



# Employment law developments in 2023: past, present and yet to come

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# Speakers



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## Employment law developments in 2023: past, present and yet to come

### BDBF Lunchtime webinar: 18th July 2023

2023 has already been a busy year for employers. Our lunchtime webinar will quickly bring you up to speed on the key cases and developments from the first half of the year and round up what lies ahead in the coming months.

We will cover the following areas:

- Recent cases on settlement negotiations and agreements, disability discrimination and flexible working.
- New laws passed on neonatal leave, carer's leave and pregnancy and redundancy.
- New guidance for employers on adjustments for mental health, managing stress at work and menopause and menstrual health in the workplace.
- Looking ahead: proposals to reform the law on employee competition, working time and holidays, TUPE consultation and whistleblowing.

**Date:**  
Tuesday, 18th July  
2023

**Time:**  
12:00pm - 12:50pm

**Please click here  
to register for the  
webinar**

[www.bdbf.co.uk](http://www.bdbf.co.uk)

# What are we going to cover today?

When?	Development?
Past	Recent cases on settlement negotiations and agreements, disability discrimination and flexible working.
Present	<p>New laws passed on neonatal leave, carer's leave and pregnancy and redundancy.</p> <p>New guidance for employers published on adjustments for mental health, managing stress at work and menopause and menstrual health in the workplace.</p>
Future	Proposals to reform the law on employee competition, working time and holidays, TUPE consultation and whistleblowing.

# THE PAST

# When are settlement negotiations “off the record”?

- Without prejudice rule applies to negotiations which are genuinely aimed at resolving an existing dispute.
- When will there be a “dispute”?
  - ✓ Once litigation has started.
  - ✓ Pre-litigation **if** the parties contemplated (or might reasonably have contemplated) that litigation would follow if settlement negotiations failed.

# Were the parties in “dispute” pre-litigation?



After employee raised a grievance  
alleging discrimination

*Garrod v Riverstone Management Ltd, EAT*



After parties agreed employee’s exit  
and to enter into a settlement  
agreement

*Scheldebouw BV v Evanson, EAT*

# Settlement agreements: is it possible to settle future claims?

Not possible to waive **unknown** future claims as this exposes employees to the risk of signing away their rights without understanding what they are doing.

*Bathgate v Technip, EAT*

It was possible to waive future claims which arose out of matters which were **well known** to the parties and very similar to claims that had been settled in the past.

*Clifford v IBM UK Ltd, ET*

# Cases on disability and flexible working

## Disability and competitive interview processes

- Competitive interview processes may disadvantage disabled candidates, triggering the duty to make reasonable adjustments.
- One adjustment would be to slot a disabled candidate into the role but the wider impact of doing so should be considered to decide whether this is “reasonable”.

*Hilaire v Luton Borough Council, EAT*

## Final decisions on flexible working requests

- The final decision in a flexible working process amounts to the application of a working pattern and may give rise to a discrimination claim.
- It makes no difference if the employee never actually works under that pattern and/or the employer later reverses its decision. Given this risk, consider the use of trial periods.

*Glover v Lacoste UK, EAT*



# THE PRESENT

# New leave and pay rights (1)

	Carer's leave	Neonatal leave
Qualification	<p>Employees who need to provide care for, or make arrangements to provide care for, a dependant who has:</p> <ul style="list-style-type: none"><li>• an illness or injury (whether physical or mental) likely to require at least three months of care;</li><li>• a disability under the Equality Act 2010; or</li><li>• care needs relating old age.</li></ul>	<p>Employees who are parents of babies:</p> <ul style="list-style-type: none"><li>• up to 28 days old; and</li><li>• who require neonatal care for at least one week without interruption.</li></ul>

## New leave and pay rights (2)

Right	Carer's leave	Neonatal leave
Day 1 right	✓	✓
Amount of leave	TBC (1 week+)	TBC (1 – 12 weeks)
Entitlement to statutory pay	✗	✓
Terms and conditions maintained	✓	✓
Right to return to work	✓	✓
Compensation for breach of process	✓	✓
Detriment and dismissal protection	✓	✓

