is reduction in hours worked. A report published by the Fawcett Society this year showed that that the options for picking up more hours after having children are limited for Black and minoritised women because of the dual impacts of sexism and racism, with many dropping out of the workforce entirely. It found that:

- The employment rate of white mothers is 5 percentage points lower than that of white women without children, whilst women of Indian, Black African and Chinese heritage see penalties of up to 11 percentage pointscompared with women without children of their own ethnicities.
- 38% of mothers of Pakistani and Bangladeshi heritage are employed, compared with 55% of all women in the same ethnic group. This 17-percentage point employment gap is the highest of all the ethnicities.

The Fawcett Society has called for mandatory ethnicity pay gap reporting, in addition to gender pay gap reporting, as one measure to address this. To date, the Government has declined to introduce mandatory ethnicity pay gap reporting. However, voluntary reporting is encouraged and new guidance has been published to support employers to do this.

**Equal pay litigation**

Equal pay litigation remains one method of seeking redress for pay inequality. However, it is complex, takes time and is expensive – a daunting prospect for most individuals. Typically, equal pay litigation tends to be the reserve of large group claims against large public and private sector organisations such as local councils (e.g. Glasgow and Birmingham) and supermarkets (e.g. Asda, Tesco, Morrisons, Sainsbury's).

However, one stand-out individual equal pay claim was the case of Macken v BNP Paribas London Branch. In 2022, the employment tribunal ordered BNP Paribas London Branch to pay £2,081,449.70 to Ms Macken in compensation for her claims for equal pay, direct sex discrimination and victimisation (£401,797 for the equal pay claim). Importantly, the Tribunal also made the first ever order for an employer to conduct an equal pay audit and publish it on its website. In making the order, the Tribunal criticised the Bank's opaque pay system and the inadequate approach taken towards reviewing pay inequality in the past (including, for example, that such reviews excluded bonus awards). The audit has now been published and includes a 12-point equal pay action plan which the Bank must implement.

Equal pay claims can shift the dial on pay inequality for a particular workplace or a group of workers.

**Look to Europe?**

On 17 May 2023, the EU's new Pay Transparency Directive was published. Member states will have to implement it by 7 June 2026.

The Directive will require organisations to report six gender pay gap statistics. However, the Directive's requirements are much more stringent than the gender pay reporting obligations in the UK. Employers with 100+ employees (rather than 250+) will need to analyse gender pay gaps within different categories of employees. Where the gap is greater than 5%, the employer must conduct a "joint pay assessment" covering their whole workforce. This is essentially an equal pay audit. Employee representatives will have the right to question the methodologies used in the analysis and ask questions about the causes of the gaps. Member states will also be required to put in place penalties for employers that break the rules and workers who have suffered gender pay discrimination can claim compensation.

Therefore, the Directive takes a more proactive approach towards addressing gender pay gaps, compared to the current UK obligation to simply report the data. The risk is that the UK will fall behind the EU in this area.

**Final thoughts**

On Equal Pay Day 2023, why not think about what concrete steps your organisation can take to promote pay equity in your workplace?

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# The Personal is Billable: A Look into the Blurring of Work and Personal Time in the Era of Hybrid Working

***Introduction***

Separation of work and personal time has become harder to achieve in an ever more digitised era. The coronavirus pandemic threw the challenge of keeping our work and personal lives separate into stark light. With hybrid working arrangements here to stay, the question of how to safeguard personal time has arisen. Calls for a legal 'right to disconnect' are growing, and have even culminated in the introduction of news laws in some jurisdictions. In this article, which focuses on the UK but looks overseas for context, we will explore the blurring of work and personal time, the concept of a right to disconnect and what this may mean for the future of work in the UK.

***Blurred lines***

Though the blurring of work and personal time emerged prior to the coronavirus pandemic, the pandemic radically altered the way in which most workers carried out their day-to-day tasks. Almost half of the UK workforce worked from home during the

UK-wide lockdown, and flexible working was embedded for a new wave of workers across a wide range of sectors.

