CP Associates

HR EMPLOYMENT BULLETIN
November 2024

KEY EMPLOYMENT LAW CHANGES AND ADVICE

This is the latest of the series of HR Employment Bulletins which will summarise some expected key employment law changes and a number of interesting Tribunal case outcomes for you to consider.

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1. Woman was unfairly dismissed for Facebook post that her bosses wrongly claimed was an attack on their business

An Employment Judge found that the employer did not act reasonably after the worker shared social media meme mocking management styles. The West Midlands Tribunal ruled that the Assembly Operative, Ms S, was unfairly dismissed by her employer after sharing a Facebook post that her bosses wrongly claimed was an attack on their business.

The Tribunal heard that Ms S was dismissed by Turnock after she reposted a meme on her Facebook account that made fun of management styles and workplace cultures. But the Tribunal ruled that simply sharing the post was not enough to warrant being dismissed, as “it was difficult to say whether anybody looking at this meme would link it directly to the claimant’s working environment”.

However, the Judge found that the Facebook post merited a discussion with Ms S and possibly some action, such as a warning or a reminder of the importance of social media and internet policies, so nothing similar happened again.

Ms S worked as an Assembly Operative at Turnock over two and a half years when she was dismissed for gross misconduct. On 24 April, a meeting was organised between Ms S and senior members of Turnock to discuss how her behaviour at work was impacting other members of the team.

They discussed “concerning behaviour” shown by Ms S, and management told the Tribunal they gave Ms S a “stern warning” during the meeting. Mrs S, a member of senior management, then produced a Facebook post from Ms S that had been posted the previous weekend.

The Tribunal heard that the firm believed the Facebook post “denigrated” her bosses as well as the Company. The Facebook post depicted a blindfolded woman sitting in front of another blindfolded person. Above the woman were the phrases ‘we’ve all had jobs like this’ and ‘how management acts after you and co-workers clearly point out the issues at work’. The respondent took the view that the post took aim at specific members of management as well as the Company, and concluded it breached its social media policy.

A further meeting was held the next day, where a list of issues was read out and Ms S was invited to comment on each one. Ms S was shown the Facebook post, and the respondent claimed that she denied having posted it.

The Managing Director, Mr S, dismissed Ms S for gross misconduct during the meeting. No notes or records were kept at either of the meetings and, when questioned about this, Mr S claimed his “handwriting is terrible”. Mr S admitted in his testimony the discovery of the Facebook post and Ms Smith’s reaction to it was the reason behind her dismissal.

The Tribunal heard that Ms S was given 48 hours to appeal the decision and the appeal hearing was held the following day; however, no notes of the meeting were produced, and the decision to dismiss Ms S was upheld.

The Employment Judge determined that Ms S made no comment in the post other than posting emojis, and said “it is difficult to say whether anybody looking at this meme would link it directly to the claimant’s working environment”. He said the post was "unlikely" to have violated the firm’s social media policies, which stipulated that nothing should be posted on social media that could "reasonably be considered to damage or adversely affect the company".

However, the Judge added: “It merited some discussion with the claimant and perhaps for some action to be taken, such as a warning or a reminder of the guidance in this area so that nothing like this was repeated.”

The Tribunal further concluded that Ms S's dismissal for conduct was unfair as the firm could have given her further guidance about social media use or a verbal or written warning before dismissing her. They concluded that the disciplinary procedure and process was unfair, and Ms S's unfair dismissal claim succeeded. A remedy hearing is to be held.

It is clear that lots of posts on social media are critical of workplaces or management styles. Understandably, employers might feel concerned that, if an employee were to like or share such posts, there is an implied criticism of the employer. While the Tribunal ruled that the possibility of someone linking it to the claimant's working environment was remote, from the Judge's perspective, that was a bit unfair on the employer.

It is not unlikely that someone might think, from an employee liking a particular post, that they had some affinity with it through their working environment. However, simply sharing or liking a social media post is unlikely to be enough to warrant a dismissal in a case such as this where the post itself was not, for example, offensive or discriminatory. The key message in this case is to ensure that social media policies are clear and specific, that staff receive training on those policies, and that managers do not overreact. Where posts are borderline and the risk is speculative, the proportionate response might be a warning or training.

2. The importance of early consultation

Employers that do not follow the correct redundancy procedure may be punished at an Employment Tribunal in light of a recent EAT ruling.

