

Diversity HR - Employment Law Update

Key cases and legislative changes

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Diversity HR is one of the leading independent specialist recruitment agencies for HR jobs in London and the South East (covering Essex, Kent, East and West Sussex, Surrey and Hampshire).

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Today's Webinar

01 New Legislative Rules and Proposals

- Employment Tribunal update
- Annual rate increases
- Harassment Bill
- Flexible Working Bill
- “Fire and Rehire”
- Increased protections for pregnancy, families and carers
- EU Revocation Bill

02 Key Case Law Decisions

- Recent cases
- What to look out for in 2023



Employment Tribunal Update: Waiting Times

Employment Tribunal Statistics

Ministry of Justice Q4 2022/2023

- Received 23,000 claims and disposed of 20,000 claims
- 8,000 single claims and 15,000 multiple claims
- 477,000 outstanding cases for 2022/2023 (37,000 single claims, 440,000 multiple claims)

Employment Tribunal Waiting Times

Waiting Time for Hearings

- Average time between a Claimant presenting their ET claim and their “first hearing”:

2008 – 2018	30 weeks
2019	39 weeks
March 2021	49 weeks

- “First Hearing” may not mean a final liability hearing
- Significant regional variations in waiting times

A background image of a clear blue sky with scattered white cumulus clouds. A dark blue arrow-shaped graphic points from the left towards the right, containing the main text.

Employment Tribunal Update: Cloud Video Platform (CVP)

Usage of CVP

- Video hearings are still commonly being used following COVID-19
- **1,500 – 1,600 hours** a week on such hearings nationally
- Compared to about 2,500 - 3,000 hours a week at the height of the pandemic

