Brachers
With you all the way

DIVERSITY HR
Recruiting HR and Training Professionals

Employment Law Update

Key cases and legislative changes

17th October 2023

Presented by:

Colin Smith - Partner

Brachers LLP

Welcome

Brachers
With you all the way

DIVERSITY HR
Recruiting HR and Training Professionals

Helping organisations to attract, recruit and retain the best people.

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).

Presenter

Colin Smith

Partner, Employment

T: 01622 6552910

E: colinsmith@brachers.co.uk

www.brachers.co.uk

Today's Webinar

01 Upcoming Legislation

02 Key Recent Case Law Decisions

Brachers
With you all the way

Upcoming Legislation

Brachers
With you all the way

Upcoming Legislation

Legislation	Status	Date Anticipated
Employment Relations (Flexible Working) Act 2023	**Act passed 20 July 2023**	**July 2024**

Employees will no longer have to explain what effect their requested change may have on the employer and how any such effect might be dealt with.

Employees will be entitled to make two requests (instead of one) in any 12-month period.

Employers will not be able to refuse a request unless the employee has been consulted.

Employers will have to make a decision in two months (reduced from three months), subject to agreeing a longer decision period.

Upcoming Legislation

Legislation	Status	Date Anticipated
Workers (Predictable Terms and Conditions) Act 2023	**Act passed 18 September 2023**	**September 2024**

Will give workers and agency workers **the right to request** more predictable terms and conditions of work where there is a lack of predictability to their work pattern.

It will be possible to make two applications in a 12-month period and applications may be rejected on statutory grounds.

A minimum service requirement to access the right, expected to be 26 weeks, will be specified in regulations.

Sounds similar to Flexible Working – key will be in the detail which we do not yet have.

Upcoming Legislation

Legislation	Status	Date Anticipated
Draft Retained EU Law (Revocation and Reform) Act 2023 (Revocation and Sunset Disapplication) Regulations 2023	**Draft before parliament 4 September 2023**	**Probably 30 December!**

Reverses the earlier Retained EU law (Revocation and Reform) Act 2023.

Removes the sunset provisions which would have seen all EU derived employment laws removed unless expressly retained, as well as granting sweeping amendment powers to the government.

The draft revocation act of the current revocation act will reverse the revocation provisions retaining all current employment laws unless expressly revoked.

Upcoming Legislation

Legislation	Status	Date Anticipated
Worker Protection (Amendment of Equality Act 2010) Bill 2022-23	**Consideration of Lords Amendments due 20 October 2023**	**Unclear – 1 year after the bill becomes an act.**

Introduces a duty on employers to take reasonable steps (previously all reasonable steps) to prevent sexual harassment of their employees.

Gives employment tribunals the power to uplift sexual harassment compensation by up to 25% where an employer is found to have breached the new duty to prevent sexual harassment.

Intended to include new requirements to prevent third party harassment but this is now in doubt.

Upcoming Legislation

Legislation	Status	Date Anticipated
Carer's Leave Act 2023	**The Act was passed on 24 May 2023**	**Not before April 2024**
The Act will introduce a new entitlement of **one week's unpaid leave** per year for employees who are providing or arranging care for a dependant with a long-term care need.		
Neonatal Care (Leave and Pay) Act 2023	**The Act was passed on 24 May 2023**	**Awaiting 7 statutory instruments to implement – anticipated around April 2025**
The Act makes provision for a right to statutory neonatal care leave (expected to be capped at 12 weeks) and pay (expected to be at the statutory prescribed rate or, if lower, 90% of the employee's average weekly earnings) for employees with a parental or other personal relationship with children receiving neonatal care.		

Upcoming Legislation

Legislation	Status	Date Anticipated
Protection from Redundancy (Pregnancy and Family Leave) Act 2023	**The Act was passed on 24 May 2023**	**Awaiting implementing regulations "in due course"**
The Act provides a power for regulations to be made to extend **the right to be offered suitable alternative vacancies in a redundancy situation** so that it will apply during pregnancy and for a period after pregnancy or maternity, adoption or shared parental leave (expected to be a period of six months after returning to work).		
Employment (Allocation of Tips) Act 2023	**The Act was passed on 2 May 2023**	**Anticipated May 2024**
Under the Act employers will have a duty to ensure that all qualifying tips are "allocated fairly" to workers (including agency workers), and make payment in full no later than the end of the month in which the qualifying tip was paid by the customer. Alternatively, if it is fair to do so, the employer may pay the tips over to an "independent tronc operator" who will allocate them to workers.		