While redundancy is a fair reason for dismissal, the process followed can lead to a finding of unfair dismissal. A key step in a fair process is early consultation with the employees about the proposals. This must be done when the proposals are still at a formative stage; there must be adequate information provided, adequate time must be allowed for responses and conscientious consideration must be given to the response.

In cases where there are 20 or more employees being made redundant in a 90-day period, the collective consultation obligations will apply, meaning that the union or employee representatives have to be informed and consulted. However, as the case of Joseph De Bank Haycocks v ADP RPO UK shows, the consultation obligations will also be important when the numbers are low enough that the collective consultation obligations are not triggered.

Mr DBH was part of a team that recruited employees for a single client company. The demand for their work diminished significantly in 2020 because of the Covid pandemic and, at the end of May 2020, a decision was taken to make redundancies.

The next step undertaken was a scoring exercise to assess the team by reference to subjective criteria that had been provided by the employer's US parent company. Mr

DBH came last in the rankings. It was then determined that there would be two posts lost and a timetable for consultation was put in (planned to start at the end of the month) to take place over a two-week period.

Mr DBH attended three meetings during that period and was given notice of dismissal in the last one. In these meetings, he was unaware of how he, or his colleagues, had been scored against the selection criteria.

Mr DBH appealed against his dismissal and before the hearing took place was given his scores but not those of his colleagues. The appeal was unsuccessful, and he brought a claim for unfair dismissal.

The Tribunal dismissed the claim. It accepted that Mr DBH knew nothing about his scores until his dismissal but concluded that the appeal process had remedied any fault and he had not in any event demonstrated that his score should have been different.

The Employment Appeal Tribunal allowed the appeal and substituted a finding of unfair dismissal on the grounds that there had been a clear absence of meaningful consultation at the formative stage of the redundancy process.

It noted that the requirement for consultation to start at a formative stage had become well established where the numbers meant that collective consultation duties applied. However, the same principle should apply as a matter of good industrial practice in relation to redundancy situations where fewer than 20 dismissals were proposed.

In relation to the impact of the appeal it held that, while that might correct some aspects of the individual consultation process, it could not repair the error of failing to begin consultation early enough.

The decision highlights the importance of early consultation and shows that a failure to give employees the opportunity to influence the employer's decision at a formative stage of the process may lead to a finding of unfair dismissal regardless of the numbers involved. However, it will always be necessary for the particular circumstances to be taken into account as there might be a good reason that consultation at an early stage was not reasonable or futile.

The decision is also a useful reminder of the limits on what errors in the process an appeal hearing can remedy. To provide an opportunity for consultation at a formative stage of the proposals it might be necessary to go back to the drawing board and start over again.

3. Changes to TUPE rules

As of 1 July 2024, significant changes have been implemented to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE). The most

notable change is the extension of the micro-business exemption for informing and consulting employees during a TUPE transfer.

Previously, only employers with fewer than 10 employees could inform and consult directly with affected employees. The new rules extend this exemption to:-

- employers with fewer than 50 employees
- employers of any size involved in the transfer of fewer than 10 employees.

This change applies only when there are no existing employee representatives or trade unions in place, and the employer has not invited elections for such representatives.

The extension of this exemption is expected to reduce the administrative burden on smaller businesses and provide greater flexibility in managing TUPE transfers. Employers now have more options to adopt a personalised approach when communicating with affected employees about the transfer and any related measures.

However, it's crucial to note that this relaxation of requirements does not absolve employers of their duty to inform and consult. Failure to comply with TUPE obligations can still result in penalties of up to 13 weeks' gross pay per affected employee in the event of a successful claim.

While the recent changes focus on informing and consulting obligations, other aspects of TUPE remain unchanged including:-

- the automatic transfer of employment contracts to the new employer;
- protection of employees from dismissal or changes to terms and conditions solely due to the transfer
- the requirement to provide Employee Liability Information to the transferee.

These changes currently apply only in Great Britain. Northern Ireland has not implemented similar amendments.

4. When volunteers may be considered workers

The distinction between volunteers and workers can have significant legal consequences for organisations. In the recent case of Mr. Martin Groom v. Maritime and Coastguard Agency [2024], the Employment Appeal Tribunal (EAT) examined the employment status of a volunteer.

