Employees to have new right to take one week's carer's leave from 6 April 2024

The draft Carer's Leave Regulations 2024 were laid before Parliament on 11 December 2023. The Regulations set out the details of how the new carer's leave regime will operate. This detailed briefing explains how the new rights will work in practice.

What is the current position?

Currently, employees with caring responsibilities have no specific right to take leave in order to discharge their caring duties. They may be able to take other relevant forms of leave where they meet the eligibility requirements, such as unpaid time off for dependant emergencies or unpaid parental leave. Eligible employees may also be able to request temporary or permanent flexible working arrangements.

However, the charity Carer's UK has reported that many affected employees either do not identify themselves as carers, or are uncomfortable about raising personal matters at work. The result is that many carers struggle on in silence. These pressures have led one in ten carers to consider reducing their working hours or giving up work altogether, with over 200,000 people per year end up leaving the workplace.

To help address this issue, in September 2021, the Government

confirmed that a Day 1 employment right to carer's leave would be introduced. The Carer's Leave Act 2023 finally came into force on 24 May 2023. The Act provided the pathway to new rights and protections at work for employees who have caring responsibilities. It allowed for secondary legislation to be made which would set out the detail of how the new rights would work. The Carer's Leave Regulations 2024 were laid before Parliament on 11 December 2023. Together, the Act and the Regulations (if passed in their current form) will introduce the new carer's leave regime on 6 April 2024.

What is the right and who qualifies for it?

Employees will have a Day 1 right to take at least one week's unpaid carer's leave in any 12-month rolling period to provide or arrange care for a "dependant" who has a "long-term care need".

In this context, "dependant" means:

- a spouse, civil partner, child or parent of the employee;
- someone who lives in the same household as the employee (but not someone who is the employee's boarder, lodger, tenant, or employee);
- someone else who reasonably relies on the employee to provide or arrange care.

The dependant must also have a “long-term care need” – this means:

- an illness or injury (whether physical or mental) that requires, or is likely to require, at least three months of care;
- a disability under the Equality Act 2010; or
- care needs relating old age (although “old age” is not defined).

However, neither the Act nor the Regulations define what counts as “providing care” or “arranging care” and so this is left open to interpretation.

In cases where an employer provides a contractual right to carer’s leave, an employee is not entitled to exercise the new statutory right and the contractual right separately. However, they may take advantage of whichever right is more favourable to them in any particular respect.

How should the employee’s carer’s leave entitlement be calculated?

The right is to take one week's leave. This means that full-time employees are entitled to take up to five working days' leave. This should be pro-rated for part-time employees to reflect their working arrangement (e.g. an employee who worked a 60% FTE arrangement would be entitled to three days' leave).

In the event that the employee's working time varies, or they work in some weeks but not others, a "week's leave" must be calculated by dividing the total of the periods that the employee is normally required to work in a 12-month period by 52. Special rules will apply where the employee is in the first year of employment, which mean that this calculation cannot be performed.

How may carer's leave be taken?

Employees may take carer's leave in discontinuous blocks of at least half a working day. The leave can be taken at different times and need not be taken on consecutive days. Alternatively, the leave may be taken as a continuous block of one week's leave. For example:

- Akash's wife was in a bad car accident and sustained damage to her legs. She needs specialist physiotherapy once a week for three months and needs assistance to get to and from the appointments. If Akash works full-time, he could ask to take half a day's leave on up to ten separate occasions, or a full day's leave on up to five separate occasions, in order to assist his wife.

- Jessica’s elderly father needs to move into a care home. Jessica may ask to take a week off for the purpose of visiting different care homes to identify a suitable home for her father and deal with the administration and practical issues associated with the move.

What are the notification requirements?

In order to qualify for carer’s leave, employees must comply with the notice requirements set out in the Regulations.

- Employees are required to give their employer notice of their intention to take carer’s leave. The notice must specify that they are entitled to take carer’s leave. Employers cannot require employees to supply evidence of their entitlement to take carer’s leave and, instead, must rely on the employee’s self-certification.

- The notice must set out the days (or half days) that the employee wishes to take as leave. The notice may relate to all or part of an employee’s overall carer’s leave entitlement (but if it only relates to part of their entitlement, they will need to serve a further notice when they wish to take a further period of leave).

- The amount of notice that must be given to the employer differs depending on the amount of leave requested. For blocks of leave of 1.5 days or under, the employee must give at least three days' notice before the first period of leave specified in the notice. For blocks of leave of two days or more, the employee must give double the number days of leave specified in the notice before the first day of leave (e.g. two weeks' notice must be given in order to take a week's leave, or seven days' notice must be given in order to take 3.5 days' leave). The Regulations provide that an employer may choose to waive the requirement to give notice in this way.

The Regulations do not require the employee's notice to be given in writing. However, there is nothing to prevent employers from asking employees to provide such notices in writing, and it would be sensible to do so to avoid requests getting missed.

Can an employer postpone a period of carer's leave?

