The Labour Party's Manifesto: five key proposals that employers need to know about

The Labour Party's 2024 Manifesto promises root and branch reform of employment law, with legislation to be launched within 100 days of taking office. In this briefing, we examine the five proposals that we think will have the greatest impact for the majority of employers.

Background:

Following the announcement that the General Election will take place on 4 July 2024, Labour published its "Plan to Make Work Pay", setting out its extensive proposals for workplace law reform. It promises that Labour *"…will deliver the biggest upgrade to rights at work for a generation"*. This is underlined in the Labour Party Manifesto – published on 13 June 2024 – which says that Labour will implement Make Work Pay *in full* and will introduce legislation within 100 days of entering Government (so by 12 October 2024).

Despite the promise of legislation within 100 days, Make Work Pay attempts to manage expectations about exactly what can be delivered and when. It provides that there will be full consultation with businesses and workers on how to put the plans into practice before any legislation is passed. Only then would the legislation begin the Parliamentary process in both Houses, and once passed, there may be an implementation period. It also points out that much of the detail will be based in regulations and where those regulations are

substantial there will be a need for further consultation.

Therefore, while employers need to brace themselves for some root and branch reform of workplace rights, the truth is that it is not going to all come into force with a bang on 12 October 2024. It will probably take many months, and in some cases, maybe even years. In this briefing, we take a look at the five proposals that we think will have the greatest impact for the majority of employers, regardless of size or sector.

Key proposal 1 – the creation of a single "worker" status:

Currently, we have a three-tier approach to employment status in the UK: "employee", "worker" and "self-employed". Worker status covers employees and a wider group of workers who are engaged under a contract where they are required to work personally, and the employer is not merely a client of the individual's business. Workers have some employment rights, but these are inferior to the rights of employees, for example, they do not have the right to claim unfair dismissal or to take various forms of statutory family leave.

The Labour Party argues that this state of affairs is confusing for workers, who often find it difficult to get a clear picture of their status and what employment protections they have. It is also said that some employers do not label staff properly, sometimes inadvertently and sometimes deliberately. To resolve this problem, Make Work Pay proposes that employee status should be abolished, and a new single employment status of "worker" should apply to everyone, save for the genuinely self-employed. Under the proposed new system, all workers would be afforded the same employment rights, for example, sick pay, holiday pay, parental leave,

protection against unfair dismissal *"and more".*

This change would radically alter our employment law landscape. Yet the consultation process is going to take time, not least because the various knock-on effects of the change will need to be addressed, for example:

- Currently, some LLP members qualify as workers, but they cannot be employees. If they are still workers under the new framework, would this mean that they would gain full employment rights?

- Would the tax status framework be aligned? If so, would all workers become subject to PAYE (and surely this must be the logical consequence of giving full employment rights to all workers)? If this happens this would increase employer costs as a result of higher employer NICs.

Key proposal 2 – unfair dismissal to become a Day 1 right for workers:

It is proposed that the two-year qualifying period for unfair dismissal claims should be removed – meaning the right to claim unfair dismissal will become a Day 1 right (for all workers and not just employees as is currently the case). Currently, only "automatic" unfair dismissal for certain narrow prohibited reasons, such as whistleblowing, is a Day 1 right.

Labour says that this will not prevent fair dismissals, nor the use of probationary periods – although it is not clear whether it will, in fact, be easier to dismiss someone within their probationary period, or whether the full rules on dismissal will apply even then. If it is easier to dismiss during probationary periods this could encourage employers to use them routinely, perhaps for longer periods of time than is currently the case. And query then whether Labour would place an upper limit on the length of probationary periods?

Either way, removing the qualifying period is certain to generate more grievances and Tribunal claims, some of which will be justified and some not. But all of which will take time and money to deal with. In terms of impact on claims, we think the most likely outcome is that claimants with automatic unfair dismissal or discriminatory dismissal claims (especially if higher paid) will continue to bring those claims but will plead ordinary unfair dismissal as an alternative or additional claim. In future, employers will wish to be more cautious when it comes to recruitment so as to limit the risk of a bad hire.

Also, as discussed below, the plan is that the time limit for bringing this claim will be increased from three to six months. Therefore, employers will have increased exposure to unfair dismissal claims and will also have to live with the uncertainty about whether a claim will be brought for a longer period of time. However, one silver lining for employers is that the proposal to remove the caps on compensation in employment claims appears to have been dropped. Neither Make Work Pay, nor the Manifesto, makes any mention of this. That said, it may yet appear as a question in any future consultation on the reform of unfair dismissal law.

Key proposal 3 – changing the trigger for consultation on collective redundancies:

Currently, collective redundancy consultation is triggered when there is a proposal to dismiss as redundant 20 or more employees assigned to one "establishment" within a 90-day period. The question of what an establishment has been ventilated in litigation, with employees arguing it should mean the business as a whole rather than the local place of work. This would mean that collective consultation would be triggered more frequently as redundancy numbers would have to be counted across the whole business. After some to-ing and fro-ing the senior Courts concluded that establishment means the local unit where the employee works, not the business as a whole.

Labour proposes to reverse this, so that collective consultation is triggered where there are 20 proposed redundancies within 90 days across the entire business rather than in just one local workplace. If taken forward, this will mean that multi-site employers will need to have a system in place to ensure that they keep track of proposed redundancies across the business. It will also mean that:

- Collective consultation will be triggered more frequently.
- The process will be administratively more burdensome as employers would need to have appropriate representatives in place for all affected workers no matter where they are based.

- The consultation itself may be more disjointed as employers may be consulting about several small pockets of unrelated redundancies.

If employers get it wrong, they are exposed to protective award claims of up to 90 days' gross pay.

Key proposal 4 – introducing a new right for workers to disconnect outside of working hours:

For the first time, it is proposed that UK workers be given the "right to disconnect" from work outside of normal working hours and to not be contacted by their employers. Make Work Pay says that this is needed in response to the growth in flexible and remote working practices which has *"inadvertently blurred the lines between work and home life".* Are these concerns justified? To some extent, yes. That said, this right is clearly potentially very disruptive to employers, especially if implemented badly.