A key factor is whether the individual is required to provide personal service and is subject to a degree of control by the organisation. In the case of Groom v Maritime and Coastguard Agency (2024), the EAT found that a volunteer coastal rescue officer was a worker during periods when he carried out activities he could be paid for, even though he was described as a ‘volunteer’. The EAT emphasised that a contract came

into existence each time Mr. G performed an activity the organisation agreed to pay for.

The presence of remuneration or benefits beyond mere expense reimbursement is another crucial factor. In this case, the volunteer agreement allowed claims for payment to cover costs and compensate for disruption to personal time. The EAT held that the right to be paid, whether or not payment was claimed, was a critical factor in establishing worker status. The key facts were that:-

- Mr. G was a volunteer coastal rescue officer for over 35 years
- he operated under a "Volunteer Handbook" and "Code of Conduct"
- some activities were unpaid, while others were paid upon submission of a claim
- the EAT found he was a worker during periods when carrying out activities he could be paid for
- a contract was formed each time he performed a paid activity, even if he didn't claim payment
- the organisation's minimum attendance requirements also factored into the decision

Organisations engaging volunteers should be aware of several other factors:-

- **Written agreements:** While having a volunteer agreement doesn't automatically create a contract, courts will examine the substance of the arrangement, including mutual obligations and control. Ensure that volunteer agreements clearly outline the nature of the volunteer role and explicitly state that there is no obligation to provide personal service or control similar to that of a worker.
- **Expense reimbursement:** Reimbursing reasonable out-of-pocket expenses alone is unlikely to change volunteer status, but flat-rate or excessive payments could be seen as remuneration. If estimating expenses, estimates should be carefully considered to ensure they are not higher than what could realistically be incurred. HMRC's guidance on charity volunteers mentions travel to and from volunteering and the cost of care for dependents during volunteering as examples of such expenses.
- **Training:** Providing training solely for the volunteer role is generally acceptable, but training that could be seen as a benefit in kind may suggest an employment relationship. According to HMRC's guidance on charity volunteers, training is not considered a 'benefit in kind' if: It is provided solely to enhance the volunteer's or intern's ability to perform their role; and, it is received during the course of the voluntary work. So it is important to limit training to what is necessary for the volunteer role.
- **Obligations and sanctions:** A genuine volunteer typically can provide their time freely, come and go as they please, and not face sanctions for failing to perform duties.
- **National Minimum Wage (NMW):** It is crucial to determine if the individual is a 'worker' based on the actual nature of the relationship, as this entitles them to the National Minimum Wage (NMW). Failing to pay the NMW can have severe consequences, including the requirement for the employer to pay six years of

backdated wages and potential criminal charges for wilful neglect. Additionally, the employer could be publicly 'named and shamed' under the NMW Naming Scheme.

- **Regular Reviews:** Regularly review the roles and agreements of volunteers to ensure that they do not inadvertently fall into the category of 'worker' under employment law. This includes checking for any changes in the nature of their activities or the benefits they receive.

This decision is crucial for employers who host volunteers, interns, or work experience placements. It highlights that while not all volunteers are considered workers, paying them more than their expenses might imply worker status and entitle them to protections.

5. Importance of considering redeployment as an alternative to dismissal

Employers have a legal obligation to consider redeployment as an alternative to dismissal, particularly in redundancy situations or when dealing with employees who have frequent absences due to health issues. This consideration is crucial for ensuring the fairness of any dismissal decision and can significantly impact the outcome of potential unfair dismissal claims.

The Employment Appeal Tribunal (EAT) has consistently emphasised that redeployment should be considered as a matter of course when determining the reasonableness of a dismissal decision. This principle applies even if the employee or their representatives do not explicitly raise the issue of redeployment during the dismissal process.

The recent case law of Bugden v Royal Mail Group [2024] highlights the importance of considering redeployment. Mr. B was terminated with notice as a result of the Respondent's attendance management policy, owing to his frequent and extended absences between 2015 and 2019. The EAT ruled that the Employment Tribunal should have explored redeployment as an alternative to dismissal, even if neither party mentioned it. This decision emphasises that Employment Tribunals should routinely consider whether the employer considered redeployment when assessing the reasonableness of a dismissal.