Flexible working simply means a working arrangement that gives a degree of flexibility on how long, where, when and/or at what times an employee works, and it encompasses hybrid working and "telecommuting" (i.e. technology supported work that be completed anywhere). There are a number of (potential) benefits, for both employers and workers to hybrid working. These include reduced overheads for employers due to lower office space requirements, increasing the size of the selection pool from which employers can recruit and enhancing the productivity of employees.

On the other hand, the impact of hybrid working is not solely positive and has led to greater consideration of how workers are able to manage their personal life/work life boundaries. We are all weighed down with hardware, apps and platforms which help to facilitate both social and work-based interactions. Due to the pervasiveness of these technologies, it is difficult, if not impossible, for most individuals to clearly separate their personal lives from their work. The fact that digital communications, for work and social reasons, are often made from the same devices further blurs these overlapping lines. The halcyon days where work was work, and home was home, are almost certainly a thing of the past.

The working styles of individuals in this new era, can, broadly, be split into two types of workers: the "segmenters" and the "integrators" **(1)**. "Segmenters" are those who establish clear boundaries between their work and non-work lives. This may be in the shape of physical boundaries, such as a dedicated room that serves as workspace in their home, or a time-based boundary, in which no work is done after a certain point in the day. In contrast, "integrators" are individuals that move between work and non-work more

frequently. It is clear that differing degrees of separation may be necessary and/or desirable for workers. The 'right' flexible working approach will be determined by considering the individual circumstances of each worker, and the resources of the relevant employer.

***The right to disconnect***

Several countries have already introduced a legal right to disconnect. In 2017, France made it mandatory for employers with at least 50 workers to negotiate agreements with trade unions that allow employees to disconnect from work technology outside of their normal working hours. If no such union agreement is reached, the employer must establish a right to disconnect policy.

Similarly, in 2021, Portugal introduced a "right to rest", which applies to companies with more than 10 staff members and prohibits these companies from contacting employees outside of their contractual working hours. Similar laws have been enacted in Argentina, Costa Rica, Italy and Peru.

Other countries have taken an approach which, though not legally binding, aims to create a culture where the distinction between work and non-work is more respected. Ireland's Code of Practice on the Right to Disconnect (the **Code of Practice**), introduced in April 2021, is one such measure and focuses on three elements:

1. the right of an employee to not have to regularly perform work outside their normal working hours;
2. the right not to be penalised for exercising the right to disconnect; and

3. the duty to respect another person's right to disconnect.

This is a broad right which goes beyond the right to disconnect from digital devices but extends to all types of work, not only remote working. Though failure to adhere to the Code of Practice is not an offence in of itself, such a failure can be admitted in any proceedings a worker pursues relating to their working hours.

***What is the current situation in the UK and what does the future hold?***

Under the Working Time Regulations 1998 (**WTR**), employees in Great Britain are not permitted to work more than 48 hours a week, averaged across 17 weeks, unless they opt-out of this limitation. Even where a worker has opted out of the maximum working hours limit, employers must still protect the health, safety and welfare of their employees. An employer must take reasonable steps to this end, including ensuring workers have adequate rest periods.

Although this does not mean that workers have a right to disconnect, a failure to allow a worker to ringfence work-related communications may result in breaches of employment law. In *Alsnih v Al Quds Al-Arabi Publishing & Advertising*, an Employment Tribunal held that a journalist was unfairly dismissed for refusing to install an intrusive work-related app on her personal phone. The Tribunal found the employer's approach meant that the employee would not be able to separate her home and work life. You can read more about this decision here.

With the next General Election set to be held no later than 28 January 2025, but likely sooner, it is worth noting that the Labour Party has promised to double the number of flexible working requests that can be made in a year, as well as making the right to flexible working a “day one” employment right for all workers. Further, the Labour Party has indicated that it would legislate to introduce a right for workers not to be contacted about work outside of normal working hours.