The plan is to follow similar models to those that are already in place in Ireland or Belgium. In fact, the models used in these two countries are quite different and it is not clear where the Labour proposal will sit on this spectrum. In Belgium, since 1 April 2023, private sector employers with 20 or more employees have been required to implement a right to disconnect for all employees via either a collective bargaining agreement or work rules. In Ireland, a voluntary Code of Practice on the Right to Disconnect has been in place since April 2021. Although only voluntary, workers who

regularly work outside their agreed hours may refer to the Code of Practice before the Labour Court or Workplace Relations Commission.

Make Work pay does state clearly that *"We will bring in a right to switch off"*, which suggests that the Belgian model is the one that we will mirror. A consultation would, of course, be needed, including on important issues such as:

- Whether workers will be permitted to "opt out" of the right.
- What, if any, exceptions there might be (e.g. by reference to job role, sector and/or size of employer).
- What the consequences would be if a worker was mistreated or dismissed for asserting the right to disconnect.

Key proposal 5 – extending the time limit for bringing Employment Tribunal claims:

It is proposed that time limits for employment claims will be increased from three to six months. It appears that this will be for all statutory employment claims. Labour says that this will allow more time for internal procedures to be completed (and also settlement discussions), potentially decreasing the number of Employment Tribunal claims. We think that employers may well see a drop in claims as a result of

employees not being forced to act quickly to protect their position. Of course, the downside is that employers will have the threat of claims hanging over their heads for a significantly longer period of time.

Conspicuous by its absence is the question of introducing fees in the Employment Tribunals. Earlier this year, the Conservative Government opened a consultation on the question of bringing back "modest" fees in the Employment Tribunal and EAT. That consultation closed in March 2024 and the response is awaited. However, it seems very unlikely that a Labour Government would reintroduce Employment Tribunal fees, even at a modest level.

What else is proposed?

While these five proposals are important, they are merely tip of the iceberg. Make Work Pay promises wide-ranging reforms in almost all areas of employment law as follows:

- **Employment status:** introducing better rights for the self-employed and regulating internships.
- **Contracts:** banning "exploitative" zero-hours contracts, giving zero-hours workers the right to a regular hours contract after 12 weeks and requiring employers to give reasonable notice of changes to working time.
- **Pay:** reflecting the cost of living in the national minimum wage rate, removing the national minimum wage age bands so adult workers receive the same rate,

legislating to ensure the fair allocation of tips and making changes to the treatment of travel time as paid working time in certain circumstances.

- **Harassment:** strengthening the new duty to take reasonable steps to prevent sexual harassment at work (due to come into force in October 2024) and introducing protection from harassment at work by third parties.

- **Discrimination and equal pay:** enacting the dual discrimination provisions in the Equality Act 2010, changing equal pay law so that comparisons in pay may be made with outsourced workers and introducing the right to bring equal pay claims based on race and disability (in addition to sex).

- **Work life balance:** strengthening flexible working rights so that it becomes a "genuine default" and regulating the surveillance of workers.

- **Family leave:** reviewing the entire parental leave framework, removing the qualifying period for parental leave (it is unclear whether this means the one-year qualifying period for unpaid parental leave only or any parental leave rights which have a qualifying period), introducing a statutory right to bereavement leave and consideration to be given to introducing paid carer's leave.

- **Other workplace rights:** strengthening whistleblowing and TUPE rights, reviewing health and safety law and guidance and improving access to Statutory Sick Pay.

- **Mandatory employer reporting:** requiring employers to publish and implement gender pay gap actions plans,

introducing ethnicity and disability pay reporting and requiring employers to publish Menopause Action Plans.

- **Disputes and dismissals:** giving workers the right to raise collective grievances via Acas (this proposal is unclear as it stands), restricting the dismissal of pregnant workers and maternity leave returners and restricting the use of fire and rehire practices, save in limited circumstances.

- **Enforcement:** introducing a state Single Enforcement Body to enforce certain areas of employment law and introducing a new enforcement unit for equal pay.

- **Collective rights:** wide-ranging measures aimed at strengthening the role of trade unions and introducing sectoral collective bargaining on pay.

To learn more about all of these proposals, you can view our recent webinar, Labour's Big Plans for Employment Law, presented by BDBF's Managing Partner Gareth Brahams and Principal Knowledge Lawyer Amanda Steadman. You can view the webinar here.

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EAT holds that future discrimination claims may be waived in a settlement agreement

In *Clifford v IBM UK Ltd* the EAT upheld a decision to strike out a discrimination claim, holding that a waiver of future discrimination claims contained in an earlier settlement agreement was effective.

What happened in this case?

The claimant, Mr Clifford, started working for IBM in 2001 and began a period of extended sick leave in 2008. In 2012, he raised a grievance about the fact that IBM had not increased his salary or paid holiday pay to him during his sickness absence. He said this amounted to disability discrimination and he asked to be moved onto IBM's disability plan (**the Plan**). Under the Plan, Mr Clifford would be paid 75% of his former salary until the earlier of recovery, retirement or death.

In 2013, Mr Clifford and IBM entered into a settlement agreement under which IBM agreed to:

- pay a sum to settle the complaint about the unpaid

holiday pay, however, no payment was to be made in respect of the unawarded pay rises;

- place Mr Clifford on the Plan, under which he would receive around £54,000 per year until retirement (and the terms of the Plan stipulated that any pay increases were to be at IBM's discretion); and

- pay employer pension contributions based upon his full salary of around £72,000.

In exchange, Mr Clifford agreed:

- to waive his rights to bring claims about the matters raised in his grievance or any other claims that he had against IBM;

- to waive his rights to bring any *future* claims that he may have connected to the matters set out in the grievance and/or the transfer to the Plan; and

- to waive his rights to bring a long list of other possible claims;

Yet, in 2022, Mr Clifford brought claims against IBM, alleging that it was discriminatory (and also a breach of working time

rules) to have paid only 75% of his previous salary to him throughout the year. He said he was entitled to 100% of pay in respect of periods of annual leave, which meant that IBM owed him around £69,000. He also claimed that it was discriminatory not to have awarded pay increases to him while he was on the Plan. He argued that the Plan was intended to give security to disabled employees, but inflation had reduced the real value of the benefit.