Where an employee is disabled, as defined in the Equality Act 2010, employers have a duty to make reasonable adjustments. Redeployment to an alternative role may be considered a reasonable adjustment in some cases, particularly when an employee is having difficulties carrying out their current role due to a disability. In Bugden v Royal Mail Group [2024], Mr. B argued that his termination was unjust and that he had experienced disability discrimination. He asserted that the Respondent had failed to provide reasonable accommodations for his disabilities. The EAT, however, concluded that the ET did not err in not considering redeployment as a reasonable adjustment, as neither Mr. B nor his Occupational Health advisor raised this issue before his dismissal or during the hearing. Additionally, the available material did not clearly demonstrate the potential impact of redeployment on Mr. B. Therefore, this

part of his appeal was unsuccessful.

To ensure compliance with legal obligations and best practices, employers should:-

- review internal policies to identify any provisions for alternatives to dismissal in certain circumstances
- consider the range of reasonable responses available and give thorough consideration to the fairness of a dismissal
- document all considerations and decision-making processes related to redeployment options
- provide sufficient information about alternative roles to employees, allowing them to make informed decisions
- implement a redeployment policy or include redeployment provisions within the organisation's redundancy policy
- proactively consider reasonable adjustments for disabled employees at all stages of employment, including during performance management, capability assessments, and disciplinary procedures
- consider various alternatives to redundancy, including reducing working hours, offering sabbaticals, or implementing pay cuts, before resorting to dismissal
- finally, the importance of redeployment consideration extends beyond redundancy situations and applies to dismissals related to capability and frequent absences.

If you require advice or support with any case, please let me know.

6. Holiday pay for irregular hours and part-year workers and TUPE change

The Government is trying to simplify the calculation for irregular hours and part-year employees and the following is a brief guide for employers to the new laws on holiday pay for part-time workers.

The Government has announced draft legislation to reform holiday pay for part-time and irregular hours workers, which will come into effect from January 2024. As well as simplifying calculations, the Department for Business and Trade said it will now allow ‘rolled up’ holiday pay for part-time workers and those who work irregular hours, enabling employers to include an amount for holiday pay on top of the hourly rate in regular pay packets.

The announcement follows a series of consultations into existing EU employment law and holiday pay and is intended to help to simplify and address concerns about the calculation of holiday entitlement for employers and make entitlement clearer for all irregular hours workers, including part-year workers and agency workers.

The draft legislation announces a new method of holiday accrual for part-time and irregular hours workers. This follows confusion that arose from the Supreme Court’s decision in the Harpur Trust v Brazel case last year. The case resulted in part-year

workers receiving more holiday entitlement than part-time workers who worked the same number of hours on an annual basis.

However, the new legislation will calculate holiday pay entitlement for such workers as 12.07% of the hours worked in a pay period, in a bid to level the playing field and create greater transparency.

Rolled-up holiday pay is where employers pay workers a sum in addition to their normal hourly rate of pay to represent their holiday pay entitlement. However, it was made unlawful following a 2006 European Court of Justice ruling, as a result of concerns workers may not be incentivised to take leave as they could earn more holiday pay by staying at work. Rolled-up holiday pay will now be allowed, but only for part-time workers, irregular hours workers and some agency workers.

However, in the Government's consultation, rolled-up pay had a "mixed response", the consultation noted that rolled-over pay would not be allowed for full-time members of staff, but said there were "still clear benefits" to business and workers in introducing the system for part-time workers and those with irregular hours.

The Government has recognised that the concerns raised with using rolled-up holiday pay, especially that it may disincentive workers from taking leave but it was considered that the existing safeguards were proportionate in addressing these concerns.

The reforms will also see changes to Transfer of Undertakings Protection of Employment (TUPE) rights, which protect employees and their benefits when their organisation transfers from one employer to another. The reforms will allow small businesses to consult their new employees directly if there are no existing worker representatives in place. Where employee representatives – including trade unions – are in place, employers will be required to consult them.

7. Worker Protection Act

Acas is encouraging employers and their staff to create a zero-tolerance approach to sexual harassment at work due to a change in law.

The Worker Protection (Amendment of Equality Act 2010) Act 2023 came into effect on 26 October 2024, introducing a legal duty for employers to proactively take reasonable steps to prevent sexual harassment.
Acas is suggesting employers create a culture where sexual harassment is understood to be unacceptable, including anyone in a position of authority.
This includes developing a policy on sexual harassment, training managers on their responsibilities, and creating an environment where people feel safe to report incidents of sexual harassment and situations where they felt unsafe.