An employer may postpone a period of carer's leave where it reasonably considers that the operation of its business would be "unduly disrupted" if the employee took carer's leave on the employee's chosen date/s. In such circumstances, however, the employer must permit the employee to take the requested period of carer's leave at another time. This must be no later than one month from the first day of the leave requested by the employee and the employer is required to consult with the employee about the new start date (although there are no rules on what form this consultation should take).

Where an employer postpones a period of carer's leave, it must provide the employee with written notice of the same, stating the reason for the postponement and setting out the newly agreed dates for the leave. This notice must be given to the employee as soon as reasonably practicable and not later than seven days after the employee's notice was given to the employer or before the first day of leave requested by the employee (whichever is the earlier).

What rights does an employee have during and after a period of carer's leave?

During any period of carer's leave, the employee has the right to benefit from the existing terms and conditions of employment that would have applied but for the leave, save for terms and conditions about wages or salary. In other words, the leave is unpaid.

After any period of carer's leave, the employee has the right to return to the same job they were employed in immediately before the absence. The employee's seniority, pension and similar rights should be the same as they would have been had the employee not been absent. The employee's terms and conditions should be no less favourable than those that would have applied had the employee not been absent.

When can an employee complain to an Employment Tribunal?

An employee will have the right to complain to an Employment Tribunal and seek compensation where the employer has:

- subjected them to a detrimental act or omission because the employee took, sought to take, or made use of the benefits of, carer's leave, or because the employer believed the employee was likely to take carer's leave; and/or

- dismissed them (or selected them for redundancy) and the reason or principal reason for dismissal (or selection for redundancy) was because the employee took, sought to take, or made use of the benefits of, carer's leave, or because the employer believed the employee was likely to take carer's leave. Any such dismissal would be "automatically" unfair and the employee would not need to have two years' service in order to bring the claim. However, compensation would be capped in the usual way.

What steps should employers take now?

With just under three months to go until these new rights come into force, employers should finalise their approach to carer's leave now. You should consider the following issues:

- Who will have "ownership" of ensuring compliance with

the new rules in your business (including things like preparing a staff policy, training line managers and managing any record-keeping obligations)? How will you raise awareness of the new right among staff?

- Will you enhance the amount of carer's leave available? If so, to what amount?

- Will you offer paid leave? If so, how much?

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

- Will you relax the notice requirements provided for in the regulations? If so, what would be the minimum notice required?

Carer's Leave Act 2023

The Carer's Leave Regulations 2024

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Paternity leave regime to be relaxed from 6 April 2024

The draft Paternity Leave (Amendment) Regulations 2024 were laid before Parliament on 11 January 2024. The Regulations set out the details of how the regime will be reformed to make it easier for fathers to take paternity leave. This briefing explains the key changes and the steps that employers should take now.

In June 2023, the Government published its response to a 2019 consultation on reforming parental leave and pay entitlements and announced plans to make it easier for fathers and partners to take paternity leave. To this end the Paternity Leave (Amendment) Regulations 2024 were laid before Parliament on 11 January 2024.

If passed in their current form, the Regulations will come into force on 8 March 2024 and will have effect in relation to children whose expected week of childbirth begins after 6 April 2024, or whose expected adoption placement date is on or after 6 April 2024.

What is going to change?

Area of change	Current position	New position for births and adoption
How statutory paternity leave may be taken	Paternity leave must be taken as a single block of either one whole week or two consecutive whole weeks. If only one week is taken, there is no ability to take the second week at a later date.	Eligible employees will be able to take their statutory paternity leave as either: a single block of either one whole week or two consecutive whole weeks; or as two separate blocks of one whole week. It remains the case that the leave must be taken as whole weeks and may not be split up into days.
When statutory paternity leave may be taken	Paternity leave must be taken within 56 days' of a child's birth or placement for adoption.	Eligible employees will be able to take their statutory paternity leave within 52 weeks of the birth or placement for adoption. When combined with the ability to take two separate blocks of leave discussed above, this means that employees will have greater flexibility about taking paternity leave. For example, a father may choose to take one week straight after the birth and the second week when the child is 11 months' old, and the mother is returning to work. However, it will remain the case that paternity leave cannot be taken where the employee has already taken a period of shared parental leave. Where an employee wishes to split up their paternity leave, they will need to be careful not to fall foul of this rule.