Recent cases – key decisions

Brachers
With you all the way

Holiday Pay

Chief Constable of the Police Service of Northern Ireland and another v Agnew and others (Northern Ireland) 2023

- Level – Supreme Court
- The Issue – **Unlawful deduction from wages – 3 month gap rule**
- Summary:
  - This case considered whether employees can claim for historic underpayments of holiday pay as unlawful deductions from wages even if there are gaps of more than three months between the deductions
  - This was an issue raised in the original Bear Scotland holiday pay claim case

Holiday Pay

Chief Constable of the Police Service of Northern Ireland and another v Agnew and others (Northern Ireland) 2023

- Decision – the 3 month gap rule was incorrect. There is no such hard and fast rule.
- Whether a claim in respect of two or more deductions constitutes a series of deductions is a question of fact.
- All relevant circumstances must be considered, including, in relation to the deductions in issue: their similarities and differences; their frequency, size and impact amongst other factors.
- Impact is limited by the statutory 2 year rule subsequently introduced after Bear Scotland

Holiday Pay

Chief Constable of the Police Service of Northern Ireland and another v Agnew and others (Northern Ireland) 2023

- Impact/Action:
  - Could impact the value of claims but most claims have already happened in our experience.
  - But will impact if you have not applied overtime/shift allowances/commissions etc. to holiday pay.

Holiday Pay

Connor v Chief Constable of South Yorkshire 2023

- Level – Employment Appeal Tribunal
- The Issue – **Can you agree to pay less than required by the WTR for holiday pay on termination of employment?**
- Summary:
  - The WTR say you can agree the amount of holiday pay on termination in a "relevant agreement".
  - They do not specify what can and cannot be agreed.
  - Does this allow you to agree less than would be payable under the default terms of regulation 14 of the WTR?

Holiday Pay

Connor v Chief Constable of South Yorkshire 2023

- Decision – No, you cannot pay less than the default under the WTR
- This is not what the literal reading of the WTR states. However, based on a purposive interpretation of the legislation this is the outcome reached. This is in line with the overall health and safety purposes of the WTR.
- So you cannot contract (a relevant agreement includes a written employment contract) to pay less than required by the WTR on termination.

Holiday Pay

Connor v Chief Constable of South Yorkshire 2023

- Key facts:
  - On termination, C was entitled to a payment in lieu of accrued but untaken holiday, and the employer calculated that he was entitled to 40 hours and 42 minutes of holiday pay.
  - C's contract included a term stating that payments in lieu would be based on 1/365th of annual salary for each day's leave.
  - C worked a regular 37.5-hour week and, had he been working, he would have received the same sum for a week of holiday as for a week of work.
  - However, under the payment in lieu calculation set out in his contract, C was paid less than if he had taken the holiday.

Holiday Pay

Connor v Chief Constable of South Yorkshire 2023

- The approach per the EAT:
  - The formula set out in Reg 14(3)(b) should apply, i.e. (A x B) – C,
  - A is the minimum period of leave to which the worker is entitled under Regs 13 and 13A,
  - B is the proportion of the worker's leave year which expired before the termination date
  - C is the period of leave taken by the worker between the start of the leave year and the termination date.

Holiday Pay

Connor v Chief Constable of South Yorkshire 2023

- The annual entitlement was 5.6 weeks, meaning that the claimant accrued 0.11 weeks of leave per week of employment.
- Eight weeks had passed and so the accrued entitlement was 0.88 weeks of leave.
- Dividing the claimant's annual gross pay by 52 gave weekly gross pay, which then had to be multiplied by 0.88 to give the final sum payable.

Holiday Pay

Connor v Chief Constable of South Yorkshire 2023

- Impact/Action:
  - What do your contracts say about pay on termination?
  - Is what they say in line with or better than the default under the WTR regulation 14?
  - If not you are not paying correctly under the WTR on termination of employment.

TUPE

Ponticelli v Gallagher 2023

- Level – Court of Session
- The Issue – **Does a share incentive plan transfer under TUPE?**
- Summary:
  - The case was about whether the Claimant's employer's share incentive plan transferred under TUPE meaning the Respondent was obliged to provide a plan of 'substantial equivalence'.
  - The employer argued that a share incentive benefit plan did not arise 'under' or 'in connection with' the Claimant's contract, so the benefit did not transfer under TUPE.