***Conclusion***

As a right, rather than an obligation, it would not be *mandatory* to disconnect from work. By enacting laws that give workers a right to disconnect, it enables those who wish to be more flexible in their working hours to do so without fear of being penalised by their employer.  The danger is that employees in certain sectors may feel under pressure not to exercise such rights, which would undermine the intention behind any new law. Employers need to create an environment in which employees are not subject to detrimental treatment for seeking to work more flexibly and, in turn, employees will likely need to balance their desires for flexible working arrangements with the needs of the employer.

In the face of what is likely to be increasing employee pressure, employers should evaluate their workplace culture and their ability to meet the flexibility demands of today’s workforce. This may include developing new policies which clearly delineate work and personal life. There is no one-size-fits-all approach, but regular, transparent communication will be integral to the successful navigation of an increasingly virtual, and flexible, working world.

**BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues**

**relating to the content of this article, please contact Anthony Nzegwu (AnthonyNzegwu@bdbf.co.uk) or your usual BDBF contact.**

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**(1)** Kreiner, G. E. (2006). 'Consequences of work–home segmentation or integration: a person–environment fit perspective', Journal of Organizational Behaviour, 27, pp. 485–507

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# International Men's Day 2023: Zero Male Suicide

On 19 November each year we mark International Men's Day. Established to celebrate the positive contributions that men make to society, it has now grown into a global movement advocating on issues relevant to men and raising awareness of men's well-being.

In a world where silence often surrounds the struggles of men, it serves as an opportunity to highlight and confront challenges that men may face. This year, International Men's Day is underpinned by a powerful and poignant theme: "**Zero Male Suicide**."

**The silent epidemic of male suicide**

The importance of this year's theme is very clear when you consider it in light of the statistics on male suicide.

Indeed, according to the latest data from the Mental Health Organisation, suicide is the leading cause of death in men under the age of 50 in the UK. Further, the latest research by the Office for National Statistics and the Samaritans, reports that in England men account for 75% of deaths by suicide and are 2.9 times more likely to die by suicide than women. No surprise then that male suicide has been described as a "silent epidemic."

An increasing amount of research undertaken in the past few years has helped to raise awareness and target action, especially in relation to why men account for the majority of suicide-related deaths.

**Factors affecting mental health**

Whilst both men and women experience mental health difficulties and similar challenges, research shows that there are notable differences between the issues affecting them and the factors contributing towards those issues.

Whilst the 2017 Mental Health Foundation report on the mental health of women and girls confirmed women are more likely to be diagnosed with common mental health problems than men, this doesn't mean that men don't also struggle with their mental health.

Research from the Men's Health Forum shows that men are far more likely than women to go missing, sleep rough, become dependent on alcohol and use drugs frequently. The propensity for men to "bottle up" their problems rather than talk about them exacerbates the difficulties they face. More often than not, this demotivator to speaking up is driven by gender-related barriers and stigmas.

The fact that the NHS, using the latest data from the Office for National Statistics, has confirmed that only 36% of referrals for psychological therapies are for men may be evidence of the reluctance that men in particular fail to seek help or support for mental health. It may even be evidence of a failure to recognise how much they are struggling. This can go on to have a severe impact on overall well-being and can lead to suicide in the most extreme and devastating of cases.

**Men's mental health in the workplace**

As employment lawyers, we are keenly aware of the impact of mental health concerns in the workplace and the fact that work-related factors can have an adverse impact on an individual or team's well-being.

Common scenarios where mental health issues may arise and on which we have to advise include:

- Bullying and harassment at work;
- Discrimination;

- Mistreatment of whistle-blowers in the workplace;

- Navigating the impact of serious allegations or disciplinary charges, some of which may affect an individual’s regulatory status and their ability to practise their profession;

- Grievances, investigations and other internal processes.

It is estimated that over a third of our lives are spent at work so employers and fellow employees can play a pivotal role in supporting the well-being of everyone in the workplace.

The starting point for any employer, and colleagues, is to create a culture of mental well-being and psychological safety in the workplace and to be attuned to the mental health of those around them.

