

Brachers Bitesize

Employment law update

18 January 2022

Presented by:

Abigail Brightwell - Associate
Colin Smith - Partner

Employment Law and HR

A woman with blonde hair tied back, wearing a dark blue blazer over a light blue collared shirt, is speaking in a meeting. She is gesturing with her right hand. The scene is overlaid with a semi-transparent blue shape that covers most of the image. The background is a bright, out-of-focus office environment with windows and curtains.

Welcome

Presenters



Abigail Brightwell | Associate, Employment

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Abigail qualified into the Employment team in 2011. She has represented several NHS Trusts in cases covering unfair dismissal (including constructive dismissal), unlawful deduction from wages, discrimination and whistleblowing.

[Connect with Abigail on LinkedIn](#)



Colin Smith | Partner, Employment

ColinSmith@brachers.co.uk

Colin is a specialist employment lawyer with over 20 years' experience. He acts mainly for employers across a range of industries.

Colin was recently named as a 'Recommended Lawyer' in leading legal directory, Legal 500 2022.

[Connect with Colin on LinkedIn](#)

Today's webinar

01 Key cases from 2021

02 What to expect in 2022

- Rates and limits changes
- Queen's Jubilee
- Flexible working
- Carer's leave
- Stable contracts



Poll 1

What is your current main concern/priority for HR?



Poll 2

What is your main priority for HR in 2022?

Key cases 2021

EMPLOYMENT TRIBUNAL

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Sleep in shifts and NMW

Royal Mencap Society v Tomlinson Blake

- Long awaited Supreme Court judgment
- Individuals not entitled to NMW for time asleep at or near the workplace
- NMW only due when awake "for the purposes of working"
- Distinction in the Regulations between carrying out "actual work" and being "available for work"

Anti-harassment training

Allay (UK) Limited v Gehlen

- Anti-harassment training must be fit for purpose
- Equality Act 2010 s.109 (4) - "Reasonable steps defence"
- Employer's "stale" diversity training not enough to amount to a reasonable steps defence
- EAT highlighted that all reasonable steps must have been taken

Menopause discrimination

Rooney v Leicester City Council, EAT

- Can menopause symptoms amount to a disability?
- In this case – effect of the symptoms on normal day to day activities were "more than minor or trivial", and were also "long term"
- Significant as first binding decision on the issue
- World Menopause Day and spotlight on menopause in the workplace

Redundancy appeals

Gwynedd Council v Barratt & Others

- Does lack of appeal make redundancy process unfair?
- Court of Appeal held it would be wrong to find a dismissal unfair if lack of appeal is only defect in otherwise fair process
- However – absence of appeal is one of many factors a court will consider when looking at overall fairness of a redundancy dismissal

Gender pay gap

Bayfield & Jenner v Wunderman Thompson UK Ltd & Others

- Actions to reduce gender pay gap should not be discriminatory and unfair
- Two male directors at advertising agency dismissed, following publication of high gender pay gap
- Employer vowed to "obliterate" its reputation for being full of "straight white men". Claimants in this case were heterosexual, British, white men
- Tribunal held that they had been dismissed for their sex

COVID-19 decisions

Key points:

- Employees have a duty to obey reasonable and lawful instructions issued by their employer – including those around COVID-19 safety measures (*Kubilius v Kent Foods*)
- Employer's failure to consider furlough affected the fairness of subsequent redundancy dismissal (*Mhindurwa v Lovingangels*)
- A breach of COVID-19 guidelines (rather than laws) may not of itself be sufficient to dismiss an employee (*Meynell v Stephenson*)

Other key decisions

- Supreme Court held that Uber drivers are definitely workers in *Uber v Aslam*
- Making a direct pay offer to employees covered by a collective agreement is unlawful (*Kostal UK Ltd v Dunkley*)
- Gender critical beliefs can be protected under the Equality Act 2010 (*Forstater v CGD Europe*)
- Employees can be indirectly discriminated against by association with a disabled person (*Follows v Nationwide*)

What to expect in 2022

Gender pay gap reporting



Gender pay gap reporting March/April 2022

- 30 March 2022 – public sector
- 4 April 2022 – private sector
- Speculation about the introduction of ethnicity pay gap reporting but no clear plans as yet



Pay costs

National Minimum/Living Wage

1 April 2022

Age group	Current	New	% Increase
23 and over	£8.91	£9.50	6.62
21 or 22	£8.36	£9.18	9.81
18 – 20	£6.56	£6.83	4.12
Under 18 (above compulsory school age)	£4.62	£4.81	4.11
Apprentices under 19 (or over 19 in year 1 of apprenticeship)	£4.30	£4.81	11.86