TUPE

Ponticelli v Gallagher 2023

- Decision - The Court of Session rejected this, noting that the restrictive interpretation of TUPE proposed by the employer would permit employers to subvert TUPE protections by creating side contracts for benefits additional to salary.

Dual/Joint Employment

United Taxis v Comolly 2023

- Level – Employment Appeal Tribunal
- The Issue – **Can a person be an employee or worker of two different employers at the same time in respect of the same work?**
- Summary:
  - Mr Comolly was a taxi driver. He carried-out work driving United Taxi's passengers through an agreement with one of its shareholders, Mr Tidman, and using Mr Tidman's licensed taxi.
  - The tribunal held that Mr Comolly was a worker of United Taxis and an employee of Mr Tidman in respect of the same work: driving United Taxi passengers.

Brachers
With you all the way

Dual/Joint Employment

United Taxis v Comolly 2023

- Decision – The EAT overturned this finding.
- The EAT held that it was not possible for Mr Comolly to be employed or engaged by two different employers in respect of the same work.
- The EAT noted that the key cases of Brook Street Bureau v Dacas and Cable & Wireless v Muscat had found the concept of dual employment to be “problematic” and concluded that it could not “see how the problems could be overcome”.
- The EAT went on to substitute a finding that there was no relationship between Mr Comolly and United Taxis and that Mr Comolly was a worker of Mr Tidman.

Disability Discrimination

McQueen v General Optical Council 2023

- Level – Employment Appeal Tribunal
- The Issue – **Can a section 15 EQ 2010 detriment claim arise where the disabilities had no effect on the relevant behaviours?**
- Section 15: Discrimination arising from disability

  (1) A person (A) discriminates against a disabled person (B) if—

  (a) A treats B unfavourably **because of something arising in consequence of B's disability**, and

  (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

  (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

Brachers
With you all the way

Disability Discrimination

McQueen v General Optical Council 2023

- Summary:
  - The Claimant was subjected to disciplinary action after incidents of aggressive behaviour.
  - The tribunal found that the Claimant's conduct was not because of his disabilities. It was due to him having a short temper and resenting being told what to do.
  - The Claimant argued that the tribunal should have considered a dual or multi-factor causation test, **whether any disabilities had been a factor in the Claimant's conduct**, meaning disciplinary action was due to something arising because of disability.

Disability Discrimination

McQueen v General Optical Council 2023

- Decision – The EAT rejected this argument
- The tribunal found that the effects of the disabilities **did not play any part in the Claimant's conduct**.
- So there was no need to consider if the treatment was partly because of disabilities.
- The claim failed on that factual basis.

Disability Discrimination

McQueen v General Optical Council 2023

- The EAT went on to give guidance on two ways to structure decisions in section 15 cases, having found the tribunal's judgment difficult to understand, suggesting four questions to consider in different orders the simplest of which is:

  (i) what are the disabilities;

  (ii) what are their effects;

  (iii) what unfavourable treatment is alleged in time and proved and;

  (iv) was that unfavourable treatment "because of" an effect or effects of the disabilities.

Disability Discrimination

McQueen v General Optical Council 2023

- They also reiterated that:

> *53. … Further, the tribunal did not at any point refer to the proposition that "something" can arise "in consequence of" a disability* ***if the disability plays more than a trivial part in causing that "something"; and that the disability need not be the predominant cause of the "something" that arises from it.***

Disability Discrimination

Pilkington UK Ltd v Jones 2023

- Level – Employment Appeal Tribunal
- The Issue – **Did an employer's incorrect belief that an employee was engaged in physical activity whilst off sick amount to something arising in consequence of his disability under section 15?**
- Summary:
  - J developed a painful condition in his dominant right shoulder from which there was no prospect of recovery. Signed off on long-term sick leave when he became unfit for work.
  - Medical advice said this would permanently prevent J from undertaking manual work. J would be able to return to work in a non-manual role once the pain was sufficiently controlled.

Disability Discrimination

Pilkington UK Ltd v Jones 2023

- In March 2019, P Ltd received information that J had been seen wearing work boots.
- P Ltd suspected that he might be working elsewhere. It decided to investigate and employed surveillance agents who filmed J on four occasions.
- The footage showed J accompanying his friend, a farmer, in a transit van delivering products. J was handling a retail-sized bag of potatoes. The deliveries themselves were carried out by the farmer (or his son).
- Further footage showed J passing a hose to the farmer with his hand on a tap.