According to a recent Acas survey, 14% of employers and 6% of employees said they had witnessed sexual harassment in their workplace

Sexual harassment is defined by the Equality and Human Rights Commission (EHRC) as “unwanted conduct of a sexual nature” that has the purpose or effect of “violating a worker’s dignity” or “creating an intimidating, hostile, degrading, humiliating or offensive environment for that worker”. It is unacceptable at work or anywhere else. Everyone needs to understand this and Acas are urging employers to take a proactive approach to stamping it out.

Under the new law, employers must take reasonable steps to prevent sexual harassment. They must not wait until something has happened before they take action.

This covers harassment from colleagues, whether at work or in settings connected to work, and also harassment from third parties such as customers, service users or members of the public.

In order to identify and address risks, employers need to:-

- consider the risks of sexual harassment happening in their organisation
- consider steps they could take to reduce the risks of sexual harassment happening
- consider which of those steps are reasonable for them to take.

Employers have a duty to take ‘reasonable steps’ to prevent sexual harassment of their employees and if a Tribunal finds an employer failed to take steps to protect workers, it will be able to order them to pay a 25% uplift to any award of compensation for sexual harassment.

Proper policies and training for managers can help eliminate the potential for sexual harassment to occur. They can also help foster environments where staff feel empowered to report any harassment and avoid it before it occurs.

8. Case law updates - indirect discrimination

The following shares the findings of two recent Tribunals where the employers have practices that put certain groups at a disadvantage. Indirect discrimination arises when an employer implements a provision, criterion or practice (PCP) that applies equally to everyone, but the effect of the PCP is to put a group of people with a protected characteristic, and an employee who shares that characteristic, at a particular disadvantage.

Indirect discrimination is often unintended and it is possible to defend such a claim if an employer can show that the PCP they have put in place is ‘a proportionate means of achieving a legitimate aim’.

Two recent cases have highlighted the need for employers to understand what they are trying to achieve in having the rule or practice in place and that they give due consideration to whether it is reasonable to seek to achieve it by applying that practice or whether there is an alternative, less or non-discriminatory way to do so.

- **Ngole v Touchstone Leeds**

In this case, Mr N made several discrimination claims on the basis of the protected characteristic of religion and belief. He is a Christian and applied to Touchstone Leeds for a role as discharge mental health support worker. Touchstone is a charity providing mental health services to various communities in Yorkshire. Approximately 12% of Touchstone's work includes providing services to the LGBTQ+ community.

Mr N was offered the role conditional upon satisfactory references. The references received were vague and Touchstone carried out its own background checks on the internet. The Company discovered references to Mr N being removed from a social work course at the University of Sheffield for posting derogatory comments about gay and bisexual people on Facebook.

Touchstone revoked the job offer and, when Mr N challenged the decision, they invited him to a second interview to establish whether his views aligned with Touchstone's values, including the promotion of LGBTQ+ rights. Touchstone did not receive sufficient reassurance from Mr N at the second interview and refused to reinstate the offer of employment. Mr N made claims against Touchstone for harassment related to religion or belief, direct discrimination and indirect discrimination.

Touchstone required its employees to actively promote and be positive about LGBTQ+ lifestyles (the PCP), which the tribunal accepted placed orthodox Christians and Ngole at a particular disadvantage. Touchstone stated that, in having a PCP of being positive about LGBTQ+ lifestyles, they sought to safeguard vulnerable service users.

Touchstone did not apply a policy of not employing Christian employees, as they had a number of employees of various religions, beliefs and backgrounds. Its' concern was with the welfare of their service users should any employee refuse or fail to promote and be positive about LGBTQ+ lifestyles, for any reason. The Tribunal found that having the PCP was appropriate and necessary to achieve that aim.

This case highlights some of the difficulties when multiple protected characteristics need to be balanced, but it does make it clear that employees need to understand and be able to articulate why they have particular practices and whether there is another, less discriminatory, way to achieve them.

- **Hilton-Webb v Minis Childcare**

This case is a reminder that the test for justification has two main parts: whether the employer was seeking to achieve a legitimate aim, and whether the PCP was a proportionate way of doing so.

The claimant had a visual impairment that amounted to a disability. The employer had a policy of printing documents in what was referred to as a 'small font' but was

generally accepted to be a standard font of between 10 and 12 point. The claimant claimed that such a practice put a group of people with visual impairment, and therefore the claimant, at a particular disadvantage as they had difficulty reading the documents.

