

EMPLOYMENT UPDATE AUTUMN 2022

Pro-rating holiday for Part Year Workers

Before reading any further, please note the distinction between 'part year' workers and 'part time' workers.

A judgement published in July this year has hit the headlines in the HR world as it has ruled out any pro rating of holiday for people who only work part of the year. For example, an employee who is employed for the whole year but only required to work during school term times.

In these circumstances, employers had commonly been reducing the normal 28 days of annual holiday on a pro rata basis in line with the number of months of the year actually worked. Not anymore. These employees are entitled to the full holiday allowance of 28 days.

This judgement does not affect people who work on a part time basis or who join or leave employment part way through a holiday year. The annual entitlement can still be pro-rated in these cases.

Is Long Covid a Disability?

There has been some debate over this question in the courts as a long-term condition can only be classed as a disability if it has the potential of reoccurring AND, when it does reoccur, it has substantial adverse effects on the individual.

It is accepted that long covid is a condition that is likely to result in future recurrences but if those future recurrences may not have substantial adverse effects, the condition is unlikely to be classed as a disability.

With this in mind, if you are requesting medical information about an employee's fitness to continue employment, do be sure to ask about both of these aspects and not just the likelihood of the conditions recurring.

Date of Termination

It is a point of law that the date of termination is the date on which an employee learns that they have been dismissed. If they are at a hearing and are told they are dismissed, that date is quite clear. Likewise, if the decision is sent by email and we have a 'read receipt', we have evidence of the date that the employee learned of their dismissal.

Things become less clear when a dismissal decision is sent by letter.

Ms S was off sick and on 15 March her employer hand-delivered a letter telling her that she was dismissed with immediate effect. Ms S continued to send her employer Fit Notes to cover her absence, but no one appears to have contacted her to query

this. On 4 July Ms S returned to work only to be told that her employment had ended on 15 March. Ms S claimed not to have received the hand-delivered dismissal letter and in the absence of any evidence to the contrary, the Tribunal accepted that Ms S's date of termination was therefore 4 July (not 15 March) as this was the date that she found out she had been dismissed.

This case highlights the danger of relying on hand-delivered documents. This method of communication provides no evidence that a letter was sent or received.

Competing Protected Characteristics

What happens when two parties with opposing protected characteristics come into conflict in the workplace?

Dr M was employed as a disabilities assessor. He objected to having to use service-users preferred pronouns because of his Christian beliefs. In short, Dr M had a lack of belief in 'transgenderism' and practiced a religion of Christianity. His employer tried to find a way to accommodate his beliefs and lack of beliefs but when they could not do so, Dr M left claiming discrimination. Dr M believed that he had been treated less favourably because of his Christian beliefs (which prevented him from using preferred pronouns) and because of his lack of belief in transgenderism (which resulted in the same behaviour).

Dr M's claims ultimately failed as the EAT found that a) it was not unlawful for the employer to require a Christian to use a service users preferred pronouns and b) in requiring him to do so, his employer had a legitimate aim – namely to ensure transgender people were treated with respect. The EAT found that the means by which these aims were achieved (using preferred pronouns) was proportionate in the circumstances.

Constructive Dismissal

For an employee to be able to claim constructive dismissal, they need to be able to show that their employer has done something sufficiently bad so as to cause a fundamental breach to the contract of employment.

Mr S went off sick after being told he was required to attend a disciplinary hearing. His employer believed that his sickness was just a device to avoid attending the hearing and so decided to pay him SSP only instead of company sick pay.

The employer did not have a clause in their contract that allowed this, but they did have wording in their disciplinary procedure that stated if they suspended an employee on full pay, they could withhold that pay where an employee went sick as a hindrance to the procedure.

Mr S resigned over the decision to withhold full pay, arguing that this was a fundamental breach of contract. The EAT upheld his claim saying that although the employer had the right to withhold pay for someone who was suspended, they had not suspended Mr S. As such, the employer had no contractual right to withhold pay.

Whistleblowing – separating the ‘how’ from the ‘what’

In this recent case the courts have made a distinction between an employee being dismissed because they made a protected disclosure (i.e. they blew the whistle on wrong-doing in the company) versus the manner in which they made that disclosure.

Ms K made a protected disclosure to the Head of Legal, but she did so in such an appalling way that the employer considered her behaviour to be gross misconduct. Ms K was dismissed and brought a number of claims including unfair dismissal for being dismissed for making a protected disclosure.

The employer was successful in their defence. The courts accepted that although Ms K’s dismissal was connected with her making a protected disclosure, it was not the fact of the disclosure that resulted in her dismissal but the appalling manner in which she had behaved when doing so.

Resignation or Dismissal?

An employee resigns giving say, 3 months’ notice, but their employer wants them to go earlier. So, the employer brings the end date forward and pays the employee in lieu of the remainder of their notice period. Is this still a resignation, or has the employee now been dismissed?

This point of law is being wrangled over in the courts. The current and most recent position is that the employment has still ended by reason of resignation, but be aware that this could well be overturned in the not too distant future.

P&O and their 800 Dismissals

You will probably remember the uproar over this one... P&O dismissed over 800 employees without any redundancy consultation. In doing so, all of those dismissals were legally unfair as a fair redundancy procedure had not been followed. And yet, only one Tribunal claim was brought.