Notices that should be given to the employer and when they should be given	Currently, an employee who wishes to take paternity leave must give their employer written notice of their entitlement to paternity leave and the period of leave that they wish to take. They must tell the employer: • the date on which they were notified that they had been matched with a child for adoption (if applicable); • the expected week of childbirth or adoption placement date; • whether they wish to take one week or two consecutive weeks' paternity leave; • and the date on which they wish the paternity leave to start. In **birth cases**, this notice must be provided to the employer not later than the 15th week before the expected week of childbirth. In **adoption cases**, this notice must be provided to the employer within seven days of the employee being notified that they have been matched with a child for adoption. Separately, an employer may *elect*to ask an employee wishing to take paternity leave to sign a declaration that they meet the eligibility requirements of the regime and that they are taking paternity leave for the purpose of caring for the child or supporting their partner.	In future, the notice of entitlement and notice of the period/s of leave will be separate. **Notice of entitlement** An employee who wishes to take paternity leave must give their employer written notice of: the date on which they were notified that they had been matched with a child for adoption (if applicable); andthe expected week of childbirth or adoption placement date. At the same time, employees will also be *required* to give a written declaration that they meet the eligibility requirements of the regime. In **birth cases**, this notice and declaration must be provided to the employer not later than the 15th week before the expected week of childbirth. In **adoption cases**, this notice and declaration must be provided to the employer within seven days of the employee being notified that they have been matched with a child for adoption. **Period of leave notice** Before each period of leave, the employee must give their employer notice of the start and end dates of the period of leave. At the same time, employees will also be *required* to declare that they are taking the leave for the purpose of caring for the child or supporting their partner. In **birth cases**, this notice and declaration must be provided to the employer not later than four weeks before each period of leave. In **adoption cases**, this notice and declaration must be provided to the employer within seven days of the employee being notified that they have been matched with a child for adoption. However, in both birth and adoption cases, where a Period of Leave Notice has already been given to the employer, an employee may vary or cancel any dates by giving at least four weeks' notice of the proposed variation or cancellation.

What steps should employers take now?

With just under three months to go until these changes come into force, employers should update their approach to paternity leave now. Employers should:

- Update relevant policies to reflect the new rules on how and when paternity leave may be taken, the shorter deadlines for giving notice of a wish to take leave and the new declaration requirements.

- Update the HR forms used to the support the paternity leave process. The Notice of Entitlement may need to be amended to cover the requirement to declare eligibility (where this is not already covered) and a standalone Period of Leave Notice will also be needed.

- Notify managers that eligible employees will be entitled to take discontinuous blocks of paternity leave within the first year of birth or adoption. However, in practice, the majority of fathers tend to take the two weeks' paternity leave as a single block following the birth (or adoption) and we think this is unlikely to change dramatically.

- Highlight the changes to staff. A new right to carer's leave is also coming into force on 6 April 2024 (you can read about that here) and it would make sense to notify staff about both of these family-friendly changes at the same time.

Separate to these changes, employers should also remember that the rate of statutory paternity pay is expected to increase on or around 8 April 2024 from £172.48 per week to £184.03 per week (or 90% of the employee's average pay if this is less than the statutory rate).

Paternity Leave (Amendment) Regulations 2024

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Flexible working requests to become a Day 1 right on 6 April 2024 and further changes to follow soon

The Flexible Working (Amendment) Regulations 2023 have been laid before Parliament and, if passed, will make the right to request flexible working a Day 1 right on 6 April 2024. Further changes will be made to the flexible working framework later this year and a new statutory Acas Code of Practice on flexible working requests has been laid before

Parliament to reflect all of these changes.

Right to request flexible working to become a Day 1 employment right – 6 April 2024

Currently, an employee needs 26 weeks' continuous service in order to make a flexible working request. However, the Flexible Working (Amendment) Regulations 2023 will remove this service requirement, making the right a Day 1 employment right. The Regulations were laid before Parliament on 11 December 2023 and will come into force on 6 April 2024.

This change means that employers would be wise to state which, if any, flexible working options would be suitable for a role in job advertisements. Employers may also wish to identify candidates' preferences in job interviews. Although this will not prevent an employee asking for something different on Day 1 of their employment, the hope is that an upfront discussion will allow a suitable pattern to be identified from the off, rather than having to deal with a request in the first few months of employment.

However, care must be taken to hold any such discussions in a non-discriminatory way, for example, by asking an open question about whether the candidate has a preferred working pattern and not making any adverse comments about the preferred pattern and/or the candidate's reasons for wishing to work in a certain way.

Changes to the flexible working request procedure – expected by end of July 2024

The Employment Relations (Flexible Working) Act 2023 became law on 20 July 2023. The Act will make the following reforms to the flexible working request process:

- Employees will no longer have 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 months as is currently the case) unless an extension is agreed.

At present, it is not clear exactly when these changes will come into force. The Act states that the changes will come into force on a date or dates specified by the Secretary of State. The Government has said that it expects the measures to come into force approximately a year after Royal Assent, in

order to give employers time to prepare i.e. sometime in July 2024. However, it remains possible that the changes will be introduced on 6 April 2024, to accompany the change to a Day 1 right.

New statutory Acas Code on flexible working

The draft statutory Acas Code of Practice on requests for flexible working (following a public consultation held last year) was laid before Parliament on 11 December 2023 and it is likely to become final within 40 days of that date (i.e. by 20 January 2024). Although the Code is not legally binding, it will be taken into account by Employment Tribunals when considering relevant cases and it may count against an employer where the Code has not been followed.

The Code has been updated to reflect changes to ways of working since the Code was first introduced in 2014, and to reflect the forthcoming legal reforms discussed above. The draft Code:

- Recommends that employers have a clear policy and procedure for handling flexible working requests. It states that this can be helpful in making everyone aware of what is expected.