IBM applied to have the claims struck out arguing, amongst other things, that they were precluded by the waivers contained in the settlement agreement, which extended to *future claims* concerning similar matters raised in the grievance or the transfer to the Plan. Mr Clifford sought to resist the strike out, pointing to the EAT's decision in Bathgate v Technip UK Ltd, which said that settlement agreements *cannot* settle unknown future claims. Mr Clifford also argued that both the blanket waiver (which purported to waive all and any claims) and the kitchen sink waiver (which purported to waive all claims set out in a long list of claims) were ineffective. Therefore, Mr Clifford said that the waivers in the settlement agreement were invalid and did not prevent him from pursuing the claims.

The Employment Tribunal Judge struck out the claims, holding that future claims about holiday pay and pay increases had been expressly waived in the settlement agreement and that waiver *was* effective. The Judge distinguished the EAT's decision in Bathgate, which was directed at future claims which had not yet arisen and were truly unknowable. By contrast, in this case, the issues of holiday pay and pay increases *were* known about at the time of entering into the settlement agreement and had been raised in Mr Clifford's grievance and subsequent appeal. The settlement agreement was clear that he could *not* bring future claims arising out of

similar matters to those that had been settled.

Mr Clifford appealed to the EAT.

What did the EAT decide?

It is worth noting that between the Employment Tribunal and EAT hearings in this case, the EAT's decision in Bathgate(which had been relied upon by Mr Clifford) was overturned by the Scottish Court of Session. The Court of Session held that the Equality Act 2010 permitted the settlement of unknown future claims, provided that the claims are clearly particularised and the objective meaning of the word used encompasses settlement of the relevant claim. However, a general waiver of all claims would not be sufficient. You can read our full briefing on the Court of Session's decision here.

The EAT dismissed Mr Clifford's appeal, holding that his claims were precluded by the waiver in the settlement agreement. The EAT reached the following conclusions:

- The EAT agreed with the Court of Session in Bathgate that there was nothing in the Equality Act 2010 which precluded the settlement of unknown future claims, provided that clear language was used. Here, the waiver wording *had* clearly covered future discrimination claims connected to Mr Clifford's grievance and/or transfer to the Plan.

- Although the Equality Act 2010 stipulates that settlement agreements must relate to "particular complaints", Bathgate (and previous authorities) had made it clear that this requirement does not mean the parties must have known about the complaint or that its grounds were in existence at the time of entering into the agreement. If Parliament had intended to prevent the settlement of unknown future claims then it could have spelt this out in the Act, but it had not done so.

- Nor was there any basis for distinguishing Bathgate from Mr Clifford's case – both concerned future discrimination claims that had not arisen at the time the settlement agreement was entered into. The fact that Mr Bathgate's employment had ended, and Mr Clifford's employment was continuing, was not pertinent.

- The EAT also noted the Court of Appeal's decision in Arvunescu v Quick Release (Automotive) Ltd, where it held that future claims may be settled by way of a COT3 agreement. The EAT held there was no sensible basis upon which to distinguish COT3 agreements and settlement agreements in this respect. You can read our full briefing on the Court of Appeal's decision in Arvunescu here.

In any event, even if the waiver had not been valid, the claims had no reasonable prospect of success on the basis that

a failure to increase an already very generous benefit would not have amounted to discriminatory treatment.

What are the learning points for employers?

This decision makes it clear that unknown future discrimination claims may be settled by way of a settlement agreement, provided the claims are particularised in the agreement, either by way of a generic description of the claim or by reference to the relevant statutory provision. Helpfully for employers, this decision is binding on Employment Tribunals, whereas the similar decision of the Scottish Court of Session in Bathgate was only persuasive.

However, employers should take care not to rely on general waivers of all claims – these continue to be unenforceable.

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Clifford v IBM UK Ltd

Failure to consult over proposed redundancy pool meant dismissal was unfair

In the recent case of *Valimulla v Al-Khair Foundation*, the EAT held that an employer's failure to consult with an employee about a proposed redundancy pool meant the dismissal was procedurally unfair. Further, the decision not to pool the employee with four other employees who performed the same role as the employee had to be looked at again by a new Employment Tribunal.

What happened in this case?

The employer is a faith-based charity, with a head office and six branch offices. Team members moved between offices frequently. Mr Valimulla started working for the employer in February 2018 as a Liaison Officer and his role involved fundraising in the community, for example, through schools and mosques. Four other Liaison Officers were employed nationally. Mr Valimulla was the only Liaison Officer who was not branch-based and worked from home.

During the coronavirus pandemic, charitable contributions decreased due to the fact that places of worship were closed. As a result, all Liaison Officers assigned to collect revenue from places of worship were placed on furlough, including Mr Valimulla. Eventually, the charity decided to make redundancies. Mr Valimulla was the only Liaison Officer who was identified as being at risk of redundancy.

Three redundancy consultation meetings took place. At the first meeting, Mr Valimulla was told that it had been decided that his role would "disappear" with the closure of branches and the retention of just two regional hubs. At the second meeting, Mr Valimulla put forward a business case as to how his role could continue, which was considered but rejected. After the final meeting, Mr Valimulla was dismissed by reason of redundancy.

Mr Valimulla claimed that he had been unfairly dismissed. Amongst several criticisms of the process, he argued that the employer had not identified a redundancy pool nor applied selection criteria before selecting him for redundancy. However, the Employment Tribunal accepted the employer's argument that his role was unique, and he was in a self-selecting pool of one.

Mr Valimulla appealed.

What was decided?

Mr Valimulla argued that the Employment Tribunal had failed to deal adequately with two questions. First, the employer's decision not to pool him with the other four Liaison Officers and, second, the failure to consult with him about the proposed pool of one.

On the decision not to pool him with the other Liaison Officers, the EAT noted that the Tribunal had found a redundancy situation had arisen because the employer had a reduced requirement for employees to carry out Liaison Officer work, but this was not tied to work being performed in a

specific location. Yet the Tribunal gave no reasons why it had accepted the employer's assertion that Mr Valimulla's role was unique, meaning he should be in a pool of one, rather than a pool of with all of the other Liaison Officers employed nationally.

Although the EAT accepted that there is no one prescribed process for selecting employees for redundancy, Tribunals must scrutinise an employer's approach when considering the fairness of a dismissal. This requires an assessment of whether the employer had genuinely applied its mind to the question of pooling and to determine whether the chosen pool was reasonable. Here, the Tribunal needed to consider whether the employer's response came within the band of reasonable responses, which required consideration of Mr Valimulla's role, the similarities and differences between the roles of all five Liaison Officers, how the employer had approached pooling and the rationale for its ultimate decision.

