



Brachers Bitesize

Employment Law throughout 2022

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Presented by:

Lauren Sellwood, Solicitor and Sophie Jarvis, Trainee Solicitor – Employment, Brachers LLP

Presenters



Lauren Sellwood

Solicitor, Employment

LaurenSellwood@Brachers.co.uk



Sophie Jarvis

Trainee Solicitor, Employment

SophieJarvis@Brachers.co.uk

Today's session

- 01** Recent developments on industrial action (Conduct of Employment Agencies and Employment Business (Amendment) Regulations)
- 02** Employment tribunals trends and statistics throughout the year
- 03** Key cases from 2022 such as Harpur Trust v Brazel, Burke v Turning Point Scotland and Quinn v Sense Scotland
- 04** Anticipated key cases in 2023

Recent developments on industrial action (Conduct of Employment Agencies and Employment Business (Amendment) Regulations)

Regulation 7

- Used to be an offence to provide temporary agency workers to perform duties of employees taking part in strike or industrial action
- Government introduced new regulations on 21 July 2022 to strike out Reg 7
- Agency workers can now lawfully be provided on short notice as temporary cover for essential roles during strike action
- Applies across all sectors
- Employers' responsibility to hire cover with necessary skills and qualifications to comply with Health & Safety rules

Facts and figures relating to ET trends and Tribunal Statistics

April – June 2022

- 19,000 claims (a decrease of 10% compared to Q1 2020/2021)
- 15,000 disposed claims (resolved or closed cases) (an increase of 114%)
- 487,000 cases outstanding at the end of June 2022 (a decrease of 2%)

Trends

- Tribunal is beginning to slowly clear backlog
- Claimants may be more prepared to settle
- Cases take between 6 – 12 months to be listed for a first hearing

Think carefully about undertaking **cost benefit analysis** for possibility of settlement

Key case law decisions: Harpur Trust v Brazel

Calculating Holiday Pay

Facts

- Mrs Brazel was a music teacher on a permanent zero hour contract
- Paid work hours varied throughout the year
- 5.6 weeks' paid leave to be taken during Easter, summer and Christmas holidays
- The Trust calculated her average pay over 12 weeks and was paid one third per holiday period
- The Trust changed the calculation to 12.07% rule – ACAS guidelines
- Mrs Brazel argued she was underpaid under the new calculation method

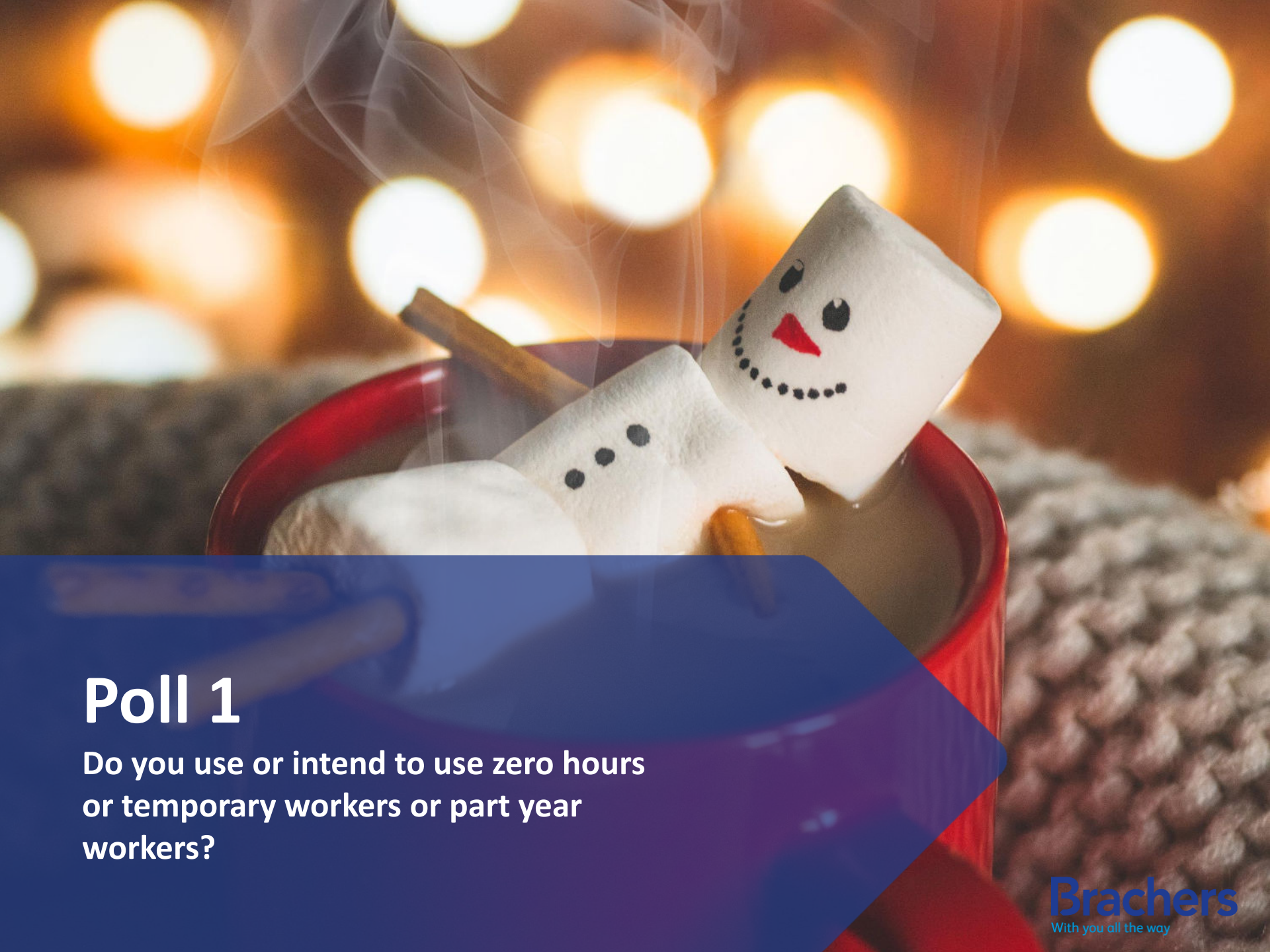
Key case law decisions: Harpur Trust v Brazel