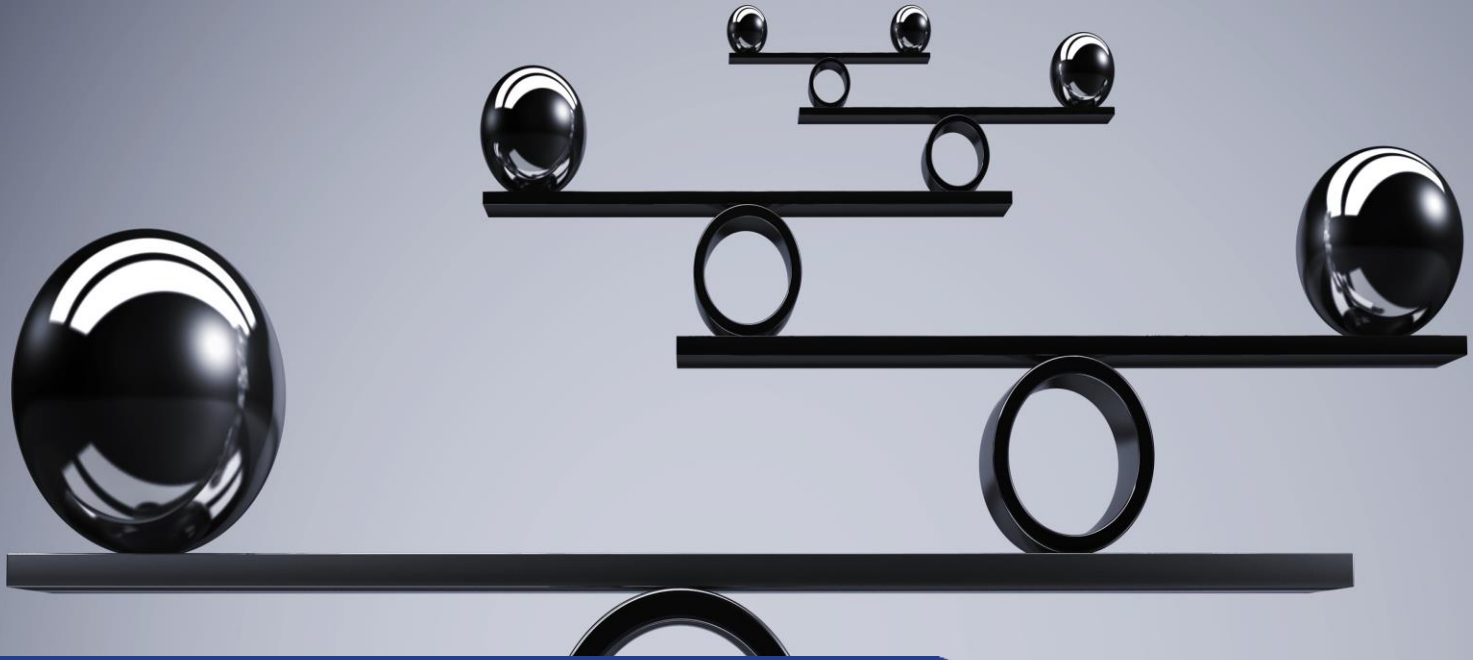


Employment Tribunal Update: Vento Bands

Injury to feelings award

- Lower band **£1,100 - £11,200** for less serious cases
- Middle band **£11,200 - £33,700** for cases which do not merit an award in the upper band
- Upper band **£33,700-£56,200** for most serious cases
- Amounts in **excess of £56,200** in exceptional cases

From 6 April 2023



Employment Tribunal
Update: Compensation
limits increased

Compensation and statutory payments

Increase on limits

- New limit on “week's pay” increased from £571 to **£643**
- Statutory redundancy payment maximum or basic award increased from £17,130 to **£19,290**
- Compensation award for unfair dismissal increased from £93,878 to **£105,707**

From 6 April 2023



Annual rate increase

National Minimum & Living Wages

2023 Rates - Took effect on 1 April 2023

	Rate from April 2023	Previous rate	Annual increase (%)
National living wage	£10.42	£9.50	9.7
21-22 year old	£10.18	£9.18	10.9
18-20 year old	£7.49	£6.83	9.7
16-17 year old	£5.28	£4.81	9.7
Apprentice	£5.28	£4.81	9.7

The National Minimum Wage (Amendment) Regulations 2023

Statutory Sick Pay (SSP)

2023 increase – Took effect from 6 April 2023

- £109.40 per week
- Up to 28 weeks
- From the 4th day

Previous rate – 2022/23

- £99.35 per week

Family related payments

2023 Rates - Took effect on 2 April 2023

- Statutory:
 - Maternity Pay
 - Paternity Pay
 - Adoption Pay
 - Shared Parental Pay
 - Parental Bereavement Pay
- First 6 weeks – 90% of average weekly earnings
- Remaining weeks - £172.48 or 90% (lower amount)

Previous rate – 2022/23

- Up to £156.66

A row of white dominoes is shown falling in a line from left to right. The dominoes are white with black pips. The background is a light blue gradient. A dark blue arrow-shaped graphic points from the left towards the right, partially overlapping the dominoes.

The Harassment Bill

Worker Protection (Amendment of Equality Act 2010) Bill

Background

- Current law prohibits employers from harassing their staff and employers may be vicariously liable for harassment carried out by their employees
- In *Unite the Union v Nailard* it was held that the Equality Act does not cover liability for third-party harassment
- A 2018 Select Committee workplace sexual harassment inquiry criticised gaps in protection and enforcement measures and consultation launched

Worker Protection (Amendment of Equality Act 2010) Bill

What does it do?

- Two new (reinstated to some degree) requirements:
- New Section 40 EQ 2010:
 - An employer (A) will be treated as harassing a person (B) if:
 - B is harassed by third parties (includes clients and customers) during the course of their employment
 - The employer fails to take all reasonable steps to prevent third party harassment
- A third party will be defined as a person other than either the employer, or an employee of employer.

Worker Protection (Amendment of Equality Act 2010) Bill

What does it do?

- New Section 40A:
 - An employer (A) must take all reasonable steps to prevent "sexual harassment" of its employees in the course of their employment.
 - For these purposes "sexual harassment" means harassment of the kind described in section 26(2) of the EqA 2010 (unwanted conduct of a sexual nature).

Worker Protection (Amendment of Equality Act 2010) Bill

What does it do?