Disability Discrimination

Pilkington UK Ltd v Jones 2023

- In P Ltd's opinion, these recordings gave it cause to consider that J could be engaged in secondary employment.
- Following a disciplinary process, P Ltd concluded that it had established to its reasonable satisfaction that J had undertaken physical activity during sickness absence, and dismissed him for gross misconduct.
- J brought an employment tribunal claim under S.15 EqA, alleging that P Ltd had treated him unfavourably because of something arising in consequence of his disability.

Disability Discrimination

Pilkington UK Ltd v Jones 2023

- Upholding J's claim, the tribunal found that the 'something arising' under S.15 EqA involved P Ltd believing that J had engaged in physical activity while off sick from work.
- His dismissal was a consequence of that belief and amounted to unfavourable treatment.
- P Ltd appealed, arguing that the tribunal had erred in finding that the belief amounted to 'something arising' in consequence of J's disability, having wrongly applied a subjective approach to an objective question.

Disability Discrimination

Pilkington UK Ltd v Jones 2023

- The EAT upheld the decision. It observed that there are two aspects of causation under S.15 EqA: firstly, something arising from the disability, and secondly, a consequential treatment that is unfavourable.

- The former requires an objective analysis, the latter a subjective consideration.

- In most cases it would be possible to point to an external factor separate from the mind of the decision-maker which is the 'something arising' from the disability, the person who is absent due to disability and is dismissed for absence being a paradigm example.

Disability Discrimination

Pilkington UK Ltd v Jones 2023

- This particular case was unusual because the tribunal had specifically rejected the external factors advanced by J, finding instead that P Ltd's belief was, in part, the 'something arising'.

- That, at first blush, might appear surprising given the need for an objective test: any belief must, naturally, be a subjective state of mind in the individual holding the belief.

- However, in the EAT's view, there can nevertheless be an objective finding that a particular state of mind arises from the disability. If there is knowledge of a disability, it is easy to conclude that any belief about that disability arises from that knowledge.

Disability Discrimination

Pilkington UK Ltd v Jones 2023

- **Therefore, either an accurate or an erroneous belief, drawn from a knowledge of the existence of that disability, would be a 'something' arising from the disability.**

- Although that belief is subjectively held, it can be objectively recognised in the same way that a subjective intent can be objectively observed from surrounding facts.

- On that basis, a belief could be properly categorised as something arising from disability, and in the instant case the tribunal had not erred in so categorising the belief in question..

Disability Discrimination

Pilkington UK Ltd v Jones 2023

- **The EAT went on to hold that the tribunal would, in any event, have been entitled to conclude that P's sickness absence was the 'something' that arose from his disability.**

- The sickness absence was the reason for the surveillance of J.

- Equally, the sickness absence was the context in which the decision to dismiss was made, relying on the (erroneous) belief that J was engaged in secondary employment.

- That belief was drawn from a number of pieces of information, a key element being J's sickness absence, which was caused by his disability. The fact that other pieces of information led to the belief did not stop the sickness absence being a substantial part of the reason that led to the unfavourable treatment.

Disability Discrimination

AECOM Limited v Mallon 2023

- Level – Employment Appeal Tribunal
- The Issue – **Does an employer need to know the specifics of a disabled person's substantial disadvantage before being required to make reasonable adjustments?**
- Summary:
  - The Claimant applied for employment at the Respondent. He had previously worked there and been dismissed during probation.
  - He sought a telephone interview to supplement his online application as a reasonable adjustment. He informed the Respondent **of unspecific disability-related difficulties with making an online application.**

Brachers
With you all the way

Disability Discrimination

AECOM Limited v Mallon 2023

- He did not explain these when requested **by email**.
- The Respondent did not agree to a telephone interview.
- The tribunal upheld a complaint of a failure to make reasonable adjustments.
- The Respondent's appeal against the findings that it had been under a duty to make reasonable adjustments failed.
- The tribunal was entitled to find that they had constructive knowledge of disability in the circumstances, **as it had failed to make reasonable enquiries of the Claimant, e.g. by phoning him.**

Disability Discrimination

AECOM Limited v Mallon 2023

- M, who has dyspraxia, applied for a consultant role with AECOM Ltd.
- The standard application process was for job applicants to complete a relatively short online form, which could be accessed by creating a personal profile with a username and password.
- M emailed his CV to AECOM Ltd's HR department and asked for an oral application because of his disability.
- He also included information about how dyspraxia affects people generally.
- Email correspondence between M and an HR manager ensued, with the latter informing him that he had to complete the online application form but that he could get assistance with submitting the form if necessary.

