



Kent CIPD Webinar
Employment Law Update
October 2022

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Welcome

Today's Session

- 01** Legal Update
- 02** Case Law Update
- 03** Looking ahead to 2023
- 04** Looking beyond 2023

Legal update

Industrial Action

Conduct of Employment Agencies and
Employment Businesses (Amendment)
Regulations 2022

- Came into force July 2022
- Law change allows businesses most impacted by industrial action to bring in temporary, skilled workers at short notice
- The reform applies across all sectors and aims to ensure critical public sector services and people's daily lives remain uninterrupted by staff strikes
- Achieved by removing provision that restricted employment agencies from supplying work seekers for positions held by workers taking part in strike action

Fit Notes

- Applied from 1 July 2022
- Category of people who can sign fit notes has been extended:
 - nurses;
 - occupational therapists;
 - pharmacists and
 - physiotherapists.
- Guidance for employers has been updated.

Right to Work Checks

- Came into force 1 October 2022
- Government has changed its Covid-19 relaxed rules around a digital solution
- Checks must now be:
 - Online via the Home Office
 - Digital using an IDSP
 - Manual
- Employers will bear the cost of using these services
- Action?

Staff Suspension

- Introduced 8 September 2022
- New ACAS guidance on suspension
- Covers deciding when to suspend an employee, the process for suspension, supporting an employee's mental health and pay and holiday during suspension
- Not legally obliged to follow as this is only guidance, but good practice
- Covers practical aspects of suspension and a reminder to consider alternatives.

Menopause in the Workplace

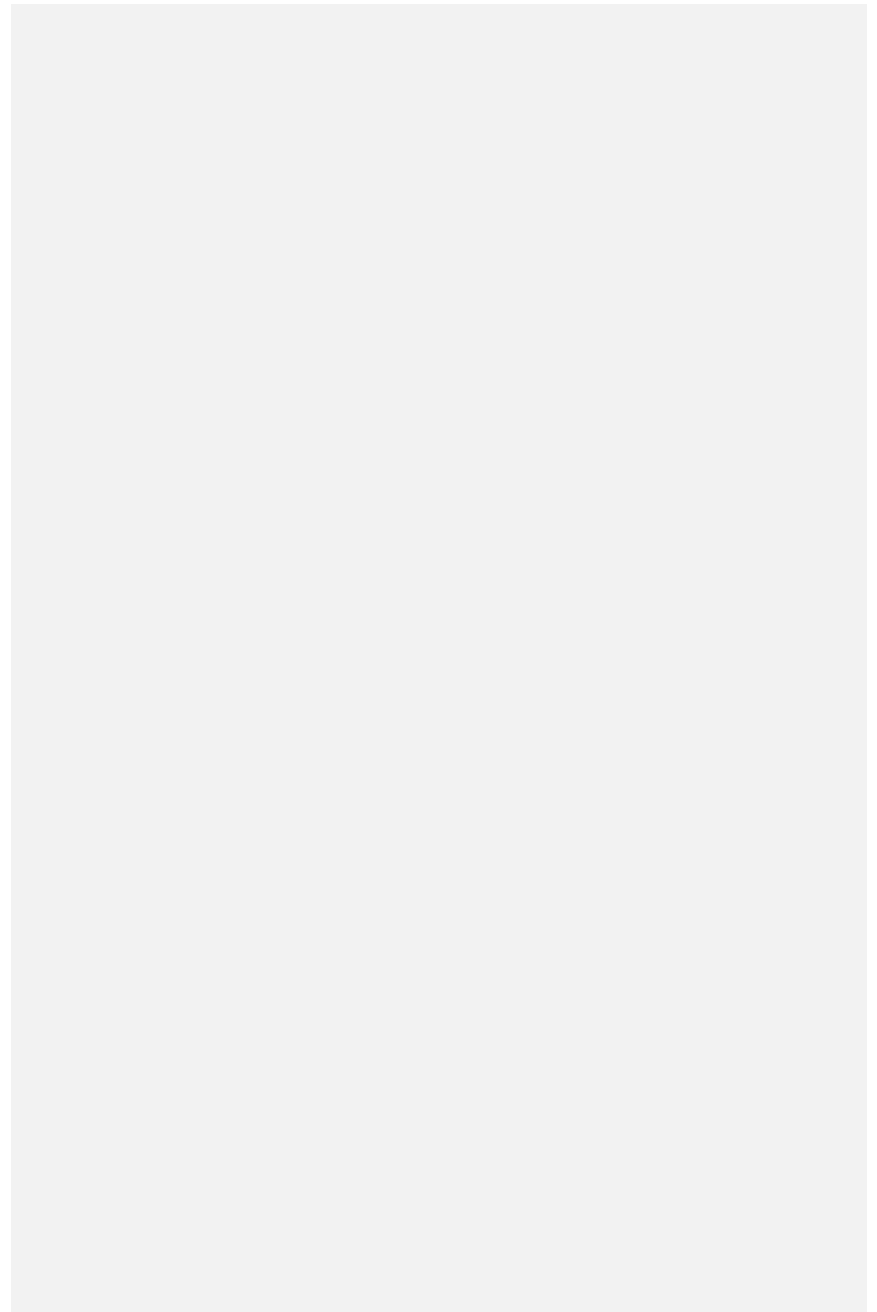
- Government response to independent report on menopause in the workplace
- Confirmed no intention to introduce menopause as a protected characteristic under the Equality Act 2010
- However, the government plans to consult with other bodies such as the Equality and Human Rights Commission and ACAS to assess and improve current guidance to reflect good practice