The Employment Tribunal found that the claimant's claim succeeded and stated: "Small font sizes – there is simply no objective justification for this. There is no legitimate aim, and it cannot be proportionate when the simple thing to do would be to provide documents in larger font. It is unfortunate that the claimant simply did not explain her difficulty with documents in small font size to the respondent at the time of the events in question."

The respondent appealed and the Employment Appeal Tribunal (EAT) noted that the respondent had stated that the legitimate aim being pursued was management efficiency and it was therefore unclear why the tribunal had concluded that there was no legitimate aim or that the provision of documents in standard/small font was not a proportionate means of achieving that aim. The EAT clarified the test to be applied as having four steps:-

- the respondent must assert and establish the aim
- it is for the Employment Tribunal to decide whether the aim is legitimate
- the respondent must establish that the PCP was a means of achieving that aim
- it is for the Employment Tribunal to decide whether the adoption of the PCP was proportionate to achieve the aim.

The case was remitted back to the Employment Tribunal to clarify the reasons for its decision but the EAT provided clarity on the test to be applied for assessing whether a PCP is justified.

9. Case law updates - age discrimination

In light of two recent tribunal claims, the importance of preventing discriminatory behaviour is clarified.

Employers are having to be more careful about the behaviour of their managers and employees to avoid discrimination claims. Two recent cases relating to age discrimination have demonstrated the fine line between behaviour that could have amounted to discrimination and behaviour that did not.

- **'Back in your day' comment**

In *Couperthwaite v Hilton Nursing Partners*, the employment tribunal found no clear evidence that an alleged comment of 'back in your day' was actually made by Ms C's younger colleague.

The Employment Judge however, went on to explain that had it been made, then, subject to context, it may have accepted that the phrase was unwanted conduct and

related to Ms C's age, which could have amounted to harassment on the grounds of age.

Such a phrase is quite often used in conversations between colleagues of different ages, and this case highlights the risks of potentially innocent comments being taken in an unintended manner by someone else. Harassment does not require there to have been any intention to offend and so both employees and employers need to be mindful of the language used in the workplace.

- **Offering a chair**

In a second claim, *Edreira v Severn Waste Services*, the Employment Tribunal found that offering an employee a chair to sit on was not harassment relating to Mr E's age.

While accepting that offering Mr E the chair was unwanted conduct, it was not related to his age and so the claim failed. This incident formed part of a number of examples given by Mr E that he alleged were to force him out of his job because of his age.

The above two claims failed. However, it is becoming more important than ever that employers educate their employees on equality, diversity and inclusion within the workplace. With compensation for discrimination claims being unlimited and the reputational damage that can be caused by a successful claim, the key is to prevent the situations from arising in the first place.

To provide employees with the tools to prevent and avoid discrimination, employers should:-

- train employees on what amounts to discrimination and the risks of behaving in a discriminatory manner. This training should be kept updated to take account of changing views in society;
- have policies in place that set out what amounts to discriminatory behaviour and ensure they are kept up to date to keep up with changes in the law; and
- take firm action against any employees that act in breach of these policies.

Showing that employers take a zero-tolerance approach to acts of discrimination should act as a deterrent to other employees, as well as encouraging staff to call such behaviour out.

10. Understanding the General Occupational Requirement (GOR) in recruitment

The General Occupational Requirement (GOR) exception is a provision under the Equality Act 2010 that allows employers to lawfully restrict recruitment to candidates with a particular protected characteristic if it is essential for the job. This exception is crucial in situations where the nature or context of the work necessitates that an individual must possess a specific characteristic, such as sex,

race, disability, religion or belief, sexual orientation, or age. The requirement must be a proportionate means of achieving a legitimate aim, ensuring that the restriction is necessary and justified.

To apply the GOR exception, employers must demonstrate that the characteristic is essential for the job and that there is no less discriminatory way to achieve the same aim. For instance, a public changing room attendant might need to be of the same sex as the users to maintain privacy and decency. Similarly, a refuge for women who have experienced domestic violence might justifiably employ only female support workers to ensure the comfort and safety of the residents. The practical steps for employers should be as follows:-

- **Evaluate the role**: Before advertising a vacancy, assess whether a GOR might apply. Consider the specific duties and context of the role to determine if a particular characteristic is genuinely required.
- **Document justification**: Clearly document the legitimate aim and the proportionality of the requirement. This documentation will be crucial if the decision is challenged.
- **Review regularly**: Circumstances can change, so regularly review the justification for any GOR to ensure it remains valid. This is particularly important if the role or its context evolves over time.