Social Care Levy

6 April 2022

- Social care levy will be introduced UK-wide from April 2022
- Applies to employed and self employed
- 2022 collected via 1.25% increase in NI
- 2023 should become a separate levy
- Individuals above State Pension age will not be affected by the temporary increase to National Insurance contributions for the 2022 to 2023 tax year but will be liable to pay the levy from April 2023

Social Care Levy

6 April 2022

It will affect employees and the self-employed with any earning above Primary Threshold, currently set at £9,568 (2021/22)

Tax Year	Employee Class 1	Employer Class 1, 1A &1B	Self Employed Class 4
21 – 22	12% / 2%	13.8%	9% / 2%
22 - 23	13.25% / 3.25%	15.05%	10.25% / 3.25%



Other rates

Family friendly leave

3 April 2022

- Statutory maternity
- Statutory adoption
- Statutory paternity
- Statutory shared parental
- Statutory parental bereavement pay
- Will increase to £156.66, up from £151.97
- 3.09% increase
- Normally takes effect on the first Sunday in April, which in 2022 is 3 April

Sick pay

6 April 2022

- Statutory Sick Pay will also rise on 6 April 2022
- The new rate will be £99.35, up from £96.35
- 3.11% increase

Statutory redundancy payments

6 April 2022

- A weeks' pay is currently £544 per week
- The new amount will be confirmed in the draft Employment Rights (Increase of Limits) Order 2022, which should be published some time in February
- Has increased £464 – £475 – £479 – £489 – £508 – £525 – £538 – £544
- My guess is around £560



Bank holidays

Queen's Jubilee

Friday 3 June 2022

- To celebrate the Queen's Platinum Jubilee
- Late May bank holiday has been moved to Thursday 2 June to give a four-day weekend
- Entitlement to this as a day off?
- Contract law issue – what do your contracts say?
- W/C 30 May holiday bookings?

Queen's Jubilee

Friday 3 June 2022

Example A:

- *“You are entitled to all bank and public holidays”*

Example B:

- *“You are entitled to all normal bank and public holidays”*

Places limited / book early to avoid disappointment!



Flexible working

Flexible working

No set date

- Employment Bill - originally promised in the 2019 Queen's Speech – could be published in 2022
- Anticipated it will include a new right to request flexible working from day one – currently 26 weeks
- Consultation closed in December 2021
- Reasonably clear no intention to introduce a right to work flexibly – only modify the current right to request

Flexible working

No set date

Five proposals:

- Making the right to request flexible working a day one right
- Whether the eight business reasons for refusing a request all remain valid
- Requiring the employer to suggest alternatives
- The administrative process underpinning the right to request flexible working
- Requesting a temporary arrangement

Flexible working

No set date

Consultation proposals also state:

*“As part of this wider discussion about making flexible working the default, the consultation document also explains how we are taking forward the July 2019 “Good Work Plan: Proposals to support families” consultation on measures to promote greater transparency about flexible working and family-related leave and pay policies, **and the proposal to require employers to say whether jobs may be open to flexible working in the advert.**”*



Carer's Leave

Carer's Leave – EU Directive

No set date

- August 2022, EU member states need to have implemented the EU work-life balance directive
- New baseline rights for carers and working parents
- UK has already promised to match the new rights for carers

Carer's Leave – UK proposals

When parliamentary allows

- Consultation closed
- Results at [Carer's leave - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/carer-leave)
- Employees will be able to take up to five days' (one week) unpaid carer's leave each year to help them carry out their caring responsibilities
- Day one right

Carer's Leave – UK proposals

When parliamentary allows

- Can be taken flexibly (from ½ day to one week)
- Booking rules similar to annual leave under the WTR but stricter refusal grounds for employers – “unduly disrupted”
- For planned care or making arrangements for planned care (not emergencies)
- Similar dependents rules as current emergency dependents leave laws

Carer's Leave – UK proposals

When parliamentary allows

- Person cared for has to have a long term care need
- Defined as a long-term illness or injury (physical or mental), a disability as defined under the Equality Act 2010, or issues related to old age
- There would be limited exemptions from the requirement for long-term care, for example in the case of terminal illness

Carer's Leave – UK proposals

When parliamentary allows

- Self certification of eligibility
- No evidence requirements
- Expected 2022
- Will you offer enhanced paid carers leave?

A close-up photograph of a person's hands writing on a document with a silver pen. The person is wearing a light-colored sleeve. In the background, a white cup of coffee sits on a saucer, and a pair of red-rimmed glasses is resting on the desk. The scene is brightly lit, suggesting an office or study environment. A large blue arrow-shaped graphic points from the bottom left towards the center of the image.