- Clarifies that while employees may make up to two requests in a 12-month period, they may only have one

"live" request ongoing at any one time. A request will be regarded as live during any appeal process. A request will only be regarded as closed once either a decision is made, the request is withdrawn or the two-month period for deciding the requests ends (without any extension having been agreed).

- Reminds employers that they must consider requests in a reasonable manner and must agree to a request unless there is a genuine business reason not to do so. The reasons for rejecting a request are unchanged. The Code also reminds employers that the legal obligation to make reasonable adjustments for disabled employees is separate to the obligation to consider a flexible working request.

- Recommends that where an employer **accepts** a request, it should confirm the decision in writing and offer the employee the chance for a discussion to clarify any information that may be helpful in implementing the agreed arrangements (and if such a discussion is held then a record should be kept). However, the Code recognises that the employer and employee may agree that a meeting is not necessary in these circumstances.

- Underlines that employers must not **reject** a request without first consulting the employee. The Code provides clarity on what this consultation should involve as follows:

- The employer should invite the employee to a consultation meeting. The employee should be given a reasonable period of time to prepare for the meeting, which should be held without unreasonable delay.

- The employer should allow employees to be accompanied to meetings, even though there is no statutory right to be accompanied. The Code recommends that employers permit an employee to be accompanied by either a colleague, a trade union representative or an official employed by a trade union.

- The meeting should be held privately but may be held in person or remotely via video conferencing or telephone. The meeting should be chaired by someone with sufficient authority to make a decision.

- The meeting should be conducted in a way that allows for a reasonable discussion and consideration of the request. If the request cannot be accepted in full, the employer and employee should discuss suitable alternatives and whether a trial period may be appropriate. A written record of the meeting should be kept.

- The final decision should be confirmed in writing without unreasonable delay and within the two-month period for deciding requests (unless an extension has

been agreed). It should clearly explain the business reasons for rejecting the request, together with any additional information which is reasonable to help explain the decision.

- Encourages employers to allow for an appeal process where a request is rejected, even though there is no statutory right to an appeal. Employers should set out details of any appeal process in their decision letter.

- Reminds employers that they must not subject an employee to any detriment or dismissal in connection with having made a flexible working request or having issued legal proceedings about the same.

Acas has indicated that it will also update its non-statutory guidance on flexible working, which complements the Code.

What steps should employers take now?

In addition to considering whether to address flexible working in job adverts and interviews, we would recommend that employers consider the following preparatory steps:

- Revise your Flexible Working policy to reflect the legal reforms. Although employees are no longer required to explain the potential effect of their request, we would recommend that this is still encouraged on the basis that it may help speed up your consideration of the request.

- Consider what your consultation process will look like. As the draft Code outlines, this should usually include a face-to-face meeting. Where you are tending towards **rejecting** a request, a meeting affords the employee an opportunity to make further submissions and allows time for consideration of alternatives. Where you are tending towards **accepting** a request, a meeting can add value by allowing an opportunity to discuss the request in more detail and think about ways to implement the arrangement successfully.

- Train HR and line managers on how these reforms will impact the handling of flexible working requests. When the Acas Code is finalised, HR and line managers should be asked to read it.

- Consider whether you need to devote further resource to the management of flexible working requests, in light of the fact that employees will be able to make two requests per year, the shorter time frame for providing your response, and that requests may be made from Day 1 of employment.

- Consider whether record-keeping procedures should be strengthened (for example, to record how many requests have been made within a 12-month period and to document what form of consultation has been undertaken).

Employment Relations (Flexible Working) Act 2023

Flexible Working (Amendment) Regulations 2023

Draft Acas Code of Practice on Requests for Flexible Working

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New guidance published to accompany holiday entitlement and pay reforms

On 1 January 2024, the Employment Rights (Amendment,

Revocation and Transitional Provision) Regulations 2023 introduced changes to the law governing holiday entitlement and pay. On the same date, the Government published detailed new guidance for employers designed to accompany the reforms. In this briefing, we outline the key points for employers to note.

What changes are being made to holiday entitlements and pay and when?

On 8 November 2023, the Government published its response to a consultation paper which had proposed a number of reforms in the areas of working time and paid holiday rights. In summary, the Government's response confirmed that the following reforms would be taken forward on 1 January 2024 (save as otherwise stated):

1. **Record-keeping requirements**: Regulation 9 of the Working Time Regulations (**WTR**) would be amended to clarify that businesses do not have to keep a separate record of the daily working hours of workers.

2. **One vs two pots of annual leave**: Regulation 13 annual leave (4 weeks) and Regulation 13A annual leave (1.6 weeks) would not be replaced with a single leave entitlement of 5.6 weeks. However, the WTR would be amended to spell out what counts as "pay" for the purposes of Regulation 13 leave.