On the question of consultation, the EAT held that redundancy consultation needs to be "meaningful". It was unclear how this could be the case here, when consultation had only started *after* Mr Valimulla had been placed in a pool of one. Meaningful consultation does not simply mean informing staff about a decision or proposal, giving them an opportunity to make representations and then putting the original decision or proposal into effect. Instead, it means setting out a provisional proposal, along with its rationale, and providing an opportunity for feedback. The decision-maker should consider such feedback and decide whether to alter the original proposal (and if not, why not) before making a decision.

The EAT upheld the appeal. The question of the failure to

pool with the other Liaison Officers was remitted to a new Employment Tribunal to consider. However, the failure to consult about the pool meant that the dismissal was procedurally unfair, although the question of what the outcome would have been had consultation taken place (i.e. would the pool have changed and, if so, what are the chances Mr Valimulla would have still been made redundant?) was remitted to the new Tribunal.

What does this mean for employers?

This decision serves as useful reminder for employers of two essential ingredients of a fair redundancy dismissal.

First, employers must identify the appropriate pool of employees from which to select potentially redundant employees. This involves interrogating which roles are the same or sufficiently similar to justify being pooled together. The fact that roles are different in some ways may or may not be enough to justify different treatment. Importantly, employers must be able to show they applied their mind to the question and reached a reasonable conclusion. Getting the pool wrong may mean any subsequent redundancies are procedurally unfair and it could also lead to claims of discrimination in certain circumstances.

Second, employers must consult with employees on the provisional pool for selection (and any selection criteria to be used) before making the final decision. This consultation should take place when the proposals are still at a formative stage, so that employees have the opportunity to influence outcomes. The need to consult about the proposed pool was

critical in this case, given that the employee was to be placed in a pool of one, meaning his dismissal was almost inevitable. However, consultation on the proposed pool should take place in all cases where pooling is being used.

Valimulla v Al -Khair Foundation

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Removal of senior employee's core responsibilities and plan to change her job role without consultation justified constructive dismissal

In a recent case, the High Court decided that a CEO's decision to reassign a senior employee's core responsibilities to others with the intention of moving her into a new role in future amounted to repudiatory breaches of contract entitling the employee to constructively dismiss herself.

What happened in this case?

Dr McCormack was employed by Medivet Group Ltd (**Medivet**) as its Director of Clinical Operations. She reported to directly to the Chief Executive Officer (**CEO**) and maintained responsibility for day-to-day operations and a number of central functions including pricing, procurement, laboratory, practice development and property. Dr McCormack's service agreement provided that Medivet was entitled, through its board of directors, to appoint other persons to act jointly with her or change her executive office or responsibilities.

In October 2021, Medivet was acquired by CVC Advisers Ltd who removed the CEO and appointed a Mr Cools as the company's new CEO. Mr Cools was unimpressed with Dr McCormack, quickly concluding that her role was too broad, she was poorly organised, and that she could not stay on top of the areas for which she had responsibility.

At a meeting on 6 April 2022, Mr Cools advised Dr McCormack that he intended to re-organise Medivet's management structure and showed her a new organisational chart. Under the new structure, she was to be appointed as Chief Clinical Officer (**CCO**). This was quite different to her existing role and would involve the reallocation of her operational responsibilities to other employees. The process of reallocating those responsibilities began straight away.

Dr McCormack was unhappy about the proposed CCO role. She felt that her existing role was more closely aligned to the role of Chief Operating Officer (**COO**), a role which would be created under the new structure. Moreover, she believed that she was not properly qualified to take on the CCO role given

that she had not been involved in frontline veterinary practice for a long time. On 16 June 2022, Dr McCormack raised a grievance arguing that she was being forced out of her role and the restructuring was a sham.

The new organisational structure came into force on 1 July 2022, although the CCO was never formally allocated to Dr McCormack, given that she went off sick. On 8 July 2022, she gave notice terminating her employment with immediate effect. She issued a breach of contract claim in the High Court, seeking damages for loss of salary and benefits.

What was decided?

The critical questions for the Court were whether Medivet was in repudiatory breach of contract and, if so, whether Dr McCormack had accepted the breach and terminated her employment in response.

The Court acknowledged that Medivet had expressly reserved rights to vary Dr McCormack's role and responsibilities. However, these reserved rights were not without limit. It was implicit that Medivet would exercise such powers honestly, rationally and for the purpose for which they were conferred (namely, good management). Here, rationality imported a requirement of good faith, a requirement that there should be some logical connection between the evidence and the reasons for the decision and an absence of arbitrariness, capriciousness or perversity.

The Court held that the decision to reallocate some of Dr McCormack's responsibilities with immediate effect exceeded

these limitations. The decision was taken on an *ad hoc* basis and had not been properly canvassed with Dr McCormack in advance. No interim solutions were explored with Dr McCormack before the decision was made and no good management reason could be discerned for making the decision at that stage. Mr Cools had only had a limited opportunity to evaluate Dr McCormack's contribution by that point and his assessment of her was based, primarily, on his view of her during their discussions.

Further, the decision to allocate the CCO role to Dr McCormack at an unspecified future date also exceeded these limitations. She was told that the role would be allocated to her, but, in fact, the board's specific decision-making powers could not have been engaged since the role was not allocated or scheduled to be allocated to her before the termination of her employment.

Therefore, the decisions amounted to breaches of contract. The next question was whether they were repudiatory in nature. The Court held that they were. By taking away and transferring core responsibilities to other employees, Medivet had eroded the essential nature of her role. Although the CCO role was never formally allocated to her, the CEO intended to allocate that role to her in future come what may and there was no room for her to resume her original responsibilities since these had already been taken away. Therefore, once it had been communicated that she was to be placed in the CCO role, she was entitled to treat that as an anticipatory breach of contract.

The Court also held that Medivet's conduct overall was likely to destroy or seriously damage the relationship of trust and confidence. This included the failure to consult with her

about the proposals prior to the meeting on 6 April 2022, taking away her responsibilities with immediate effect, the way in which the CCO role had been communicated to her and the failure to assess and accommodate her views in the period leading up to termination, including the failure to deal with her grievance. Accordingly, there had also been a breach of the implied term of trust and confidence, which was repudiatory.

Finally, it was held that Dr McCormack accepted these repudiatory breaches and terminated her employment in response. Therefore, she was entitled to damages for breach of contract, which are yet to be determined.