- A breach of the employer's duty to take all reasonable steps (or a breach of section 111 or 112 of the EqA 2010 which relate to a breach of that duty) will be enforceable in two ways:
 - by the EHRC as an unlawful act under its existing enforcement powers in Part 1 of the Equality Act 2006; and
 - by an employment tribunal where it has first found a breach of section 40 which involved, to any extent, sexual harassment.
- 25% uplift on damages awards
- New Statutory Code of Practice on Prevention of Sexual Harassment to come with the new Act.

Worker Protection (Amendment of Equality Act 2010) Bill

The Bernard Manning problem:

- In the following circumstances, A will not be treated as having failed to take all reasonable steps to prevent the harassment solely because A did not seek to prevent the expression of opinion:
 - a third party harasses B in the course of B's employment;
 - the harassment falls within section 26(1) (unwanted conduct related to a relevant protected characteristic) and not within section 26(2) or (3) (Sexual harassment and Rejection of or submission to conduct of a sexual nature);

Worker Protection (Amendment of Equality Act 2010) Bill

The Bernard Manning problem:

- the conduct constituting the harassment involves a conversation in which B is not a participant, or a speech which is not aimed specifically at B;
- the conversation or speech involves the expression of an opinion on a political, moral, religious or social matter;
- the opinion expressed is not indecent or grossly offensive; and
- the expression of the opinion does not have the purpose of violating B's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

Worker Protection (Amendment of Equality Act 2010) Bill

What stage is it at?

Not imminent.

House of Commons 1st Reading – 15th June 2022

House of Commons 2nd Reading – 21st October 2022

House of Commons Committee Stage – 23rd November 2022

House of Commons Report Stage – 3rd February 2023

House of Lords 1st Reading – 6th February 2023

House of Lords 2nd Reading – 24 March 2023

House of Lords Report Stage – TBC

House of Lords 3rd Reading – TBC

Consideration of Amendments – TBC

Royal Assent – TBC



Worker Protection (Amendment of Equality Act 2010) Bill

Issues

- Unclear what will amount to reasonable steps in each case.
- Unclear how this will interact with the current reasonable steps defence within the Equality Act for acts of harassment.
- Unclear how far “third parties” will be applied and whether what is reasonable will vary dependent on how remote the connection becomes.
- Fuller details are awaited.



The Flexible Working Bill

Employment Relations (Flexible Working) Bill

Background

- Under current law (ERA 1996) employees with at least 26 weeks' continuous service have the right to request "flexible working".
- Employers must consider these requests in line with a statutory Code of Practice
- Employers are obliged to respond to these requests within 3 months
- One request in 12 months

Employment Relations (Flexible Working) Bill

Background

- In 2021, a Government consultation sought feedback on proposals to reform the right to request flexible working
- A response to the consultation was given in December 2022 in which Government committed to measures identical to those in the current Bill along with making flexible working a day 1 right

Employment Relations (Flexible Working) Bill

What does it do?

- Day 1 Right
- Removes the requirement for employees to explain their application's effects on the employer
- Allows employees to make 2 flexible working requests per 12 months
- Requires employers to consult with the employee before being allowed to refuse an application
- Reduces the deadline for an employer decision on flexible working requests from 3 months to 2 months
- New duty to discuss alternative options (possibly)

Employment Relations (Flexible Working) Bill

What stage is it at?

House of Commons 1st Reading – 15th June 2022

House of Commons 2nd Reading – 28th October 2022

House of Commons Committee Stage – 7th December 2022

House of Commons Report Stage – 24th February 2023

House of Lords 1st Reading – 27th February 2023

House of Lords 2nd Reading – TBC

House of Lords Report Stage – TBC

House of Lords 3rd Reading – TBC

Consideration of Amendments – TBC

Royal Assent – TBC





“Fire and rehire”


Union of Shop, Distributive and Allied Workers & Ors v Tesco Stores

- Dismissal and Rehiring under new terms to try and remove unfavourable to Tesco pay commitments.
- Union sought to prevent this approach by way of an injunction.
- High Court granted injunction preventing Tesco from firing and rehiring some employees
- Overturned by the Court of Appeal, said not appropriate to use this route to prevent this process.