Stable contracts

Stable contracts

No set date

- Employment Bill expected to introduce new rights:
 - For workers with variable hours to request a more stable and predictable contract after 26 weeks' service
 - To reasonable notice of working hours
 - To compensation for short-notice shift cancellation
- The EU transparent and predictable working conditions directive will introduce similar rights on an EU-wide basis in August 2022

Stable contracts

No set date

EU proposals:

- Where the work pattern is entirely or mostly unpredictable, the employer must state:
 - The number of guaranteed paid hours
 - The pay for work performed in addition to those guaranteed hours
 - The reference hours and days within which the worker may be required to work

Stable contracts

No set date

- It will become unlawful to prohibit workers from taking up employment with other employers outside working hours
- Unless this can be justified by objective grounds such as health and safety, protecting business confidentiality or avoiding conflicts of interests

Stable contracts – EU Directive

No set date

- Workers whose work pattern is unpredictable will be able to refuse an offer of work without suffering adverse consequences unless they are given reasonable notice and it takes place within predetermined reference hours and days as set out in their contract
- Workers will become entitled to compensation if their employer cancels an assignment after a specified “reasonable deadline” (what this is must be decided by Member States)



Equality laws

Equality: third party harassment

No set date

- The government has promised to introduce a new pro-active duty on employers to prevent sexual harassment in the workplace
- It has also committed to bring back laws making employers responsible if employees are harassed by customers or other third parties
- Provision could be made in the Employment Bill for these changes



Whistleblowing

Whistleblowing – EU Directive

No set date

- New enhanced EU rules due in 2022
- Does not apply to the UK but may influence best practice here
- Key feature is the requirement to provide feedback to whistleblowers within certain specified timescales (seven days and then reasonable but not exceeding three months)
- Also to keep records

EU laws – why do they matter?

No set date

- EU-wide enterprises like to standardise policies and procedures
- The Trade and Cooperation Agreement (The Brexit Trade Deal)
 - Commits to maintaining a fair playing field on employment rights
 - Commits to enhancing employment rights over time



Neonatal care and redundancy

Neonatal Leave – EU Directive

No set date

- UK government promise
- No clear date. Expected in Employment Bill
- New right to 12 weeks' **paid** neonatal leave for parents whose babies spend time in neonatal care units
- Await definition of “parent”

Neonatal Leave – EU Directive

No set date

- Leave anticipated to be a day one right
- Pay 26 weeks right and lower earnings dependent
- Notice requirements to be confirmed
- Neonatal care definition to be confirmed

Pregnant workers – redundancy

No set date

- UK commitment to improve redundancy protection for pregnant employees and maternity returners by giving them priority for alternative employment opportunities if made redundant
- Similar protections for parents returning from adoption or shared parental leave
- Speculated to cover six to 12 months post return from leave
- No set date



Tips

Tips

No set date

- The Employment Bill may also introduce the long-awaited tips regulations governing how tips are to be distributed
- Consultation closed in 2016!
- Will prohibit any deductions from tips other than taxes

Tips

No set date

- Employers to distribute tips in a way that is fair and transparent, with a written policy on tips, and a record of how tips have been dealt with
- Employers will be able to distribute tips via a tronc, and a tip must be dealt with no later than the end of the month following the month in which it was paid by the customer
- Provisions to allow workers to make a request for information relating to an employer's tipping record

Tips

No set date

- Employers will have flexibility in how to design and communicate a tipping record, but should respond within four weeks
- Statutory Code of Practice to be introduced

A diverse group of people, including men and women of various ethnicities, are seated in an audience. In the foreground, a woman with dark curly hair is smiling and raising her right hand. The background shows other audience members looking towards the front. A large blue arrow-shaped graphic points from the left towards the center of the image.

Any questions?

About Brachers' Employment team

Our [Employment and HR team](#) take pride in delivering employment law and HR services that are tailored to your needs. We are dedicated to listening and learning about your business to understanding the challenges you face, your ambitions, and how to retain, your key asset, your people.

We are one the largest employment and HR teams in the South East, working alongside businesses with 60,000 employees in the region.

We appreciate that business is about taking managed risks. Our commitment to you is that we will not sit on the fence but will make recommendations using the benefit of our judgment and experience.

Free online consultation

If you would like more information on how we can support you with the issues covered in this webinar, [book a 30-minute online appointment](#) with a lawyer from our Employment team for an initial discussion on your needs and to find out how we can help.