Practical steps that should be taken by employers to cultivate this culture include:

- Facilitating open and stigma-free conversations about mental health in the workplace and making men feel comfortable discussing their challenges. This can be achieved in part by promoting days like International Men’s Day and Mental Health Awareness Week;

- Providing/attending training including Mental Health First Aid courses which enable attendees to recognise

signs of mental health issues and how to respond appropriately;

- Providing access to healthcare benefits including employee assistance and promoting them internally;

- Handling health issues at work, and internal processes, sensitively, with an open mind and recognising the risk of the mental health impact that internal processes can have on all involved – making reasonable adjustments where necessary;

- Encouraging work-life balance to reduce stress and ensure that workers can manage their professional and personal lives effectively. This can be encouraged through initiatives such as the Mindful Business Charter;

- Implementing mental health programs that provide resources and support e.g., counselling and stress management initiatives; and

- Not only encouraging employees to speak up, but listening when they do so, recognising when mental health issues are a risk and supporting employees accordingly.

Of course, the workplace is only one possible factor that may contribute to a mental health crisis.

We can also all do our bit in society to foster an environment

that is supportive of men's mental well-being.

One way to do this is to use International Men's Day as an opportunity each year to remind ourselves to check in on the well-being of male friends and family members frequently, open up the conversation on men's mental health and suicide and break the taboo that often stops men from seeking support.

**BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Polly Rodway (PollyRodway@bdbf.co.uk), Amy Hammond (AmyHammond@bdbf.co.uk) or your usual BDBF contact.**

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# BDBF announces promotion of Rebecca Rubin to Senior Associate

Congratulations! BDBF is pleased to announce the promotion of Rebecca Rubin to Senior Associate, effective 13 November, 2023. Her promotion supports what has been a year of considerable growth for BDBF as a top-ranked employment firm. Since joining the firm in 2021, Rebecca has built her practice focusing on advising clients in relation to whistleblowing and discrimination matters, including sex discrimination, harassment and sexual harassment. Rebecca also frequently advises on negotiated exits, grievances, disciplinary issues, dismissals, redundancies, share schemes, incentive

arrangements and regulatory issues, as well as drafting and advising on settlement agreements and employment contracts.

Gareth Brahams, Managing Partner said, *“We are delighted to announce Becky’s promotion. It is a well-deserved recognition of her skills, determination and flair that she brings to her cases.”*

# 17th Annual Labor and Employment Law Conference – Seattle

BDBF Partner Claire Dawson will be attending the 17th Annual Labor and Employment Law Conference in Seattle on 8-11 November 2023.

# Israel-Gaza conflict: what rights do employees have to express their views on social media and what can employers do to manage risk?

**In this briefing, we consider why the discussion of the Israel-Gaza conflict by employees is potentially a problem for employers, the rights of employees to express their political views and what measures employers can take in practice to manage the objectionable expression of views by employees.**

**Why is discussion of the Israel-Gaza conflict by employees potentially a problem?**

There are a range of strong views held on the Israel-Gaza conflict, with the risk that the expression of those views may be emotive. When expressed on social media, the stakes are raised even further. The tone of political debate on social media is often robust, with users emboldened to speak in a more provocative way than they would in person. Added to which, there is the scope for social media posts to reach a large audience.

It is easy to see how this presents a risk for employers. Views on the conflict could be expressed in ways

which run contrary to the values and aims of the organisation, bring the organisation into disrepute, amount to the harassment of other employees or third parties or give rise to a range of criminal offences, civil causes of actions and/or breaches of regulatory obligations. Employers faced with this are unlikely to sit by and do nothing. Indeed, we have already seen people facing disciplinary action, and even losing their jobs, because of social media posts about the conflict.

- In the US, Ryan Workman, a law student had a job offer rescinded after she wrote in a student e-newsletter that Israel was solely to blame for the conflict and it had *"created the conditions that made resistance necessary".* The message was circulated on social media and users alerted her prospective employer, Winston & Strawn, who rescinded the offer on the basis that the comments were in *"profound conflict"* with the firm's values.