Government crack down

Proposed statutory code

- Stricter rules around some dismissal tactics
- Up to 25% uplift to employee's compensation
- Cannot threaten employees' into accepting new terms
- Open-minded discussions
- Somewhat vague.
- Does not prevent hire and re-hire as a concept.
- It exists for good reasons!
- Consultation closed 18 April 2023 – outcome awaited.



Increased protections for
pregnancy, family and
carers

Extension to pregnancy and family protections in relation to redundancy

Protection from Redundancy (Pregnancy and Family Leave) Act 2023

- Received Royal Assent on 24 May 2023
- Will come into force at the end of the period of two months beginning with the day on which the Act was passed.
- Statutory Instruments with the final detail awaited.

Extension to pregnancy and family protections in relation to redundancy

Protection from Redundancy (Pregnancy and Family Leave) Act 2023

- Purpose/intention is to extend the period of time protected by special pregnancy/maternity redundancy laws.
- Currently only apply to pregnancy and during maternity leave (but not after or before).
- Act enables (by SI) protection to be in a period to be set “during or after”
- It is anticipated this will be used to extend protection from the date the employee notifies the employer until 18 months after birth
- Offer of suitable alternative employment

Carer's Leave Act 2023

- Also received Royal Assent on 24 May 2023
- Actual implementation date to be confirmed
- Makes provisions in relation to unpaid leave for employees with caring responsibilities
- At least 1-weeks unpaid leave in any period of 12 months to arrange or provide care for a dependent with a long term care need
- Day 1 Right for employees

Carer's Leave Act 2023

- A dependent includes spouse, civil partner, child or parent, someone in same household, someone reasonably relying on the employee ('reasonably' is ambiguous and could be interpreted widely)
- Long-term care needs if an illness or injury that requires or likely to require care for more than 3 months, have a disability under Equality Act 2010, or in relation to elder age
- Employees protected from dismissal or detriment for taking carer's leave
- Employees will have a 'day on right' meaning no need for qualifying service
- Current understanding is that a week will mean up to 5 days and that the leave may be flexibly taken e.g. in one block or separate individual blocks

Carer's Leave Act 2023

- A dependent means if they:
 - are a spouse, civil partner, child or parent of the employee,
 - live in the same household as the employee, otherwise than by reason of being the employee's boarder, employee, lodger or tenant, or
 - reasonably rely on the employee to provide or arrange care

Carer's Leave Act 2023

- Long term care need means if:
 - they have an illness or injury (whether physical or mental) that requires, or is likely to require, care for more than three months,
 - they have a disability for the purposes of the Equality Act 2010, or
 - they require care for a reason connected with their old age.

Carer's Leave Act 2023

- Employees protected from dismissal or detriment for taking carer's leave (automatic unfair dismissal)
- Details of rules and evidence etc. to be set out in SI.



Brexit and Proposed Changes

Working Time Rules

- Government Paper 10 May 2023 proposes:
 - Removing retained EU case law that requires businesses to keep working time records for almost all members of the workforce.
 - Introducing ‘rolled-up holiday pay’
 - Merging the separate ‘basic’ and ‘additional’ leave entitlements under the Working Time Regulations into one entitlement to annual leave, while maintaining the same amount of leave entitlement overall
- The requirement to elect employee representatives to be removed for the purpose of TUPE consultation for businesses with fewer than 50 employees and transfers affecting less than 10 employees, allowing businesses to consult directly with the affected employees.

TUPE

- Government Paper proposes:
 - Business with less than 50 employees can consult directly with employees (if not existing representatives are in place) on a transfer
 - Businesses of any size will be permitted to consult directly with employees (where no existing employee representatives are in place) where a transfer of only a small number of employees (fewer than ten) is proposed.
- Consultation closes on 7 July 2023.

Sunsets and Restrictions

- Proposals to restrict non compete clauses to a maximum 3 months duration in employment and worker relationships (see our recent June 2023 Webinar on this topic)
- <https://www.brachers.co.uk/insights/brachers-bitesize-are-your-restrictive-covenants-worth-the-paper-they-are-written-on>
- Government has confirmed its automatic bonfire of EU regulations at the end of December 2023 is to be cancelled.