What does this mean for employers?

This decision illustrates the limitations of contractual clauses which purport to give employers flexibility to change an employee's role. Such clauses are subject to a requirement to exercise them honestly, rationally, for the purposes for which they were conferred and not in an arbitrary or capricious way.

To limit the risk of breaching the contract, employers wishing to rely on flexibility clauses to vary an employee's role should consider the evidence for making the change, for example, the employee's performance over time and the needs of the business under the proposed new structure. Further, an employer should conduct meaningful consultation with the employee in advance of the proposed change and consider any responses before making any final decision.

McCormack v Medivet Group Ltd

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Legal 500 Hall of Fame interview with Gareth Brahams

Described as *"a titan of the employment law world,"* BDBF Managing Partner Gareth Brahams is ranked in The Legal 500 Hall of Fame. He recently sat down with Legal 500 who asked him to reflect on his greatest achievements, as well as consider the biggest challenges clients are likely to face in the next year.

Check out the video below for an insightful and interesting discussion.

https://www.legal500.com/firms/3963-brahams-dutt-badrick-french-llp/5994-london-england/#Video

https://player.vimeo.com/video/941556532?h=5843db67b0

BDBF Partners recognised in Best Lawyers in the United Kingdom for Employment Law

BDBF Partners Gareth Brahams, Claire Dawson, Nick Wilcox and Polly Rodway have been recognised in the 13th edition of the Best Lawyers in the United Kingdom for Employment Law.

We are delighted to also see Clare Brereton newly ranked this year in the third edition of Best Lawyers: Ones to Watch.

Congratulations to our colleagues in the employment law world

who have also been ranked this year.

World Whistleblowers Day 2024 – why you should remain confident to speak up

World Whistleblowers Day, originally created by a group of non-governmental organisations in 2019, is an annual opportunity to reflect on the importance of an individual's right to blow the whistle and the importance of the Public Interest Disclosure Act 1998 (**PIDA**) in fostering an open workplace culture and preventing wrongdoing.

Recent news stories have highlighted the poor treatment of

whistleblowers across a range of sectors. In the NHS, there are claims that the careers of talented doctors and nurses have been ruined after blowing the whistle. Employees at Fujitsu were afraid of being ‘dragged over the coals’ had they raised concerns about the Horizon software used by Post Office sub-postmasters. It is no surprise then that potential whistleblowers still feel apprehensive about speaking up in 2024.

The Telegraph, for example, recently reported that over 50 doctors and nurses have been targeted after raising concerns about patient safety and that whistleblowing is not welcomed by management. Headlines refer to NHS managers using a ‘playbook of tactics’ to silence whistleblowers, “designed to break you.”

However, not only in the NHS, but in every industry, it remains important for individuals to be able to raise concerns and for management to foster a culture in which they are able to do so. A ‘qualifying disclosure’ must relate to:

- a criminal offence;
- a breach of a legal obligation;
- a miscarriage of justice;
- someone’s health and safety being in danger; or
- potential damage to the environment.

Feeling able to raise concerns of this nature, where you have a reasonable belief that there has been a miscarriage of justice, is essential to prevent wrongdoing and individuals should be aware of the legal protection available to them when doing so.

So, by way of reminder, it is unlawful for an employer to dismiss an employee if the reason or principal reason is that they have made a protected disclosure. It is also unlawful to subject any worker to a detriment on the grounds that they have made a protected disclosure (see https://www.bdbf.co.uk/thinking-of-whistleblowing/ for more detail about what constitutes a protected disclosure). Detriments in this context can include being marginalised, subjected to disciplinary action, overlooked for a promotion or denied a bonus. Employees who have been dismissed for whistleblowing at work or resigned in response to detrimental treatment due to whistleblowing, may also have additional claims for automatic unfair dismissal.

There are limitations to whistleblower protection in the UK. There is no state body tasked with the oversight of whistleblowing measures, no requirement for an organisation to investigate concerns raised (save for in certain sectors, such as financial services) and no fine or other penalty/punishment enforceable against those who choose to subject the whistleblower to detriments. In addition, protection does not extend to genuinely self-employed individuals – the injustice of this distinction was recently highlighted when it became clear that, because the Post Office sub-masters were self-employed, they would not have been protected by the legislation.

We remain optimistic that despite the likely (and imminent) change of government, the principles contained in the Whistleblowing Bill 2023, which had its first reading in the House of Commons earlier this year, may be taken forward by a new Labour Government. The Bill proposed, among other things, introducing new civil and criminal offences (punishable by fine or imprisonment) for subjecting a whistleblower to a detriment and establishing an Office of the Whistleblower, an official body tasked with enforcing such punishment – thereby adding teeth to PIDA and establishing a real deterrent to the decision makers in these circumstances.

With the Labour Party's Manifesto commitment to strengthen protection for whistleblowers, any future iteration of the Bill may also see the protections of PIDA expanded to self-employed contractors who remain equally at risk of suffering from detrimental treatment, reflecting the wider protection afforded to whistleblowers in the EU through the EU Whistleblowing Directive.

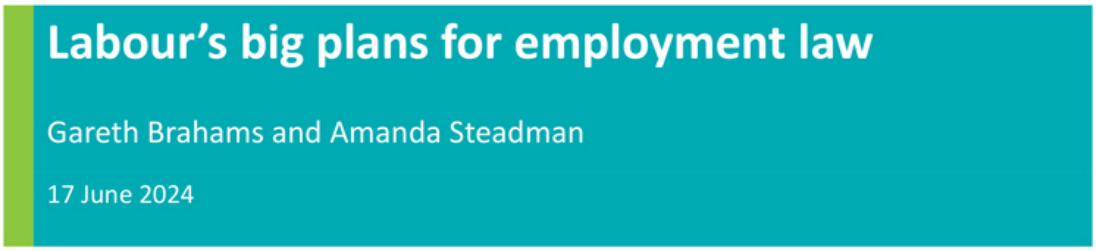
The legislation should allow individuals to feel confident to raise concerns in the knowledge that the law is there to protect them – as eloquently put by the charity Protect; '*it is the insiders within organisations who have the power to expose wrongdoing and improve business, and society, for the better.*'

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 BDBF Associate Julia Gargan (JuliaGargan@bdbf.co.uk) or your usual BDBF contact.