- Also in the US, Citibank fired 25-year old banker Nozima Husainova after she commented on an Instagram post about the Gaza hospital bombing, stating *"No wonder why Hitler wanted to get rid of all of them",* followed by a smiley face emoji. A screenshot of the post was shared to X (formerly Twitter) and users asked Citibank whether it condoned her comments. Citibank promptly fired Ms Husainova and released a statement that it condemned *"anti-Semitism and all hate speech and do not tolerate it in our bank."*

- In Canada, Mostafa Ezzo, an Air Canada pilot lost his job after he posted photos of himself on Instagram dressed in Palestinian colours, holding banners saying that Israel was a *"terrorist state"*, that it should *"burn in hell"*. Again, social media users reported him to his employer, and he was fired shortly afterwards.

- In the UK, Fadzai Madzingira, the Online Safety Director at the media and communications watchdog, Ofcom, was suspended for posts made on a private Instagram account, which were screen grabbed and posted online. One post described Israel as an *"apartheid state"* and she also appeared to "like" another post calling the UK and Israel a *"vile colonial alliance".* Ofcom's Code of Practice on public statements states that expressions of opinion on matters of political controversy which could compromise Ofcom's reputation for impartiality or otherwise harm their reputation should be avoided.

- Also in the UK, an unnamed tube driver was suspended by Transport for London (TfL) for apparently leading a chant of *"free Palestine"* on a tube train filled with passengers. Video footage was posted on social media which appeared to show the chant being led by the driver over the train's speaker system. The footage came to TfL's attention and the driver has been suspended while an investigation takes place.

Employers in the UK are entitled to take steps to manage the objectionable expression of views by their employees about the conflict. However, this must be handled with great care. What should be kept front and centre, is that freedom of expression is foundational in a democracy, and the expression of political views is of particularly special importance. Interference with free expression is permitted, but it will be scrutinised carefully, and any misstep could leave employers exposed to legal claims.

**What rights do employees have in connection with the expression of their political views?**

***Rights under the European Convention of Human Rights***

UK citizens have the right to freedom of thought, conscience and religion under Article 9 of the Convention. This includes the right to manifest such religion or belief, for example, by posting about it on social media. To qualify for protection the belief must be compatible with human dignity and attain a certain level of cogency, seriousness, cohesion and importance – in other words it must be more than a mere view or opinion. Yet if the employee cannot jump these hurdles, the expression of views may still be protected under Article 10 of the Convention, which enshrines the right to freedom of expression more generally. This includes the freedom to hold opinions and to receive and impart information and ideas.

However, neither of these rights are engaged where the views expressed are aimed at the destruction of the rights and freedoms of others. However, this is a high threshold and means things like advocating totalitarianism or Nazism, or espousing violence and hatred in the gravest of

forms. Beliefs which are offensive, shocking or disturbing to others may still be protected.

Therefore, in the majority of cases, Article 10 will be engaged, and possibly Article 9 as well. Yet these rights are not absolute rights. In certain circumstances, employers may interfere with them by introducing rules regulating staff behaviour. Broadly speaking, this is permitted where the interference is lawful, necessary and aimed at protecting the rights or reputation of others.

Although private sector employees cannot rely on the Convention rights directly (e.g. to bring a claim against their employer for an alleged infringement), the Courts and Tribunals must interpret UK law in a way which is compatible with these rights. This means that relevant discrimination and unfair dismissal claims must be viewed through the prism of these Convention rights.

***Protection from religion or belief discrimination***

The Equality Act 2010 protects employees and workers from discriminatory treatment in connection with their religion or belief. This does not mean that all views expressed about the Israel-Gaza conflict will be protected from discrimination. In Grainger plc v Nicholson, the EAT set out the criteria for a philosophical belief (as opposed to a religious belief) to qualify for protection – the belief must:

- be genuinely held;

- be a belief, not a mere opinion or viewpoint;
- concern a weighty and substantial aspect of human life and behaviour;
- attain a certain level of cogency, seriousness, cohesion and importance; and
- be worthy of respect in a democratic society, and not be incompatible with human dignity or conflict with the fundamental rights of others.