Tribunal Statistics

Employment Tribunal Quarterly
Statistics April – June 2022

- HMCTS has recently released quarterly statistics.
- Main trends:
 - Decrease in claims received
 - Increase in disposed claims
 - Outstanding claims rising
- Received 19,000 claims, decreased by 10% compared to Q1 for 2020/21.
- An increase of 114% of disposed claims – resolved or closed.
- Highest awards this period included:
 - Disability discrimination £265,719
 - Age discrimination £243,636
- Average award £5,664

Case Law Update



Mackereth v Department for Work and Pensions & anor.

- Concerned philosophical beliefs under Equality Act 2010
- Claimant required to use transgender service users by their preferred pronouns
- EAT held that Christian doctor's belief that person cannot change their biological sex was protected under Equality Act 2010
- *A lack of believe in transgenderism could be protected*
- However, employer's actions were not found to be acts of discrimination
- Be aware of further updates.

Harpur Trust v Brazel

- Held that employees that work part of the year are entitled to the same holiday as employees that work all year
- This applies to term-time only workers, seasonal workers, bank staff, zero-hour contracts and workers engaged under umbrella contracts
- Likely to impact education, health and social care, hospitality, retail, manufacturing and recruitment agency industries

Harpur Trust v Brazel

- Employers should check whether they are using the correct calculation and should amend any incorrect methods previously used
- Employers should consider how part-year workers are employed going forward
- This could be engagement on a temporary contract covering a specific period or on a contract with regular work hours

Burke v Turning Point Scotland

- Claimant successful in arguing that symptoms of long COVID amounted to a disability.
- Claimant needed help with basic day-to-day activities, which made the symptoms substantial, and they were likely to be long-term.
- First decision in the UK to successfully argue that long COVID amounts to a disability
- Reminder that each case will turn on its own facts

Quinn v Sense Scotland

- Employee who was suffering from long COVID was found not to be disabled under the Act
- Differentiated from *Burke v Turning Point Scotland* because at the time of dismissal, the employee had not been diagnosed with long COVID and it was too soon to tell if it was likely to last 12+ months
- Tribunal found whilst the employee's condition was substantial, it was not long-term for the purpose of disability definition

Rentplus UK Ltd v Coulson

- Concerned the scope of the ACAS Code
- Can an uplift for failure to follow the code apply where the reason relied upon for dismissal was redundancy?
- Tribunal and EAT held that the real reason for dismissal was Claimant's performance
- ACAS code should have applied
- Reminder that Tribunal will look beyond the reason for dismissal given by the employer

Law by Design Ltd v Ali

- Involved non-competition restrictive covenants
- Restrictions in shareholder agreement and service agreement
- 12 month non-compete clause
- Service agreement restriction held to be enforceable
- Useful reminder to issue restrictions alongside a pay rise or promotion.