Judgment

- Supreme Court held the 12.07% rule is no longer permitted
- Term-time and other “part-year workers” are entitled to 5.6 weeks’ annual leave per year

Employers must check:

- How holiday pay is calculated
- Whether steps must be taken to change holiday pay practices
- If it is necessary to make repayments to employees underpaid under the old 12.07% calculation



Poll 1

Do you use or intend to use zero hours or temporary workers or part year workers?

A festive floral arrangement featuring various greenery, red berries, and striped pumpkins. The arrangement is set against a light-colored wooden background. It includes large green leaves, clusters of red berries, and several small, striped pumpkins. The overall theme is holiday and winter.

Poll 2

How do you deal with holiday pay?

Key case law decisions: Burke v Turning Point Scotland

Long COVID and disability

- First UK case deciding symptoms of long COVID amounted to disability under s6 Equality Act 2010
- Mr Burke required assistance with day-to-day normal activities
- Symptoms were:
 - **substantial** – more than minor or trivial
 - **long term** – likely to last 12 months or longer
- Outcomes of long COVID cases are fact dependant

Key case law decisions: Quinn v Sense Scotland

Long COVID and disability

- Not all long COVID sufferers will be considered disabled
- Mrs Quinn had multiple symptoms which had a substantial effect on her daily life
 - Brain fatigue, brain fog and inability to drive
- Too early to establish whether it would be long term
- Distinguished from *Burke v Turning Point Scotland* where Mr Burke was absent for 9 months
- Emphasises the outcomes of long COVID cases are fact dependant

Key case law decisions: Bathgate v Technip UK Ltd

Settlement agreements and future claims

- S147 Equality Act does not allow settlement of unknown future claims
- Condition of a qualifying agreement is that “the contract relates to the **particular complaint**”
- Conflicting case law, unlikely to see drastic changes in near future

Employer next steps

- Be alert to developments
- Be considerate of actions following settlement agreements
- Ensure no employer actions amount to discrimination due to risk of claim

Anticipated key cases in 2023: Hope v British Medical Association

Unfair dismissal

- S98 Employment Rights Act 1996 determines whether dismissal is unfair
- Employer must show:
 - a. The reason for the dismissal
 - b. That the reason for the dismissal was fair (capability, conduct, redundancy, contravention of a duty or restriction imposed)

Facts

- ET held Hope was fairly dismissed and referred to EAT
- Hope argued to the EAT that the ET:
 - Had not considered whether his conduct was gross misconduct
 - Wrongly characterised non-attendance at meetings as misconduct

Anticipated key cases in 2023: Hope v British Medical Association

Held

- Label or characterisation of gross misconduct did not matter
- Key question is whether the employer acted reasonably in the circumstances
- Takes into account the size and resources of the employer
- Whether conduct meets the definition of “gross misconduct” is relevant, but not determinative

Hearing date

- Originally due to be heard in Court of Appeal on 2 February 2023
- Now vacated, awaiting new hearing date

Anticipated key cases in 2023: HMRC V Professional Game Match Officials

Employment status and types of working

- Referees paid fees and expenses for each match officiated
- Could accept or reject matches offered and were provided uniform and benefits
- Code of practice stated self employed with no guarantee of match offers
- Three main factors for employment relationship:
 1. Personal service and substitution rights
 2. Control
 3. Mutuality of obligations

Anticipated key cases in 2023: HMRC V Professional Game Match Officials

Held

- ET concluded there was insufficient mutuality of obligation and lack of control to establish an employment relationship
- On appeal, the Upper Tribunal held the ET erred in stating there was no sufficient framework of control in individual contracts
- Court of Appeal allowed HMRC's appeal against the decision that referees were not employees

Hearing date

- Due to be heard at Supreme Court on 26 and 27 June 2023

Anticipated key cases in 2023: Manjang v Uber Eats UK Ltd and others (Raja v Uber)

Discrimination

- Two separate claims to ET allege facial recognition system is indirectly discriminatory on the grounds of race
- Claimants supported by Independent Workers Union of Great Britain (IWGB) and App Drivers or Couriers Union (ADCU)
- Drivers must log in by providing photo of their face and if it does not match there is a risk of account termination
- More inaccurate results occur when used by black and minority ethnic workers

Hearing date

- Full hearing date awaited



Questions

Thank you