If a belief is protected, then the employee will be protected from discriminatory treatment because of the belief, including indirect discrimination, which tends to be the battleground in disputes related to the expression of protected beliefs. For example, the employee may complain that sanctions for social media posts cause particular disadvantage to those with political beliefs. However, an employer can avoid liability if it can show that the rule was a proportionate way to achieve a legitimate aim, such as protecting its reputation or protecting others from harassment.

Helpfully, in the recent case of Higgs v Farmor's School, the EAT gave some guidance on how to assess the proportionality of any disciplinary action for the expression of religious or political views. In all cases, employers should ask whether their objective is important enough to justify the action and, if it is, whether there is a less intrusive way of achieving that objective. Employers should also go on to consider the following factors before taking action:

- what was said;
- the tone used;
- the employee’s understanding of the likely audience;
- the extent and nature of the intrusion on the rights of others and any consequential impact on the employer’s business;
- whether it was clear that the views were personal;
- whether there was a potential power imbalance between the employee and those whose rights are being intruded upon; and
- the nature of the employer’s business and whether the views could impact vulnerable service users or clients.

The key take-away is that each situation is going to fact-specific, and a careful assessment is needed in each case before sanctioning an employee.

***Protection from unfair dismissal***

Even where an employee cannot rely on discrimination law, they retain the right not to be unfairly dismissed. Ordinarily, employees need two years’ service to bring this claim. However, where the sole or principal reason for the

dismissal is, or relates to, the employee's political opinions or affiliations, the two-year service requirement is dispensed with, and it becomes a "Day 1" right (although it is not treated as an automatically unfair dismissal). There is very little case law guidance on how this exception works in practice and so, in relevant cases, it is better to err on the side of caution and assume that employees will have the right regardless of length of service.

In order to dismiss fairly, employers will need to demonstrate that the employee understood that their actions would be treated as misconduct and that they were aware of the potential consequences. In Weller v First MTR South Western Trains Ltd, the Tribunal highlighted that if an employer wishes to sanction an employee for social media activity, especially where it is conducted on a personal device during personal time, they must *"provide clarity or some degree or education or awareness training".*

A fair dismissal for misconduct also requires a fair procedure, which complies with the requirements of the Acas Code of Practice on Discipline and Grievance. This includes conducting an appropriate level of investigation and considering arguments put forward in defence. In Webb v London Underground Ltd, an employee was dismissed for posting comments on a private Facebook account which had harmed the employer's reputation and was in breach of the employer's policies. However, the dismissal was held to be procedurally unfair because the employer had failed to engage with arguments put forward by the employee during her disciplinary hearing regarding her Convention rights. Although these were complex points, the employer ought to have grappled with them.

A Tribunal will also want to see that the interference with

the Article 9 and/or Article 10 Convention rights can be justified. If the interference *cannot* be justified, it is likely this would take the dismissal outside the "band of reasonable responses" and mean the dismissal is unfair.

**What measures can employers take to manage the objectionable expression of views by employees?**

Where does this complicated landscape leave employers? Defensively, employers should ensure that they have a good suite of policies in place, which are given to staff and understood by them. This could include the following:

- A Code of Conduct which sets out expectations regarding standards of behaviour and is clear about the circumstances in which this extends to time outside work.

- A Social Media Policy which prohibits staff from accessing social media on work devices at any time and also sets out expectations about social media use on personal devices. It would be a good idea to require staff to state on their social media platforms that the views expressed are their own and not those of the organisation.

- Equality and Anti-Harassment Policies should explain accurately what characteristics are protected and also

give examples of protected beliefs. Training should also be provided.

- Disciplinary Rules should state that breaches of the Code of Conduct, Social Media, Equality and Anti-Harassment Policies will be treated as misconduct, and serious breaches as gross misconduct.

Where an employee crosses the line, employers need to consider the following:

- As far as possible, assess which legal rights are engaged.