University of Dundee v Chakraborty

- Considered whether draft investigation reports are disclosable in later legal proceedings
- EAT held that the fact legal advice had been sought did not render the investigation itself or initial drafts to be covered by legal privilege
- Just because a document has gone to a lawyer may not mean it is covered by legal advice privilege.

**Ali v Heathrow
Express and
Redline Assured
Security Ltd**

- Claimant worked as an airport security guard
- Complained that a security test amounted to harassment by reference to his religion
- S.26 (1) Equality Act 2010:

“A person (A) harasses another (B) if—

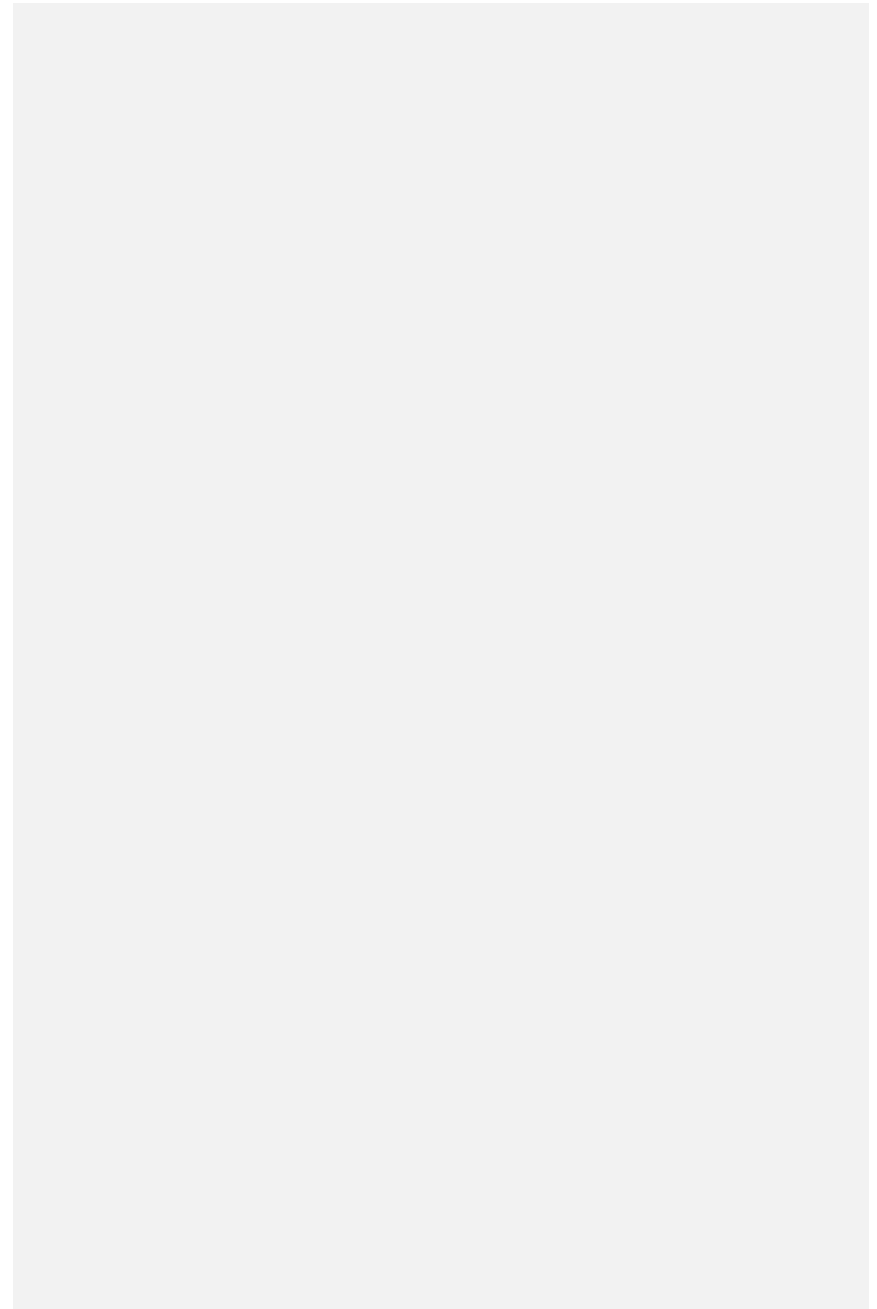
(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Looking Ahead to 2023