Employers must ensure that the application of a GOR is consistent with the latest legal guidance and case law. The Equality and Human Rights Commission (EHRC) provides updated guidance on job adverts and the lawful use of GORs. Employers should be aware that the definition of sex for these purposes refers to the legal sex recorded on a birth certificate or gender recognition certificate, which can have implications for roles restricted by sex.

Finally, employers should also consider the potential for indirect discrimination and ensure that any recruitment practices do not inadvertently disadvantage other groups. Positive action can be taken to encourage applications from underrepresented groups, but this must be carefully balanced to avoid crossing into unlawful positive discrimination.

11. The Employment Rights Bill

The Employment Rights Bill, recently introduced by the UK government, represents a significant overhaul of employment law, aiming to enhance workers' rights and provide a more balanced framework for both employers and employees. The following summary outlines the key aspects of the Bill, its implications for employers, and the steps businesses should take to prepare for these changes. The key provisions of the Employment Rights Bill are as follows:-

Unfair dismissal

- **Day one rights**: One of the most notable changes is the introduction of unfair

dismissal rights from the first day of employment. This marks a departure from the current requirement of two years' continuous service. Employers will need to adapt their hiring and probationary processes to accommodate this change.

- **Probationary periods**: The Government's preference is for a nine-month probationary period during which a "lighter-touch" dismissal process can be applied, allowing employers to assess an employee's suitability for the role. This period will be subject to further consultation to ensure it provides stability and security for both businesses and workers.

Flexible working

- **Default right**: Flexible working is set to become the default position, with employers required to grant requests unless it is unreasonable to do so. The grounds for refusal remain similar to existing legislation, but employers must now provide a written explanation of why a request is refused and why the refusal is reasonable. This change emphasizes the importance of accommodating flexible working arrangements where possible.
- **Reasonableness requirement**: The Bill introduces a statutory reasonableness requirement for refusing flexible working requests, which will likely make it more challenging for employers to deny such requests. Employers should review their current policies and ensure they have clear, documented reasons for any refusals.

Statutory Sick Pay (SSP)

- **Immediate entitlement**: The Bill removes the lower earnings limit and the waiting period for SSP, allowing employees to receive sick pay from the first day of absence. This change aims to provide greater financial security for workers and reduce the administrative burden on employers.
- **Implications for employers**: Employers will need to update their payroll systems and policies to reflect these changes. The removal of the waiting period may also require more proactive management of short-term sickness absence.

Family-friendly rights

- **Day one entitlements**: The Bill introduces day one rights for paternity leave, unpaid parental leave, and bereavement leave. This expansion of family-friendly rights aims to support working families and promote a better work-life balance.
- **Protections for pregnant women and new mothers**: The Bill strengthens protections against dismissal for pregnant women and new mothers, extending these protections to six months after returning to work. Employers must ensure their policies comply with these enhanced protections.

Zero-hours contracts

- **Guaranteed hours**: Employers will be required to offer zero-hours workers a guaranteed-hours contract based on the hours they regularly work over a 12-

week reference period. This change seeks to address the exploitative nature of zero-hours contracts while allowing workers to retain flexibility if they choose.
- **Reasonable notice and compensation**: Workers on zero-hours contracts will be entitled to reasonable notice of shift changes and compensation for cancelled shifts. Employers must ensure they have systems in place to provide adequate notice and manage compensation claims.

Fire and rehire practices

- **Automatic unfair dismissal**: The Bill introduces new statutory obligations around the use of fire and rehire practices. Dismissals will be automatically unfair unless they fall within a limited exception related to financial difficulties threatening the business's viability. Employers must adhere to a prescribed consultation process before implementing such changes.
- **Consultation requirements**: Employers considering contractual variations through fire and rehire must engage in thorough consultation with employees and trade unions. This process should be documented and transparent to avoid potential legal challenges.

Collective redundancy consultation

- **Broader scope**: The Bill removes the one-establishment requirement for collective redundancy consultation, meaning that 20 or more proposed redundancies within 90 days across a whole business will trigger consultation obligations. This change will likely increase the frequency of collective consultations for larger employers.
- **Implications for employers**: Employers must be diligent in monitoring redundancy numbers across their entire business to ensure compliance with consultation requirements. This may necessitate changes to internal processes and record-keeping practices.