- Focus on precisely why the expression of the belief amounts to misconduct – consider the factors in the Higgscase discussed above.

- If disciplinary action is needed, the disciplinary process needs to be fair and in line with the Acas Code.

- Once disciplinary action has started, be prepared for a grievance to be lodged in response, which will have to

be dealt with.

- If the employee is to be sanctioned, remember that this should always be done in the least intrusive way possible. Is dismissal really necessary? Would a request to take down the post and not repeat with similar posts, together with the provision of training be enough?

- Even where the employee is not dismissed, any disciplinary sanction for the expression of a protected belief may be viewed as an act of discrimination by the employee and used as a basis for constructive dismissal.

- In serious cases, it may be necessary to report the matter to a regulator and/or the police.

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# Supreme Court eases path for deductions from wages claims, including for underpaid holiday

**The Supreme Court has ruled that a series of unlawful deductions from wages is not broken by gaps of three months or more between deductions, nor by the making of a lawful payment in between the unlawful payments. This decision makes it easier to succeed in claims where repeated deductions have been made from pay, for example, in underpaid holiday claims.**

**What is the background?**

Entitlement to paid holiday in the UK is governed by the Working Time Regulations 1998 in England, Wales and Scotland and the Working Time Regulations (Northern Ireland) 1998 in Northern Ireland. Under both, workers are entitled to 5.6 weeks' holiday per year. Four weeks is derived from the EU Working Time Directive (**Directive Leave**) and 1.6 weeks is an additional domestic entitlement (**UK Leave**).

In terms of pay for holiday, UK law states that leave should be paid at the rate of a "week's pay" for each week of leave. For workers with normal working hours, a week's pay includes basic salary only and excludes other types of payments such as commission and overtime. However, European case law has made it clear that workers are entitled to receive their "normal pay" during any period of Directive Leave.

There have been a number of cases which have sought to determine exactly what types of payments should be included in "normal pay". In 2014, in the case of *Bear Scotland Ltd v Fulton and Baxter*, *Hertel (UK) Ltd v Wood and others, Amec Group Limited v Law and others* (**Bear Scotland**), the EAT held, for the first time, that payments made in respect of non-guaranteed compulsory overtime (i.e. overtime an employer is not obliged to offer, but, if offered, a worker must accept) should be included in holiday pay.

This decision exposed employers who had *not* included such payments in holiday pay to claims that they had made a series of unlawful deductions from wages. Where this is the case, the three-month time limit for bringing the claim runs from the last deduction in the series and the worker is able to claim for all losses in the series. When multiplied across a workforce, this left affected employers facing huge backpay bills.

However, the EAT went on to limit the impact of its decision by ruling that:

- A series of deductions must have a sufficient similarity of subject matter and there must be a sufficient frequency of repetition.

- There could not be a gap of more than three months between the unlawful deductions in order for the deductions to form part of the same "series" (the

"three-month rule").

- Its decision applied to Directive Leave only and not to UK Leave, for which basic pay only could still be paid.

- Workers are deemed to take their Directive Leave before their UK Leave.

These conditions limited the risk of large backpay claims because, in practice, the series of unlawful deductions would likely be broken by the lawful payments made in respect of the UK Leave. For example, a worker takes their 20th day of Directive Leave on 4th August and takes their UK leave across September, October, November and December. The worker then takes the 1st day of Directive Leave in the next holiday year on 15th January. As there would be a gap of more than three months between 4th August and 15th January, the series of unlawful deductions would be broken.

In 2015, the Government stepped in to limit the impact of the ruling even further, by introducing regulations which prevented most claims of unlawful deductions from wages looking back further than two years from the date of the claim (although, in practice, the three-month rule had made it very difficult to establish a series of deductions going back even

as far as this). However, these regulations do not apply in Northern Ireland.

**What happened in this case?**

Claims for underpaid holiday extending back to 1998, were brought by 3,380 police officers and 264 civilian employees employed by the Police Service of Northern Ireland (**PSNI**). The claims were that they had been paid basic pay for periods of holiday only, and not their "normal pay", which included overtime. The PSNI accepted the claimants had been underpaid, but disputed the period for which they were entitled to recover. The PSNI sought to rely on the three-month rule to limit the value of the claims.