Chancellor's MiniBudget

- Announced on 23 September 2022
- Headline employment related issues include:

IR35 off-payroll rules

- 2017 and 2021 reforms to be repealed
- Responsibility to determine employment status for tax purposes and to pay appropriate tax and NICs falls back to contractor
- Will take effect from April 2023

Chancellor's MiniBudget

Bankers' Bonus Cap

- Current cap on banker's bonuses will be removed
- Currently capped at 100% of fixed pay or 200% with shareholder approval
- No set date from when will apply.
- Will this lead to more employment tribunal claims?

Retained EU Law (Revocation and Reform) Bill 2022

- Aims to accelerate removal and replacement of EU law, so it expires on 31 December 2023
- If passed, all EU retained law will either be reinstated, replaced or revoked
- This could affect:
 - Working Time Regulations 1998
 - Agency Workers Regulations 2020
 - Part-Time Workers Regulations 2000
 - Fixed-Term Employees Regulations 2002
 - TUPE 2006
 - Information & Consultation of Employee Regulations 2004
 - Maternity & Paternal Leave Regulations 1999

Retained EU Law (Revocation and Reform) Bill 2022

- The government has not yet published any detail on what it intends to repeal, revoke or retain
- Possible changes **could** include:
 - Clarification on holiday pay calculation
 - A cap on discrimination claim compensation
 - TUPE consultation changes
 - Agency Worker regulations could be repealed
 - Changes to protection for equal pay for work of equal value
- Removing legislation may lead to uncertainty for employers and employees
- It allows courts greater discretion to depart from case law

Retained EU Law (Revocation and Reform) Bill 2022

- However, the UK entered into a Trade and Co-operation Agreement (TCA) on 1 January 2021
- TCA contains 'level playing field' provisions for fundamental rights at work, occupational health and safety, fair working conditions etc.
- TCA would not prevent the Bill from becoming law, but a breach could have trade implications such as the introduction of tariffs

Data Protection Changes

- The DCMS Response to Consultation 'Data a new direction' was published June 2022
- The Data Protection and Digital Information Bill (Data Reform Bill)- Introduced in July 2022 but now paused -several laws likely to be amended including UK GDPR, Data protection Act 2018 and PECR (ePrivacy).
- Changes could include:
 - Some exclusions around consent
 - DSAR can be refused if requests are vexatious or excessive.
 - Reform of the ICO

Family and Care Related Leave Proposals

Neonatal Care (Leave and Pay) Bill

- Neonatal Care (Leave and Pay) Bill
- Bereavement Leave and Pay (Stillborn and Miscarried Babies) Bill
- Carer's Leave Bill
- Fertility Treatment (Employment Rights) Bill
- No set date for introduction
- Further detail awaited

Allocation of Tips

Employment (Allocation of Tips) Bill

- No set date
- Intention to create a new legal obligation on employers to allocate tips, gratuities and service charges to workers without deductions other than taxes
- Workers will have the right to see employer's records showing how tips are distributed
- Workers will no longer be able to agree to reduce salary in return for receiving tips.

Further Proposals

- New statutory code for 'fire and rehire'
- New employer duty to prevent sexual harassment
- New law prohibiting confidentiality clauses in contracts from preventing disclosure to police, regulated health and care or legal professionals
- New law requiring confidentiality clauses to set out their limitations

Further Proposals

- Law on criminal record disclosures to be amended, reducing disclosure period for sentences lasting 4 years or less
- Redundancy protection for new parents to be extended to 6 months after they return
- New law introducing right for workers to request a more predictable and stable contract after 26 weeks service

Further Proposals

- New law to increase break in continuous employment from one week to four weeks
- Exclusivity clauses to be extended to employees on contracts that guarantee hours earning them less than lower earning limits

Thankyou

01 Slides

02 Survey

03 Next Session

04 Ideas and Suggestions