Why? Because P&O paid the employees a financial settlement that exceeded what they would have been awarded by bringing a claim. To avoid such a distasteful and complete disregard of employee rights in future, the Government is introducing a statutory code of practice dealing with proper consultation in redundancy situations. By doing so, Tribunals will be able to increase awards by up to 25% should an employer fail to engage in proper consultation in future.

Whilst this may not prevent another P&O situation in the future, it will certainly make it more expensive to ignore the law.

Transgender Rights in Single Sex Spaces/Facilities

The Equality and Human Rights Commission (EHRC) has published guidance for service providers around the provision of single-sex services (toilets, changing rooms etc) and the legal exceptions that can apply to transgender people.

The guidance aims to recognise the rights of transgender people to access single-sex spaces and facilities but also balance these with the rights of people who hold gender-critical beliefs. For example, a mother of a 13 year old girl may not feel comfortable that her daughter could be sharing a changing room with a transgender woman.

The guidance includes exceptions where service providers may exclude, modify or limit access for transgender people to their single-sex spaces and facilities, where it is proportionate to do so in order to achieve a legitimate aim.

Data Protection Reform

It seems like only months ago that we were working flat out on data protection changes, but with Brexit behind us the Government is planning to take advantage of our regulatory freedom from the EU and revisit the UK's approach to data privacy.

The changes that may be coming our way include making it easier for businesses to refuse to comply with a Subject Access Request, the possible removal of data processing impact assessments and a definitive list of legitimate interests to rely on for processing data so that this is no longer open to interpretation.

The second reading of the Bill in the House of Commons has been delayed so no clear timeframe for introduction as yet.

Menopause - Recommendations for Employers

In July the Government published a policy paper entitled "Menopause and the Workplace: How to enable fulfilling working lives" which sets out a number of recommendations for employers.

You can find the Paper here [Menopause and the Workplace: How to enable fulfilling working lives: government response - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/consultations/menopause-and-the-workplace)

The recommendations are brief and high-level, covering the basics... but if you are developing a policy it is potentially worth looking at.

Tax Review of Hybrid Working

The Office of Tax Simplification has launched a review into hybrid and distant working to assess whether they are missing any tricks when it comes to taxing employees and companies.

The review will consider income tax, social security, employee/self-employed expenses and allowances and potential corporate residence and permanent establishment (taxable presence) implications for companies.

No doubt we will be hearing all about this once the review is complete.

Reversing European Employment Laws

It is often the case that the Bill with the dullest title is the one that has the greatest potential impact for employers.

In this case, we are talking about the catchy 'Retained EU Law (Revocation and Reform) Bill'.

On 31 December 2023 all retained EU law will expire unless the UK introduces its own legislation to retain or reform it. That means that, amongst other things, we could see the end of:

- Protection for agency workers;
- Protection for fixed term employees;
- Parental leave; and
- Some aspects of TUPE

We will keep you posted.

Immigration – Mixed Messages

We seem to be getting extremely mixed messages from the Government over immigration at the moment. But we think it's fair to say that whatever your politics, 'consistent approach' has not been in evidence much recently.

The update on immigration is that the Government had announced that it was going to make it easier for businesses to recruit overseas workers – by expanding the shortage occupation list and making it easier to obtain visas for certain roles. Will these changes actually materialise? We shall see.

Up and Coming.....

Neonatal Care Proposals

The Neonatal Care (Leave and Pay) Bill has passed its second reading in the House of Commons. There is no date for introduction as yet and things may change, but the current proposal is set out below.

Parents of babies born prematurely or requiring specialist medical intervention will be able to take an extra 12 weeks of paid leave on top of their entitlements to maternity or paternity leave and pay. The purpose of this entitlement is to allow parents to spend more time with their baby in situations where regular maternity and paternity leave is being used up whilst the baby is separated from parents in an incubator or is having to remain in hospital.

Neonatal care leave will be available to employees from their first day of employment and will apply to parents of babies who are admitted into hospital up to the age of 28 days and who have a continuous stay in hospital of seven full days or more.

Flexible Working Bill

This bill is still only on its second reading in the House of Commons, but the proposal on the table at present is as follows:

- To remove the 26 week service requirement so that employees can make a flexible working request from their first day of employment;
- To allow up to 2 flexible working requests in 12 months instead of limiting this to one request per year;
- To reduce the length of time employers have to consider and make a decision on a request. This is currently 3 months and the proposal is to reduce it to 2 months;
- To remove the requirement on employees to put forward an explanation as to how they anticipate their request impacting the business and their suggestions as to how this could be mitigated.

Carer's Leave Bill

As with the above Bill, this one has only just gone through its second reading in the House of Commons, so the detail could still change before it becomes law. At present, the proposal is to introduce a new right to unpaid time off for carers. The time off would be limited to one week per year to provide care to a dependant.

At present we have Time off for Dependants to deal with an immediate emergency involving a dependant. The new Carer's Leave would provide employees with follow-on leave after taking Time off for Dependants once the immediate emergency is over and more time is needed to care for someone.

Employment Bill Shelved

We reported in our Spring Update that the 'Employment Bill' that was due to be introduced in 2021, then 2022, appears to be on hold since it was scrapped from the Queen's speech in April this year.

Some elements of that Bill are making their own way through the House of Commons in their own right, such as the Flexible working changes, Neonatal Leave and Carers Leave as mentioned above.

Other aspects of the Bill were set to provide protection for casual or zero hours workers when they are promised work that does not materialise and new protections for pregnant employees.

There is still no news as to when these proposals will be back on the agenda but we will provide an update in our Spring 2023 Update.