In June 2019, the case went to the Northern Ireland Court of Appeal. The Court agreed with an earlier Industrial Tribunal decision and disagreed with the decision in *Bear Scotland*. The Court ruled:

- Whether or not there is a series of deductions is a question of fact to be decided in each case. To identify a series it is necessary to look for the "common fault" or "unifying vice" of the underpayments. Here, the unifying vice was that holiday pay had been calculated by reference to basic pay rather than normal pay. This meant the underpayments belonged to the same series.

- A series is not ended by a gap of more than three-months between the unlawful deductions, nor by making a correct and lawful payment.

- Annual leave is not taken in a particular order. Directive Leave and UK Leave form part of a "composite whole" and each day's annual leave must be treated as a fraction of that composite pot.

This decision meant it was easier for workers in Northern Ireland to establish a series of unlawful deductions from wages by virtue of underpaid holiday. When coupled with the fact that the two year look back regulations did not apply in Northern Ireland, the PSNI was left facing a backpay bill of £30 million.

However, this decision was not binding in England, Wales and Scotland, where *Bear Scotland* remained the leading authority. Unsurprisingly, the PSNI appealed to the UK Supreme Court. A decision of the UK Supreme Court is binding across the whole of the United Kingdom, thereby taking precedence over both *Agnew* and *Bear Scotland*.

**What was decided?**

The Supreme Court agreed with the Northern Ireland Court of Appeal and ruled that:

- What constitutes a "series" is a question of fact that must be answered in light of all relevant circumstances including, but not limited to, their similarities and differences, their frequency, size and impact, how they came to made and what links them together. In this case, the Northern Ireland Court of Appeal had been right to find that each unlawful underpayment was linked by the same "common fault" (i.e. that holiday pay had been calculated by reference to basic pay only) and belonged to the same series.

- A series is not necessarily ended by a gap of more than three-months between the unlawful deductions or by the making of a lawful payment. Unlawful deductions do not have to be next to each other in order to establish a series.

- There is no legal requirement that Directive Leave and UK Leave must be taken in a particular order. Instead, both forms of leave (together with any additional contractual holiday the worker may be entitled to) form part of a composite whole.

**What does this mean for employers?**

This decision means it will be easier for UK workers to bring deduction from wages claims in respect of underpaid holiday pay. It will be possible to establish a series even where

unlawful payments are interspersed with lawful payments and even where there are gaps of more than three months between the deductions.

Employers who have not adjusted holiday pay to include components of pay representing a worker's normal pay should ensure that holiday pay is now regularised. Exposure to claims for the historic underpayments will remain, but workers will still only have three months from the date of the last deduction to bring the claim (subject to any extension of time given by virtue of Acas Early Conciliation and/or ordered by an Employment Tribunal). Where claims are brought in time, they will remain limited to the two-year look back period in England, Wales and Scotland.

Employers should remember that this ruling does not apply to deductions caused by underpaid holiday only. It applies to any deductions from wages claim where the series of deductions relates to any form of wages as defined by the ERA 1996 including a fee, bonus, commission or other employment-related emolument.

Finally, the ruling that all types of annual leave entitlement form part of a "composite whole", leaves employers with a practical headache. By way of example, a full-time worker working for Company X is entitled to 33 days' annual leave made up as follows:

- 20 days' Directive Leave paid at his normal rate of pay (i.e. basic pay plus overtime);

- 8 days' UK Leave paid at his basic rate of pay; and
- 5 days' of contractual leave paid at his basic rate pay.

In other words, around 60% of his leave is paid at the normal rate of pay and around 40% of his leave is paid at the basic rate of pay. Strictly speaking, when he takes one day's leave, the pay for that one day should be calculated according to that ratio. And where employers have workers with differing holiday entitlements, the calculations would need to be adjusted on a case-by-case basis.

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

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