3. **Accrual of annual leave**: the position on accrual of annual leave will be changed for "irregular hours

workers" and "part-year workers" only. These workers will accrue their annual leave entitlement at the end of 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. The new accrual system for irregular hours and part-year workers will apply to leave years commencing on or after 1 April 2024 only.

4. **Introduction of rolled-up holiday pay**: a system of "rolled-up holiday pay" would be permitted for irregular hours and part-year workers, but not for other types of workers. Where an employer elects to pay rolled-up holiday pay, it must be calculated at 12.07% of the worker's pay. Rolled-up holiday pay will be permitted for leave years commencing on or after 1 April 2024 only.

5. **Carry-over of annual leave**: from 1 January 2024, workers will not be able to carry over any accrued Covid-related Regulation 13 leave. On top of this, the WTR would be amended to clarify when workers may carry over accrued leave in other circumstances.

You can read our detailed briefing on these reforms here.

On 1 January 2024, the Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023 came into force to effect these reforms. On the same day, the Department for Business and Trade published detailed new guidance to accompany the reforms (the Guidance).

What does the new guidance say?

The Guidance is designed to provide further details to support an understanding of the reforms. The Guidance applies only to the minimum statutory leave entitlement (i.e. 5.6 weeks' leave per year), but not to additional contractual holiday over and above this.

Meaning of "irregular hours worker" and "part-year worker"

The new "accrue as you go" system of holiday entitlement and the new system of rolled-up holiday pay will apply to irregular hours workers and part-year workers only. The Regulations provide that a worker will be:

- **an irregular hours worker**, in relation to a leave year, if the number of paid hours that they will work in each pay period during the term of their contract in that year is, under the terms of their contract wholly or mostly variable; and

- **a part year worker**, in relation to a leave year, if, under the terms of their contract, they are required to work only part of that year and there are periods within that year (during the term of the contract) of at least a week which they are not required to work and for which they are not paid.

Section 2 of the Guidance offers examples of workers who would fall into these categories. The example is given of an irregular hours worker is a hospitality worker who worked a different number of hours each week. In contrast, a worker who worked a rotating two-week shift pattern of 15 hours in the first week and 20 hours in the second week would not qualify as an irregular hours workers as their working hours are fixed and not variable.

The example given of a part year worker is a seasonal worker in the farming industry who only works and get paid during the Spring and Summer months. In contrast, a worker who is paid a flat salary over 12 months but has periods of time that last more than one week when he is not working would not qualify as a part year worker as he would be paid throughout the year. Typically, this would mean that term-time only workers in the educational sector would notqualify as part year workers as their salary tends to be paid in equal instalments across the year, including periods when they are not working.

Calculating holiday entitlement for irregular hours and part-year workers

Section 3 of the Guidance sets out that for leave years beginning on 1 April 2024, irregular hours and part year workers will accrue statutory holiday entitlement at the rate of 12.07% of actual hours worked in a pay period. An example is given of how to calculate the statutory leave entitlement as follows:

- **Scenario:** A worker works 68 hours in the month of June.
- **Step 1:** Divide the hours worked in a pay period by 100: 68 / 100 = 0.68.
- **Step 2:** Multiple the answer to Step 1 by 12.07: 0.68 x 12.07 = 8.2076.
- **Step 3:** Round up or down to the nearest hour: 8.2706 rounds down to 8.
- **Answer:** A worker who worked 68 hours in June accrued 8 hours of statutory annual leave that month.

This calculation method works for workers entitled to statutory holiday only. However, the Guidance goes on to explain how employers may calculate the entitlement for workers with an additional contractual leave entitlement.

The Guidance also goes on to explain (with worked examples) how to calculate the statutory leave entitlement for irregular hours and part year workers who:

- leave their role part way through the leave year;
- work a fixed number of hours each week, but a variable

number of hours each day;

- are on maternity or other family-related leave; and/or
- are off sick.

Calculating holiday pay for irregular hours and part year workers

Section 5 of the Guidance explains that for leave years beginning on 1 April 2024, employers may elect to pay irregular hours and part year workers using the system of "rolled up holiday pay". However, this method of paying holiday pay may not be used for workers with regular hours and fixed pay.

Where rolled-up holiday pay is used:

- the employer should check the worker's contract in case payment in this way would amount to a variation of their contract (for which their agreement would usually be needed);
- instead of paying holiday pay when the worker takes their annual leave, an additional payment must be paid at the same time as the worker is paid for work done;

- the rolled-up holiday pay is calculated as 12.07% of the worker's total pay in a pay period (e.g. weekly, fortnightly, monthly) and must be clearly itemised on the pay slip;

- if the worker carries any annual leave over into a new holiday year, they will have already been paid for the period of leave carried over.

The Guidance goes on to offer some worked examples of how to calculate rolled-up holiday pay.