BDBF Webinar – Labour's big plans for employment law – 17 June, 2024

In this 1-hour webinar, BDBF Managing Partner Gareth Brahams and Principal Knowledge Lawyer Amanda Steadman consider what changes a Labour Government might make to employment law. This webinar was originally delivered on 17 June 2024 and reflects our understanding as of that date. Do get in contact with either of the speakers if you would like to discuss any of the issues raised.

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



https://youtu.be/6E-PxkpSpwU?si=LmxMvqh0y-ZZGvtL

Please contact Gareth Brahams (GarethBrahams@bdbf.co.uk),

Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact, for further advice.

BDBF Partners Ranked in Who's Who Legal 2024

We are pleased to announce that BDBF Partners, Gareth Brahams, Claire Dawson and Paula Chan have been recognised in the Labour, Employment & Benefits field for 2024's Who's Who Legal, with Claire and Paula also selected as Thought Leaders.

BDBF's team of employment lawyers is top ranked by the leading legal directories and we're delighted to see our lawyers recognised by Who's Who Legal.

Congratulations to our fellow leading employment law practitioners who have also been ranked, and thank you to our peers across the employment law network for their feedback.

EAT ruling on when there will be a series of deductions from holiday pay

In *British Airways plc v De Mello and others*, the EAT considered whether the exclusion of certain allowances from holiday pay amounted to unlawful deductions from pay. In doing so, the EAT considered when a series of deductions may be broken and whether employers are entitled to designate the order in which different types of leave may be taken.

What happened in this case?

British Airways pays its cabin crew by way of a system of basic pay supplemented by various allowances. Not all of these allowances are reflected in holiday pay. A dispute arose with members of cabin crew about whether different allowances have been included in the calculation of holiday pay. The claimants argued that the allowances represented part of their "normal pay" and so, according to previous case authorities, should be included in holiday pay. The majority of claimants eventually settled their claims, but six claimants continued with the litigation.

The claimants' claim for unlawful deductions from wages reached the Employment Tribunal in 2019. Although the Tribunal held that some of the allowances *should* have been included in holiday pay, the claim would be limited in value for two reasons. First, the Tribunal held that any gap of three months or more between consecutive deductions from holiday pay would be enough to break the "series". Second, BA had designated the first tranche of annual leave as statutory leave, followed by contractual leave. This would likely result in a break in the series of unlawful deductions towards the end of the holiday year, since it is lawful to pay only basic pay for contractual leave as opposed to "normal pay".

BA appealed the inclusion of one type of allowance in holiday pay and the claimants cross-appealed the decision to exclude some other allowances. The claimants also cross-appealed the Tribunal's decisions that three months between deductions would break the series and that BA had designated the order in which types of annual leave were taken.

What was decided?

Inclusion / exclusion of allowances

The question of whether certain allowances should be included in holiday pay was remitted to a new Tribunal to consider on the basis that the original Tribunal has fallen into error.

- In relation to the inclusion of a generous meal allowance, the Tribunal had gone wrong by placing the burden of proof on BA to show that it should not be included. The burden rested on the claimants to show that the allowance formed part of their normal pay.

- In relation to the exclusion of duty-free sales commission, the Tribunal had wrongly excluded the sums on the basis that they were so small that their exclusion from holiday pay would not have deterred a worker from taking annual leave. The Tribunal was wrong to have discounted these sums on the basis of their size – this was not a relevant factor.

- In relation to the exclusion of a "Back-2-Back" allowance, the Tribunal had excluded it on the basis that it was not paid regularly enough to constitute normal pay (namely three times in a 12-month reference

period). The EAT said the Tribunal was overly mechanistic in its approach to the reference period given that the claimant in question had only become entitled to the allowance in the seventh month of the year (i.e. it had actually been paid three times in a five-month period). The reference period should be fairly representative of what is the typical pattern during periods that the worker is working.

Breaking the series of deductions

The EAT overturned the Tribunal's decision that a gap of three months or more between deductions would break the series. The decision of the Supreme Court in *Chief Constable of the Police Service of Northern Ireland v Agnew* in 2023 had made it clear that the earlier authority on this point (*Bear Scotland*) was incorrect and that gaps of three months do *not* necessarily break a series of deductions.

Whether there is a series comes down to whether there is sufficient similarity and a temporal connection between the deductions in question. Although this is a question of fact for the Tribunal to decide, the EAT noted that where there are similar features between the deductions they should be regarded as sufficiently similar, even where there is some difference in detail. In this case, all the deductions related to holiday pay, and all had occurred because BA had failed to treat one or more allowances as normal pay. The EAT substituted a finding that the payments were sufficiently similar.

However, the question of whether there was a sufficient temporal connection between the deductions was remitted to a new Tribunal to determine. Although the series was not automatically broken by gaps of three months or more, the EAT could not rule out the possibility that there might have been gaps long enough to disrupt the series. However, the EAT did appear to offer a steer on this point when it noted that the Tribunal must keep in mind that the purpose of the legislation is to protect vulnerable workers and that there will inevitably be gaps in time between holidays.

Designation of leave

The EAT accepted that in *Agnew* the Supreme Court did not exclude the possibility of an employer designating the order of annual leave, albeit that they said it could not be done retrospectively to run out a time limit for bringing a claim. However, the EAT said that the exercise of any such power could not be relied upon to make a worker's position in relation to a time limit less favourable than it would have been if the employer had *not* designated the order of leave.

However, in this case, the Tribunal had erred in finding that BA had made such a designation. The relevant contractual documents did not give BA the power to do this and, even if they did, there was no evidence that it had been exercised. Therefore, all annual leave days were to be treated equally as part of a composite whole (i.e. part statutory leave and part contractual leave). The consequence is that a deduction would have been made every time leave was taken, since normal pay must be paid for a certain proportion of statutory leave.

What does this mean for employers?

This decision follows the Supreme Court's ruling in *Agnew* and reminds us that gaps of three months or more between deductions will not necessarily break a series of deductions. Whether a series exists is a question of fact for the Tribunal. Although this decision concerns deductions from holiday pay, this principle will apply to all types of deduction from wages where the claimant asserts there has been a series of repeated deductions.