Harassment and equality

- **Enhanced protections**: The Bill strengthens the duty on employers to take all reasonable steps to prevent sexual harassment, including third-party harassment. Employers will be liable if they fail to prevent harassment by third parties, and regulations may specify what constitutes reasonable steps.
- **Equality action plans**: Large employers will be required to develop and publish equality action plans addressing gender pay gaps and supporting employees through menopause. This requirement aims to promote diversity and inclusion in the workplace.

Trade union rights and industrial action

- **Simplified recognition process**: The Bill simplifies the union recognition process and introduces new rights of access for union officials. Employers must inform

employees of their right to join a union and facilitate union access to the workplace.
- **Repeal of minimum service levels legislation**: The Bill repeals The Strikes (Minimum Service Levels) Act 2023, which previously set minimum service levels during strikes. This change may impact industrial relations and require employers to reassess their contingency plans for strike action.

It is suggested that the following practical steps for employers should be considered.

Reviewing policies and procedures

- **Update employment contracts**: Employers should review and update employment contracts to reflect the new rights and obligations introduced by the Bill. This includes provisions related to unfair dismissal, flexible working, and zero-hours contracts.
- **Revise HR policies**: HR policies should be revised to ensure compliance with the new family-friendly rights, statutory sick pay provisions, and harassment prevention measures. Employers should also consider implementing training programmes to educate managers and employees about these changes.

Preparing for consultation and implementation

- **Engage with stakeholders**: Employers should engage with trade unions, employee representatives, and other stakeholders to discuss the implications of the Bill and gather feedback on proposed changes. This engagement will be crucial for navigating the consultation process and ensuring a smooth transition.
- **Plan for implementation**: Employers should develop a detailed implementation plan outlining the steps required to comply with the new legislation. This plan should include timelines, resource allocation, and communication strategies to ensure all employees are informed and prepared for the changes.

Monitoring and compliance

- **Establish Monitoring Systems**: Employers should establish systems to monitor compliance with the new requirements, such as tracking flexible working requests, managing zero-hours contracts, and ensuring adherence to consultation obligations. Regular audits and reviews can help identify potential issues and ensure ongoing compliance.
- **Seek legal advice**: Given the complexity and scope of the changes introduced by the Bill, employers may benefit from seeking legal advice to ensure they fully understand their obligations and avoid potential legal challenges. Legal experts can provide guidance on specific issues and help develop strategies for compliance.

There are a number of other additional considerations as follows:-

Future reforms and consultations

- **Right to Switch Off**: The government has indicated plans to introduce a "Right to Switch Off," preventing employees from being contacted outside of working hours except in exceptional circumstances. Employers should stay informed about this potential reform and consider its implications for their business.
- **Single status of worker**: The Government is considering a move towards a single status of worker, which would simplify the current employment status framework. This change could have significant implications for employers, particularly those with diverse workforces.
- **Ethnicity and disability pay gap reporting**: Large employers may soon be required to report on ethnicity and disability pay gaps, in addition to the existing gender pay gap reporting requirements. Employers should begin preparing for this potential obligation by reviewing their data collection and reporting processes.

Impact on business practices

- **Cost implications**: The introduction of day one rights and other changes may result in increased costs for employers, particularly those with large workforces or high turnover rates. Employers should assess the financial impact of these changes and consider strategies to mitigate potential costs.
- **Workforce management**: The Bill's emphasis on flexible working and family-friendly rights may require employers to adopt more flexible workforce management practices. This could include offering remote work options, adjusting shift patterns, and providing additional support for employees with caring responsibilities.
- **Cultural shift**: The changes introduced by the Bill reflect a broader cultural shift towards greater employee rights and protections. Employers should consider how these changes align with their organizational values and culture, and take steps to foster a supportive and inclusive work environment.

The Employment Rights Bill represents a significant shift in the UK employment landscape, with far-reaching implications for employers. By understanding the key provisions of the Bill and taking proactive steps to prepare for its implementation, employers can ensure compliance and support a positive working environment for their employees.

12. Further help and/or advice

If any of the above is not clear or you wish to discuss it or just would like further advice on any of the issues in this Bulletin or indeed support on any other issue or particular employment situation, please do contact me on clivep@cpassociates.co.uk or call me on 01582 755172 or 07970 381592. I always look forward to hearing from you on anything with which I may be able to help.

Clive

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