Alternatively, employers who do not wish to adopt a system of rolled-up holiday pay may continue to pay irregular hours and part years workers in the usual way (i.e. pay holiday pay at the time the holiday is taken). Where this is done, holiday pay for such workers should be calculated by reference to the worker's average pay over a reference period of the last 52 weeks in which they were paid. This may mean that, in some cases, employers will need to look back further than 52 weeks if there are weeks were the worker did not get paid (or where they were absent on family-related leave or sick leave). However, this look back period is capped at 104 weeks. Where the worker has not been paid for 52 out of 104 weeks, the reference period is shortened to that lower number of weeks.

Carrying unused leave forward into a new holiday leave year

Section 4 of the Guidance explains the circumstances in which

all workers are entitled to carry forward any unused annual leave into a new leave year:

- **Family leave:** if a worker is unable to take some or all of the statutory holiday entitlement as a result of taking a period of maternity or other family-related leave, they will be entitled to carry forward up to 5.6 weeks' leave to be used in the following leave year.

- **Sickness:** if a worker working regular hours throughout the year is unable to take some or all of their statutory holiday entitlement as a result of being off sick, they will be entitled to carry forward up to 4 weeks' leave to be used within 18 months of the end of the leave year in which the holiday accrued. However, if the worker is an irregular hours or part year worker then they are able to carry forward up to 5.6 weeks' leave, again, to be used within 18 months of the end of the leave year in which the holiday accrued.

- **Denial of leave:** if a worker does not take annual leave because the employer:

- refuses to pay them;
    - 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; or
- does not warn the worker that they will lose their leave if they do not use it by the end of the leave year,

then they are entitled to carry forward up to four weeks' leave into the next holiday year.

- **Covid-19:** from 1 January 2024, workers will not be able to carry forward any accrued Covid-related leave. Workers have until 31 March 2024 to use up any Covid-related leave accrued before 1 January 2024.

The rate of holiday pay

Section 5 of the Guidance clarifies the position about rates of pay for statutory annual leave for all workers.

It confirms that for the first four weeks of leave, a worker is entitled to be paid their normal rate of pay and that, from 1 January 2024, the WTR was amended to state that this

includes:

- payments, including commission payments, intrinsically linked to the performance of tasks which a worker is contractually obliged to carry out;
- payments relating to 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.

In contrast, a worker is only entitled to be paid their basic rate of pay for the remaining 1.6 weeks of leave (although it is noted that, in practice, many employers will also pay normal pay for this portion of leave). The Guidance recommends that where an employer wishes to pay different rates of pay for the two portions of leave, this should be explained clearly in the worker's contract or the staff handbook.

Comment

Where you have irregular hours and/or part year workers, you will need to become familiar with the calculations for the new

“accrue as you go” system of accruing annual leave. Further, if you intend to introduce a system of rolled-up holiday, your payroll team will need to become familiar with the new method of calculating holiday pay, and be clear about when it should be paid and the related pay slip requirements.

Some of these changes are involved and may necessitate 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. 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

Guidance – Holiday Pay and Entitlement Reforms from 1 January 2024

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.

BDBF’s Top 5 from 2023

2023 brought numerous updates to the UK employment law landscape. From changes highlighting a clear focus on promoting a healthy work-life balance, to better redundancy protection. It can be hard to keep track, especially with the Government showing no signs of slowing down with numerous further changes to employment law on the horizon.

So, if you missed them the first time around, here’s a look back at BDBF’s top 5 most-read articles of 2023.

1. **Employee unfairly dismissed for refusing to put work app on her personal phone**

In this case, 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. We considered the learning points for employers to note.

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

The Protection from Redundancy (Pregnancy and Family Leave) Act 2023 which came into force on 24 July 2023 granted

employees who are pregnant or returning from certain types of family leave priority status for redeployment opportunities in a redundancy situation. In this briefing, we explained the new rights, the background behind them and what steps employers need to consider taking.

3. **Data subject access requests: two opinions on the scope of the right**

Two new opinions concerning the scope of data subject access requests under the GDPR were handed down by advisors to the judges of the European Court of Justice. We considered the implications for employers.

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

We considered why the expression of views on the Israel-Gaza conflict by employees on social media may be problematic and what steps employers may take to manage the risk.

5. **New law passed which will shake up flexible working regime**

On 20 July 2023, the Employment Relations (Flexible Working) Act 2023 received Royal Assent and became law. The Act made a number of changes to the flexible working regime and allowed employees to make flexible working requests more easily. In this briefing, we summarised these changes and noted the steps employers should be taking.

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 these articles, please email info@bdbf.co.uk or your usual BDBF contact.

BDBF shortlisted for Employment Law Team of the Year at LexisNexis Legal Awards 2024

BDBF is delighted to have been shortlisted as a finalist for Employment Law Team of the Year at the LexisNexis Legal Awards 2024. The annual awards, which are now in their 11th year, "celebrate excellence and innovation across the legal sector."

Winners will be recognised at an awards ceremony in London on 14 March 2024.


BDBF
EMPLOYMENT LAW
BDBF shortlisted for Employment Law Team of the Year at LexisNexis Legal Awards 2024
Finalist of
LEXISNEXIS 2024
LEGAL AWARDS

LUNCHTIME WEBINAR – What do employers need to know about in 2024?