This decision seems to suggest that employers are entitled to designate the order in which leave is taken, although it offers no guidance on how employers should go about this. However, the EAT did seem to accept that a contractual term could potentially give the employer the power to designate, although this will not disadvantage a claimant from a time limit perspective. It is not clear how this would work in practice. Would a Tribunal simply extend time for a claim which is out of time as a result of designation? Or would the designation be ignored for time limit purposes only? The EAT's decision does not address the mechanics of how a claim would be treated as in time in these circumstances.

The reality is that many employers would consider paying normal pay for some types of holiday but only basic pay for other types of holiday to be too administratively cumbersome. Either it involves treating each day's leave as part of a composite pot (requiring a complex calculation for each day's pay) or designating leave (without being certain of how this may be done effectively). In practice, many employers will opt to pay normal pay for all annual leave to avoid these headaches.

British Airways plc v De Mello and others

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Flexible working requests and the dangers of overlooking menopausal symptoms

In *Johnson v Bronzeshield Lifting Ltd,* the Employment Tribunal held that an employer's failure to take into account an employee's menopausal symptoms when considering her flexible working request was an act of direct disability discrimination and a repudiatory breach of trust and confidence which resulted in her constructive unfair dismissal

What happened in this case?

The employer, Bronzeshield Lifting Ltd, is a small crane hire business with a predominantly male workforce. Ms Johnson was employed as an Administrator. She was a long-serving employee, having worked for the employer for over 25 years. In 2018, Ms Johnson began experiencing a wide range of menopausal symptoms including:

- low mood and volatile emotions;
- anxiety and low self-esteem;
- feelings of anxiety or panic when performing tasks that she had previously found easy;
- sleep problems causing tiredness and fatigue the following day; and
- "brain fog" which manifested as feelings of disorientation and made it difficult to concentrate.

These symptoms affected her general resilience and ability to cope with the stresses and strains of day-to-day work. This was exacerbated by the fact that she needed to help care for her elderly parents and uncle.

Ms Johnson's worked 32.5 hours per week between the hours of 9am to 4pm, Monday to Friday (she had a 30-minute unpaid lunch break each day). In August 2021 she asked to changing her working hours to 9am to 5pm, four days per week, with Wednesdays off (totalling 30 hours per week). She said she would be happy to check and reply to emails from home on Wednesdays if required. The request was approved for a fixed period until 1 July 2022, after which the arrangement would be reviewed and either made permanent, or she would be expected to revert to her original working pattern.

The review did not take place in July 2022. However, around this time, Ms Johnson asked to if she could reduce her working hours further. She asked to work 9am – 4.30pm on Monday to Wednesday with no lunch break, 9am – 1pm on Thursday and to have Fridays off (totalling 26.5 hours per week). She suggested that another colleague could cover on Thursdays and Fridays. When making the request, she explained she needed the change to accommodate her caring responsibilities and her menopause issues. A meeting was held to discuss the request, during which Ms Johnson made mention of her menopause and caring responsibilities again.

The employer refused the request on the basis that it would be unfair to ask a colleague to cover and it was not feasible to recruit someone. In addition, the proposal would put the employer in breach of the rules on daily rest breaks and they would be left without cover on Fridays, which was considered to be their busiest day. No alternative proposal was put forward and the implication was that she would have to return to her original five-day week working pattern.

Ms Johnson resigned on notice, expressing her disappointment that her reasons for wanting to change her working patterns had not been taken into consideration, nor a compromise suggested. The employer wrote back offering a one-week "cooling off" period and reminded her that she could appeal the decision. Although she then submitted a letter challenging the decision, the employer failed to treat this as an appeal as she had not labelled it as an appeal letter. Therefore, Ms Johnson's employment terminated at the end of her notice period.

Ms Johnson argued that the employer had directly discriminated against her because of her disability and/or sex by:

- failing to take into account her menopause when determining the flexible working request; and

- refusing to grant the flexible working request.

She also claimed that both matters amounted to serious breaches of trust and confidence, meaning she had been constructively unfairly dismissed.

What was decided?

Shortly before the Employment Tribunal hearing, the employer conceded that Ms Johnson was disabled for the purposes of the Equality Act 2010, meaning this question did not have to be determined by the Tribunal.

In relation to the first discrimination complaint, the Employment Tribunal found that the employer had failed to take into account the fact that Ms Johnson was going through the menopause when determining her flexible working request. Given that she had explicitly referred to it in her written flexible working request, and in the meeting, it was not something that should have been missed. The Tribunal found that the employer would have treated an employee with a different but serious medical condition (e.g. cancer) in a different way. It would have made efforts to find out whether such a person would have needed treatment and what the link

was between the condition and the working pattern. More generally, it would have taken the condition into account when determining the application. Therefore, the Tribunal concluded that Ms Johnson had suffered less favourable treatment because of the particular disability of menopause. However, it rejected the claim that she had been treated less favourably because of her sex.

In relation to the second discrimination complaint, the Employment Tribunal found that the employer had refused the flexible working request, but this was not because of her menopause (indeed, her menopause had not been taken into account when considering the request). Nor would the employer have treated an employee with a different but serious medical condition in a different way – their request would also have been refused. The Tribunal accepted the employers reasons for refusing the request were that it would mean they would be in breach of rules on daily rest breaks, and that it was not practicable for the business for Ms Johnson to have Fridays off. Accordingly, this disability discrimination complaint failed. The sex discrimination complaint failed for the same reasons as the first complaint.

Finally, the Tribunal held that the employer had committed a breach of contract by failing to take into account her menopause when determining her flexible working request. The Tribunal notes that *"All that was really required was to ask the Claimant a few questions, listen to her answers and factor it all into the reasoning when coming to a decision upon the application."* The Tribunal considered this amounted to be a repudiatory breach of trust and confidence for the following reasons:

- the hours an employee works has a major impact on their life – all the more so where they have health problems and other commitments as was the case here;

- it matters how a flexible working application is dealt with – the outcome is not the only thing of importance;

- here, the employee had put her menopause "front and centre" of her request;

- the menopause was affecting the employee in a profound way but there was an absence of effort to try and understand how menopause was affecting her and its relevance to her application – there was no good reason for leaving this important factor out.

The refusal of the flexible working request itself was not a breach of trust and confidence – there was reasonable and proper cause for the refusal.

The Tribunal found that Ms Johnson had resigned in response to the repudiatory breach of contract, meaning her constructive unfair dismissal claim succeeded.

What does this mean for employers?