# Protection from Redundancy (Pregnancy and Family Leave) Act 2023



Right of first refusal for suitable alternative roles in redundancy situations



Pregnant women  
from point of  
notifying employer

Those absent on  
maternity, adoption  
and shared parental  
leave

Recent returners  
from maternity,  
adoption and shared  
parental leave

# New guidance for employers

1

Acas guidance on  
reasonable  
adjustments for  
mental health

2

Acas guidance on  
managing stress at  
work

3

BSI Standard on  
menstruation and  
menopause in the  
workplace

# Acas guidance on managing stress at work

Advocates an holistic approach – stressors in and out of work

How managers should approach sensitive conversations


Stress risks assessments

Steps to take when an employee goes off sick with stress

Making adjustments

Tips for employers on how to avoid stress at work

# Acas guidance on reasonable adjustments for mental health



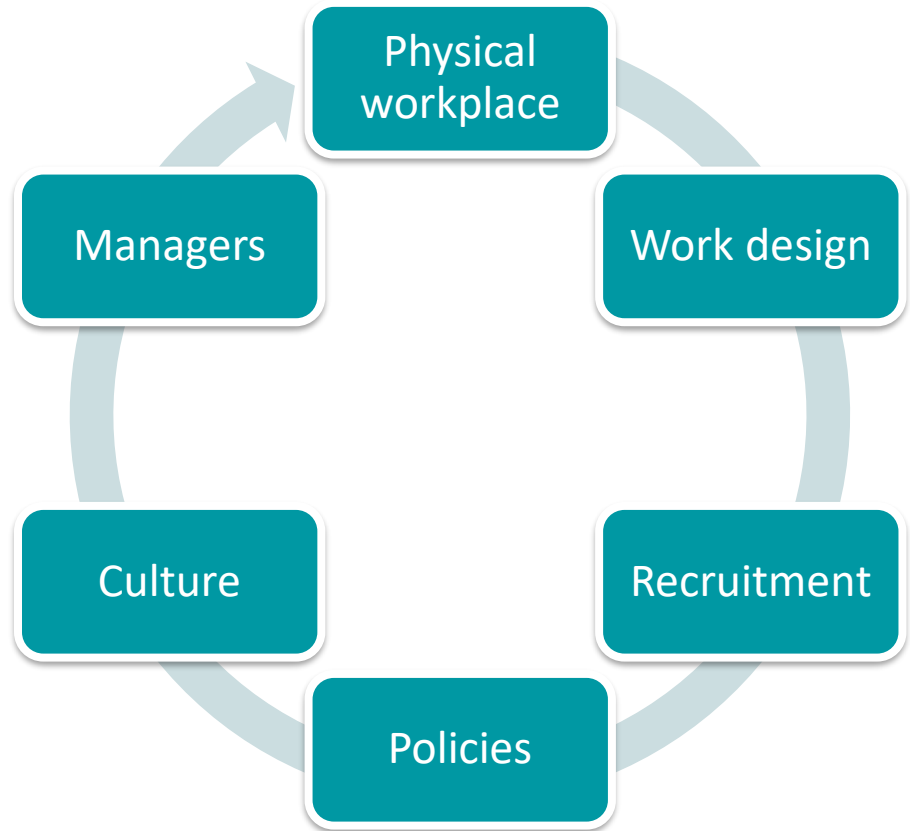
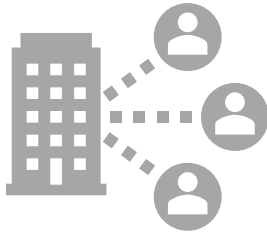
Lots of examples of adjustments for those with mental health conditions

Responding to requests for reasonable adjustments for mental health

Checklist of what to cover in a meeting to discuss reasonable adjustments

Managing staff with adjustments in place and ensuring internal policies are accessible

# BSI standard on menopause and menstrual health in the workplace





# THE FUTURE

# Limiting the length of non-compete covenants

- Non-competes to be limited to three months - what we do and don't know:
  - ✓ Other types of post-termination restriction may be longer.
  - ✓ Applies to employment and worker contracts only.
  - ? Unclear whether it will apply to existing contracts.
  - ? Unclear how garden leave will be treated.
  - ? Unclear when it will come into force.

# Working time and holidays



## Record-keeping

- Clarification that employers are not required to have systems to measure and record the daily working time of workers.

## Annual leave entitlement

- Abolition of two types of annual leave and creation of a single pot of 5.6 weeks' leave.
- May affect the rate of pay – normal vs basic.

## Rolled-up holiday pay

- Introduction of RUHP for all employers
- Permits payment in lieu of holiday pay at rate of 12.07% with nothing to be paid when holiday taken.



# TUPE informing and consulting

- **Current position:**
  - Employers must inform and consult with representatives of affected employees.
  - Micro employers may inform and consult with affected employees directly.
- **Proposal:**
  - Extend the micro-employer exemption to employers with:
    - up to 49 employees; or
    - any number of employees where a transfer of up to nine employees is proposed.

# Whistleblowing framework



- Review launched in March and due to close in Autumn - terms of reference:
  - Does the whistleblowing framework facilitate disclosures?
  - Does the whistleblowing framework protect workers?
  - Is information about whistleblowing available and accessible to workers, employers and others?
  - What are the wider benefits and impacts of the whistleblowing framework?
  - What best practice looks like in terms of responding to disclosures.

# What else is on the horizon?

## Legislation

- Retained EU Law (Revocation and Reform) Act 2023
- Employment Allocation of Tips Act 2023
- Employment Relations (Flexible Working) Bill
- Worker Protection (Amendment of Equality Act 2010) Bill
- Worker (Predictable Terms and Conditions) Bill
- Strikes (Minimum Service Levels) Bill

## Areas for possible reform in future

- Consultation on statutory code of practice on dismissal and re-engagement
- Consultation on holiday entitlement for part year workers
- Consultation on removal of the cap on bankers' bonuses
- Review of the Senior Managers and Certification Regime
- More flexible approach to paternity leave promised

# Our contact details



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