LUNCHTIME WEBINAR – 6 FEBRUARY 2024

2024 promises to be another busy year for employers, with major changes to employment law ahead. Our lunchtime webinar will bring you up to speed on the key developments to look out for this year.

We will cover the following areas:

- **Working time and holidays:** we will consider recent and future changes to the rules on working time and holiday entitlement, including how holiday is accrued, when it may be carried forward and how it should be paid.
- **Sexual harassment:** we will explain the new duty on employers to take proactive steps to prevent sexual harassment at work, and the consequences of failing to do so. The new duty is expected to come into force in October 2024.
- **Flexible working:** we will consider reforms coming into force in April 2024, which will make the right to request a Day 1 right, as well as future changes likely to make the process more onerous for employers. We will also discuss the new and separate right for workers to request more predictable working patterns.
- **Redundancies:** we will consider changes coming into force in April 2024, which will provide pregnant employees and those returning from certain types of family leave with special protection in redundancy situations.
- **Carer's leave:** we will outline the new right for

employees to take one week’s unpaid carer’s leave, which comes into force in April 2024.

- **Discrimination law:** we will explain recent changes to the Equality Act 2010, which were introduced to maintain the level of legal protection for workers post-Brexit. The key changes concern the rights of new mothers.
- **TUPE transfers:** we will consider recent changes to the requirements to inform and consult affected staff, which will apply to transfers taking place on or after 1 July 2024.
- **Round up of other changes on the horizon:** we will bring you up to speed on other key reforms on the horizon, including the introduction of neonatal leave, changes to paternity leave and the proposed limitation of non-compete covenants. We will also consider what a future Labour Government might mean for employment law.

Date: Tuesday, 6 February 2024

Time: 12.00pm-1.00pm

Click here to register

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EMPLOYMENT LAW

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What do employers need to know about in 2024?

BDBF Lunchtime webinar: 6th February 2024

2024 promises to be another busy year for employers, with major changes to employment law ahead. Our lunchtime webinar will bring you up to speed on the key developments to look out for this year.

We will cover the following areas:

- **Working time and holidays:** we will consider recent and future changes to the rules on working time and holiday entitlement, including how holiday is accrued, when it may be carried forward and how it should be paid.
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Date: Tuesday, 6th February 2024
Time: 12:00pm - 1:00pm

Please click here to register for the webinar

Court of Session rules that unknown future claims may be waived in settlement agreements

Overturning a decision of the Scottish EAT, the Court of Session has ruled that unknown future claims arising under the Equality Act 2010 may be waived in a settlement agreement provided that the types of claim are clearly identified.

What happened in this case?

Mr Bathgate was employed as a Chief Officer on a number of different vessels. In January 2017, his employer notified him that he was at risk of redundancy and offered settlement terms, which he accepted. Mr Bathgate entered into a settlement agreement, under which he settled all claims against his employer. His employment terminated on 31 January 2017.

Under the settlement agreement, the employer had agreed to pay notice pay, enhanced redundancy pay plus an "additional payment". The additional payment was to be calculated by reference to the terms of a maritime collective agreement and paid in June 2017. The collective agreement stated that additional payments were only due to officers under the age of 61. However, Mr Bathgate was aged 61 on the date that his

employment terminated. Therefore, the employer decided not to pay the additional payment to Mr Bathgate after all. He was notified of this on 26 June 2017, around five months after his employment had terminated.

Mr Bathgate claimed that his employer's decision not to pay the additional payment to him amounted to post-employment age discrimination. The employer accepted that the reason the additional payment was not paid was age. However, it sought to defend the claim on two jurisdictional grounds:

- first, that Mr Bathgate had entered into a settlement agreement under which he had waived his rights to pursue claims against them, including for age discrimination; and
- second, protection under the Equality Act 2010 did not apply to Mr Bathgate as he was a seafarer.

Decisions of the Employment Tribunal and EAT

The Employment Tribunal held that the settlement agreement constituted a full and final settlement of Mr Bathgate's claims. It had listed various types of claim, including age discrimination, and it also included a blanket waiver which had excluded *"all claims…of whatever nature (whether past, present or future)".* Although the Tribunal held that the claim would *not* have been precluded by virtue of the fact that

Mr Bathgate was a seafarer (on the basis that the claim concerned post-employment discrimination), the overall result was that the claim could not proceed as a result of the waiver.

Mr Bathgate appealed against the decision that the claim had been validly settled. He argued that the Equality Act 2010 did not permit the settlement of claims *before* they had arisen, and that the waiver was limited to claims which were known to the parties, or at least in existence at the time of entering into the settlement agreement. The employer cross-appealed against the decision that Mr Bathgate was entitled to bring a claim under the Equality Act 2010 even though he was a seafarer.