Disability Discrimination

AECOM Limited v Mallon 2023

- She also asked him on a number of occasions to let her know which parts of the form he was finding difficult to complete.
- M did not tell her that he was unable to create a username and password to log on to the online form.
- Neither M nor the HR manager telephoned each other to discuss this issue.

Disability Discrimination

AECOM Limited v Mallon 2023

- The tribunal identified that AECOM Ltd had applied a provision, criterion or practice (PCP) – in that candidates were expected to create an account, by providing a username and password, in order to access the online application form and to answer the questions raised by inserting the information and answers on the online form in the spaces provided – which put M at a substantial disadvantage.

- The substantial disadvantage was that M was too anxious because of his dyspraxia to provide a username and password to begin accessing the online form.

Disability Discrimination

AECOM Limited v Mallon 2023

- The tribunal found that AECOM Ltd did not have actual knowledge of the disadvantage to M because, although it knew that he had difficulty in filling in the online application form because of his dyspraxia, it did not know more than that because M had not identified the specific reasons why completing an online form was a particular difficulty.

- However, the tribunal went on to find that **AECOM Ltd had constructive knowledge of M's disadvantage: AECOM Ltd ought to have known that M was at a substantial disadvantage because it ought to have telephoned him to ask for more details of his difficulties when he had failed to respond to its email questions.**

Disability Discrimination

AECOM Limited v Mallon 2023

- The EAT noted that an employer is not subject to a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, both that the complainant has a disability and that he or she is likely to be placed at the substantial disadvantage.

- The case law showed that what is necessary is not that the employer knows that the complainant is generally disadvantaged by their disability by reason of the PCP, but that it knows (actually or constructively) that they are likely to be placed at the particular disadvantage.

- Whether an employer reasonably ought to have known whether the complainant was disabled and at the relevant substantial disadvantage **requires the employer to make reasonable enquiries of that individual**. **What is reasonable in this context will depend on all the circumstances**.

Brachers
With you all the way

Harassment

Greasley-Adams v Royal Mail Group 2023

- Level – Employment Appeal Tribunal
- The Issue – **Can a Claimant be harassed if they were not aware of the act of harassment?**
- Summary:
  - The Claimant argued that he had suffered harassment in relation to his disability by reason of conduct which he was not aware of at the time it occurred.
  - He only became aware of the conduct when it was revealed as part of a bullying and harassment investigation against him by colleagues.

Harassment

Greasley-Adams v Royal Mail Group 2023

- The EAT held that these incidents could not have had the ‘effect’ of violating the Claimant's dignity before the time at which he became aware of them.
- It held that the perception of the person claiming harassment was a key and mandatory component in determining whether or not harassment has occurred.
- If there was no awareness, there could be no perception.

Harassment

Greasley-Adams v Royal Mail Group 2023

- It also held that when the Claimant did become aware of the acts of harassment it was not reasonable, given the context in which he had become aware of them (as part of an investigation into his alleged bullying), for them to be considered as having violated his dignity.

Discrimination – Whose motive?

Alcedo Orange Ltd v Ferridge Group 2023

- Level – Employment Appeal Tribunal
- The Issue – **Is a tribunal permitted to look behind the decision-maker's motivation in a discrimination case and take account of the motivation of other employees who were only indirectly involved?**
- Summary:
  - The Claimant was dismissed shortly after telling her manager she was pregnant.
  - The dismissing officer relied on information he had been provided with by her manager in deciding to dismiss.

Discrimination – Whose motive?

Alcedo Orange Ltd v Ferridge Group 2023

- The tribunal concluded that the manager had been motivated by the Claimant's pregnancy in the way in which she presented this information to the dismissing officer (who then relied on it to dismiss) and that she had therefore been dismissed for pregnancy-related reasons.
- The EAT disagreed.
- The EAT held, applying the Court of Appeal case of Reynolds v CLFIS (UK) Limited, that when deciding whether an individual has been dismissed for a discriminatory reason, a tribunal should only consider the motivation of the person who makes the decision to dismiss, not other employees who may be indirectly involved.
- Contrast with some whistleblowing claims (Royal Mail Group v Jhuti)

Questions?

Brachers
With you all the way