Recent cases – key decisions

Holiday Pay and Relevant Agreements

Connor v Chief Constable of the South Yorkshire Police 2023

- Working Time Regulations - Payment for untaken holiday on leaving employment - Relevant agreement providing to amount to be paid
- EAT ruled an agreement under regulation 14 WTR cannot agree to pay less than the entitlement under the WTR
- It is important to fulfil the health and safety purpose underpinning the Working Time Directive and the WTR, and that the calculation of holiday pay is necessary because it would undermine that purpose if the amount paid could differ from the usual level of pay.
- Thus, any payment for time off that falls below the usual level of pay will not be in accordance with the legislation's purpose.

Unfair Dismissal and Furlough

Lovingangels Care Ltd v Mhindurwa 2023

- Unfair dismissal – furlough – fair process – EAT case
- Employer was found not to have considered using furlough as an alternative to redundancy.
- Tribunal had applied the same approach to furlough as it would have applied to any possible alternative to dismissal that a reasonable employer might have been expected to have considered.
- EAT also held that determining a claim of unfair dismissal where the dismissal occurred in the context of the COVID-19 pandemic did not require a variation of the general tenets of unfair dismissal law: the law was robust enough to deal with the exceptional circumstances created by the pandemic.

Disciplinary Processes

Lyfar-Cissé v Western Sussex University Hospitals NHS Foundation Trust and others [2022] EAT 193

- Not unfair to dismiss an employee after reopening a previously concluded disciplinary matter which resulted in a final written warning
- EAT held that earlier disciplinary outcome can be part of the circumstances to consider whether a dismissal is fair
- Will depend on the circumstances

Reasonable Adjustments

Hilaire v Luton Borough Council [2022] EAT 166

- Duty to make reasonable adjustments did not arise when a disabled employee refused to participate in a redundancy process interview for a reason not connected to his disability
- Argued he should have been slotted into a role without interview
- EAT took into account effect of slotting him into new role on other potentially redundant employees

Unfavourable treatment arising from disability

McQueen v General Optical Council [2023] EAT 36

- Claimant's 'meltdowns' at work did not arise from his disability
- 2 disciplinary processes
- After medical evidence and Claimant's impact statement, assessed it was not a consequence of his disability

Direct Sex Discrimination

Earl Shilton Town Council v Miller [2023] EAT 5

- EAT upheld that employer discriminated against employee because of her sex based on provision of inadequate toilet facilities.
- Tribunal must consider “the reason why” test
- Held that the facilities were inadequate because the employee was a woman

Age discrimination resulting from expedited redundancy

Mr K Cook v Gentoo Group Ltd [2023] EAT 12

- Claimant was made redundant just before 55th birthday
- Employer ignored usual procedure and sped up the redundancy process to avoid enhanced redundancy payment
- First instance – upheld claim for unfair dismissal but not age discrimination
- EAT – favour of Claimant, ET had not taken into account whether the treatment was a proportionate means of a legitimate aim – cost plus

Menopause and disability

Rooney v Leicester City Council

- Case concerning disability and menopause
- EAT overturned ET decision that an employee suffering from significant menopausal symptoms was disabled
- Important case because it will assess how menopausal symptoms fit the disability definition
- EAT's decision to pass the case back to ET already acts as a caution to employers that menopausal symptoms must be taken seriously and could amount to a disability

Holiday and unlawful deduction of wages

Chief Constable of the Police Service of Northern Ireland and another v Agnew and Others

- Supreme Court Judgment awaited – Court of Appeal decided gaps of more than three months would not interrupt a “series” of unlawful deductions from holiday pay
- Supreme Court's decision will be binding throughout the UK
- Opening floodgates for historic pay claims?

Agency workers

Kocur v Angard Staffing Solutions

- Do agency workers have a right to apply for vacancies?
- Agency staff were informed permanent staff allowed to apply first
- Court of Appeal held it didn't breach regulations and agency staff do not have right to apply in the same way permanent staff do
- To be heard Supreme Court in December 2023



Questions?