The EAT allowed both appeals, meaning that the end result was the same: Mr Bathgate could not proceed with the claim. However, its decision about the scope of settlement agreement waivers was significant for employers. The EAT held that in order for a settlement agreement to settle a claim under the Equality Act 2010 it must relate to a "particular complaint". The EAT noted that previous case authorities had said that:

- *actual complaints* must be identified in a settlement agreement either by a description of the claim or reference to the relevant statutory provision;
- *known potential claims* may be settled provided that a description of the claim or the relevant statutory provision is stated, although this could not be achieved

by the use of a blanket form of waiver; and

- *unknown claims* could be settled provided that the language was absolutely plain and unequivocal.

However, the EAT took issue with the last of these principles. In their view, there was no clear authority for the proposition that the words "particular complaint" included complaints that may occur at some point in future. Rather, on a proper reading of the authorities, they only went as far as saying that *known complaints* which had not yet been brought before an employment tribunal could be settled.

The EAT concluded that the words the "particular complaint" indicated that the parties must anticipate the existence of an actual complaint or circumstances where the grounds of the complaint already existed. It also concluded that general waivers of all and any claims, and waivers listing all and any type of complaint by reference to their nature or section numbers, were unenforceable.

The EAT went on to say that it was apparent that Parliament's intention had been that the ability to waive statutory employment claims would *only* be available in respect of complaints that had already arisen between the parties. To extend this further would expose claimants to the risk of signing away their rights without understanding what they are doing.

Therefore, the EAT held that the settlement agreement waiver

did not preclude Mr Bathgate from pursuing a claim. However, the EAT also allowed the employer's cross appeal, finding that he *was* a seafarer at the time of dismissal, meaning he was precluded from bringing a claim. The fact that the claim concerned post-employment discrimination made no difference.

Decision of the Court of Session

Once again, both parties appealed. Mr Bathgate appealed against the EAT's decision that he was not was entitled to bring a claim under the Equality Act 2010 because he was a seafarer. At the same time, the employer cross-appealed the decision that the waiver in the settlement agreement did not extend to unknown future claims.

Taking the settlement agreement waiver issue first, the Court allowed the employer's appeal for the following reasons.

- The requirement that a settlement agreement must relate to a "particular complaint" does not mean that the complaint must have been known of, or its grounds at least in existence, at the time of the agreement. There was no logical or principled basis upon which to conclude that a waiver would only settle future claims based on facts and circumstances in existence at the time of entering into the settlement agreement.

- It also made no sense to maintain that a potential

future claim could be settled by way of a COT3 agreement (to which no "particular complaint" requirement applies), but not by way of settlement agreement, to which provisions regarding independent legal advice and insurance applied.

- The correct approach was that set out in the EAT's decision in *Hilton UK Hotels Ltd v McNaughton*. In that case, the EAT decided that a future claim of which the employee does not, and could not, have knowledge would not be effectively waived by a blanket-style waiver. To be effectively waived, a future claim must be identified by either a generic description (e.g. unfair dismissal) or a reference to the section of the statute giving rise to the claim (e.g. s.94(1) of the Employment Rights Act 1996). Provided that the wording used is *"plain and unequivocal"* an unknown future claim *may* be settled.

- The Court also agreed with earlier authorities which had said the "particular complaint" requirement was not temporal in nature. The Court held that all that matters is *"…the presence or absence in the waiver of sufficient identification of the complaint being made".*

- The Explanatory Notes to the Equality Act 2010 state that the settlement agreement must be tailored to the circumstances of the claim, not that it must settle an existing claim. Comments made in a Parliamentary debate on predecessor legislation did not change the position since they concerned a different statute (and, in any

event, the comments did not suggest that settling future claims in the context of a clean break settlement was prohibited).

In conclusion, the Court held that the Equality Act 2010 does not exclude the settlement of future claims provided that *"the types of claim are clearly identified"* and *"the objective meaning of the words used is such as to encompass settlement of the relevant claim".* In Mr Bathgate's case, the settlement agreement waiver *had* referred to future age discrimination claims. That being the case, the Employment Tribunal did not have jurisdiction to hear the claim.

For completeness, the Court considered the seafarer issue briefly. The Court agreed with the EAT, holding that Mr Bathgate *was* a seafarer at the time of dismissal and was, therefore, precluded from bringing a claim. The fact that the claim concerned post-employment discrimination made no difference – he was still outside the scope of protection of the Equality Act 2010.

What are the learning points for employers?

This decision underlines the importance of particularising claims of concern in settlement agreements. Only the particularised claims will be effectively waived, even where the claims are not known about or in existence at the time of entering into the settlement agreement. Therefore, employers should consider what, if any, potential claims could arise in the future and ensure that these are addressed in the

settlement agreement, either by way of a generic description or reference to the relevant statutory provision. However, employers cannot circumvent this exercise by way of a general waiver of all claims – these continue to be unenforceable.

The Court of Session's decision is not binding on Employment Tribunals and the EAT in England and Wales, but it will be regarded as highly persuasive. It is not yet known whether Mr Bathgate will seek permission to appeal to the Supreme Court.

Bathgate v Technip Singapore PTE Ltd

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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.

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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?

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

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.

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.

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.

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).

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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