The employer in this case appeared to have sound reasons for refusing the flexible working request on the facts. Where they went wrong was in the process leading up to that

decision.

If an employee signposts their motivations for making a flexible working request, an employer should explore this with them when discussing the proposal. This is all the more important where the employee has highlighted a health reason, including those that the employer may not immediately understand as being relevant to the request. Here, it was found that the employer would have taken other serious health conditions into account when considering the request. But because the employer did not properly understand the potential impact of the menopause, it failed to make the necessary connection and explore the issue further. This underlines the need for appropriate disability training, which includes menopause, to be given to appropriate staff.

As the Tribunal made clear, taking the underlying reason into consideration is not an especially onerous task. It could have required as little from the employer as discussing the matter with the employee and factoring this into their decision in a fair way. In cases where symptoms are unclear, it may mean medical advice is needed before a fair decision can be made.

In this case, the failure to get the process right amounted to direct disability discrimination and was also a repudiatory breach of contract. The latter finding should be of concern to employers when dealing with *all* flexible working requests – not just those motivated by health reasons. The Tribunal's comments about the major impact of working patterns in employees' lives, and the importance of how flexible working applications are dealt with, suggests that shortcomings in such processes could open the door to constructive dismissal claims. Not only would this be costly to deal with, it risks

the loss of a valuable employee.

Although not argued in this case, employers should also remember that a rejection of a flexible working request by a disabled employee could attract other types of disability discrimination claim including failure to make reasonable adjustments, indirect disability discrimination and disability arising from discrimination.

Johnson v Bronzeshield Lifting Ltd

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What really matters to younger workers?

Deloitte has recently published the results of its Global 2024 Gen Z and Millennial survey. Over 22,800 respondents from 44 countries participated in the survey, which aimed to uncover their attitudes to work and the wider world. In this briefing, we distil the key points of interest for employers and consider what really matters to younger workers.

Stereotypes of Gen Z and Millennial workers (those born between 1995-2005 and 1983-1994 respectively) tend to present them as demanding, entitled, disengaged, lacking in loyalty and obsessed with technology. Like most stereotypes, these labels are unfair and are likely to lead to unjustified negative views of younger workers. Deloitte's Global 2024 Gen Z and Millennial survey seeks to cut through the labels, by using data to find out what actually motivates workers from these generations.

The survey made six key findings, which will be of interest to all employers of Gen Z workers and Millennials.

- **Work/life balance is the top priority:** work/life balance topped the list of priorities for when choosing a new job role. Conversely, poor work/life balance or feelings of burnout were commonly cited reasons for leaving a job. Two thirds of respondents had been mandated to return to office working post-pandemic. There were mixed feelings about this. On the plus side, respondents liked the improved engagement, connection, collaboration and routine. Yet others reported increased stress levels, a drop in productivity and a negative financial impact. Overall, these workers prized flexibility in both where and when they worked and wanted employers to offer part-time working opportunities and four-day working weeks. Last year, a pilot scheme in the UK trialled a four-day working week – you can read more about this in our article here. More recently, UK flexible working laws have been overhauled to improve access to flexible working – you can read more about the reforms in our

article here.

- **The cost of living is a major concern:** although just under half of respondents expected their personal finances to improve within the next year, financial insecurity was still a major concern for many. Around a third reported feeling financial insecure and over half were living from pay day to pay day. The cost of living remained the top concern for these workers, ahead of other concerns such as unemployment, climate change, mental health and crime. In our recent article, we explored way that employers support workers facing financial difficulties – you can read that article here. These concerns were exacerbated by social and political uncertainty, particularly in countries (including the UK) facing elections over the next year.

- **Stress and mental health at work needs to managed properly:** only around half rated their mental health as either good or very good, and stress levels remain high. Around 40% reported feeling stressed all or most of the time. Financial and family matters are major stressors, as are job-related factors such as long working hours, lack of recognition, overwork and not feeling decisions are made in a fair or equitable way. Although many reported that their employers took mental health at work seriously, only around 40% said they would feel comfortable discussing mental health

with their manager or would be confident that the manager would know how to respond if they did raise it. Concerningly, around 30% said they feared their manager would discriminate against them if they raised concerns about mental health. Acas has recently published guidance on making adjustments for mental health, with specific guidance aimed at managers – you can read more about the guidance in our article here.

- **Purpose and values at work are important:** the vast majority of respondents (almost 90%) say having a sense of purpose is important to their overall job satisfaction and wellbeing. So much so, that around 40% of these workers had rejected roles with prospective employers who did not align with their values or beliefs on issues such as the environment, inclusivity and work/life balance. Others reported turning down specific tasks or projects with their current employer for the same reason – although around a fifth said they were not listened to and made to complete the task anyway, while others reported that detrimental treatment followed. Emphasis was also placed on an employer's purpose beyond making profit, with three-quarters of respondents reporting that societal impact was an important factor when considering a future role. Respondents wanted businesses to champion protection of the environment, ensure that Generative AI was used ethically, and influence social equality, for example by creating inclusive employment opportunities.

- **Environmental sustainability affects career decisions:** in keeping with the focus on purpose and values, respondents also reported environmental sustainability as a top concern. Around 60% reported feeling worried or anxious about the environment in the past month. This group want employers to take more action to protect the environment and make sustainable choices. The actions that these workers wanted employers to take included educating staff about sustainability, renovating the workplace to become greener and committing to net-zero greenhouse emissions in the next decade. Again, workers in these groups were prepared to choose job roles which aligned with these values, with 20% saying they had changed jobs for this reason, and another 25% reporting that they intended to do so in the future. And around 70% said environmental credentials and policies were important when assessing a potential employer.

- **There are mixed feelings about the rise of Generative AI in the workplace:** only around a quarter of respondents use Generative AI all or most of the time at work, the remainder used it rarely or not at all. Less frequent or non-users were more likely to feel uncertainty about such tools, with women being more uncertain than men. In contrast, frequent users were more likely to feel trust and excitement about such tools, believing that they will free up time, improve work/life balance and enhance the way they work. However, such users also had concerns that Generative AI drive automation would eliminate jobs and make it harder for young people to progress in their careers. In response, some are

focusing on reskilling and/or applying for roles that are less vulnerable to automation. Overall, only half of respondents felt their employer was providing sufficient training on the capabilities, benefits and value of Generative AI.

You can read the full results of the survey here.

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