

Brachers Bitesize

Employment Law Update

Key cases and legislative changes

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Welcome

Presenter

Brachers
With you all the way



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Today's Webinar

01 What to expect in 2023

- Rates and Limits Changes
- ET Waiting Times
- King's Coronation
- Retained EU Law (Revocation and Reform Bill) 2022
- Harassment Bill
- Flexible Working Bill
- "Fire and Re-Hire" Code of Practice
- Other proposed changes

02 Key Case Law Decisions



Poll

What is your current main concern / priority for HR?

What to expect in 2023



Annual Wage and Payment Increases

National Minimum & Living Wages

2023 Rates

	Rate from April 2023	Annual Increase (£)	Annual increase (%)
National living wage	£10.42	0.92	9.7
21-22 year old	£10.18	1.00	10.9
18-20 year old	£7.49	0.66	9.7
16-17 year old	£5.28	0.47	9.7
Apprentice	£5.28	0.47	9.7

Anticipated to take effect on 1 April 2023

Statutory Sick Pay and Family Leave Pay

2023 Rates

Type of Pay	2022/23	2023/24
Statutory sick pay	£99.35	£109.40
Adoption pay	£156.66	£172.48
Maternity pay		
Paternity pay		
Shared parental pay		
Parental bereavement pay		

SSP anticipated to take effect on 6 April 2023

Family pay anticipated to take effect on 2 April 2023



Employment Tribunal: Waiting Times

Employment Tribunal Waiting Times

Waiting Time for Hearings

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

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

- “First Hearing” may not mean a final liability hearing.



King's Coronation: Extra Bank Holiday

Employee Entitlement to an Extra Bank Holiday

King's Coronation

- King Charles III Coronation will be on Saturday 6 May 2023
- Additional one-off bank holiday on Monday 8 May 2023 to celebrate
- Entitlement to this extra one-off bank holiday?

Employee Entitlement to an Extra Bank Holiday

First Instance: The Employment Contract

- Depends on the wording of the employment contract
- A contract may allow for:
 1. Annual leave **plus** bank holidays
 2. Annual leave **inclusive of** bank holidays
 3. Annual leave plus bank holidays **normally observed**
 4. A fixed **28 days** holiday per year
 5. Annual leave **plus New Years Day, Good Friday, Easter Monday, early May bank holiday, spring bank holiday Christmas day and Boxing day**



The Retained EU Law (Revocation and Reform) Bill 2022

The Retained EU Law (Revocation and Reform) Bill 2022

What is retained EU Law?

- The EU Withdrawal Act 2018 removed EU law from UK statute and introduced replacement body of law (retained EU law)
- Laws that originate from EU laws/treaties
- In practice – much of UK employment laws
- Subject to UK courts interpretation

The Retained EU Law (Revocation and Reform) Bill 2022

What does the Bill do?

- All retained EU law will be sunset (i.e. revoked) on 31 December 2023 by default
- Unless action taken through specific legislation or deemed repeal date is extended
- Potential extension to 23 June 2026
- Could radically reshape employment law landscape and remove long-established rights.

The Retained EU Law (Revocation and Reform) Bill 2022

Implications for employment law

- Working Time Regulations 1998
- Agency Workers Regulations 2020
- Part-Time Workers Regulations 2000
- Fixed-Term Employees Regulations 2002
- TUPE 2006
- Collective Redundancy laws
- Equal Pay Law/Discrimination law changes

The Retained EU Law (Revocation and Reform) Bill 2022

Implications for employment law

- The Bill gives the government power to restate secondary retained ET law as domestic law or replace it completely
- Repeal of s.4 EUWA - retained law under s.4 no longer recognised or enforceable in domestic law (including right to equal pay under EU law)

New Bill: Harassment



New Bill: Harassment

Worker Protection (Amendment of Equality Act 2010) Bill

Background

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

Worker Protection (Amendment of Equality Act 2010) Bill

What does it do?

- Creates new legal liabilities for employers
- An employer (A) will be treated as harassing a person (B) if:
 - B is harassed by third parties (includes clients and customers) during the course of their employment
 - The employer fails to take all reasonable steps to prevent third party harassment
- Creates a new duty on employers to take all reasonable steps to prevent sexual harassment of their employees
 - Subject to a 25% uplift by employment tribunal sexual harassment cases if employer failed to uphold this duty

Worker Protection (Amendment of Equality Act 2010) Bill

What stage is it at?

Not imminent.

House of Commons 1st Reading – 15th June 2022

House of Commons 2nd Reading – 21st October 2022

House of Commons Committee Stage – 23rd November 2022

House of Commons Report Stage – 3rd February 2023

House of Lords 1st Reading – 6th February 2023

House of Lords 2nd Reading – Date to be announced

House of Lords Report Stage – TBC

House of Lords 3rd Reading – TBC

Consideration of Amendments – TBC

Royal Assent – TBC



New Bill: Flexible Working



New Bill: Flexible Working

Employment Relations (Flexible Working) Bill

Background

- Under current law employees with at least 26 weeks' continuous service have the right to request a change in working hours, relating to either time or location
- Employers must consider these requests in line with a statutory Code of Practice
- Employers are obliged to respond to these requests within 3 months

Employment Relations (Flexible Working) Bill

Background

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

Employment Relations (Flexible Working) Bill

What does it do?

- Removes the requirement for employees to explain their application's effects on the employer
- Allows employees to make 2 flexible working requests per 12 months
- Requires employers to consult with the employee before being allowed to refuse an application
- Reduces the deadline for an employer decision on flexible working requests from 3 months to 2 months

Employment Relations (Flexible Working) Bill

What stage is it at?

House of Commons 1st Reading – 15th June 2022

House of Commons 2nd Reading – 28th October 2022

House of Commons Committee Stage – 7th December 2022

House of Commons Report Stage – 24th February 2023 ←

House of Lords 1st Reading – TBC

House of Lords 2nd Reading – TBC

House of Lords Report Stage – TBC

House of Lords 3rd Reading – TBC

Consideration of Amendments – TBC

Royal Assent – TBC



“Fire and re-hire” Draft Code of Practice

“Fire and re-hire” Draft Code of Practice

What is “Fire and re-hire”?

- Occurs when an employer is seeking to change the terms of their employees’ employment contract and the employee does not agree to it
- The employer dismisses an employee and offers to re-employ them on the new terms and conditions
- Essentially, the changing of terms and conditions by way of dismissal and re-engagement

“Fire and re-hire” Draft Code of Practice

Background

- Follows on from ACAS concern over prevalence of “fire and rehire” during the pandemic
- Well publicised dismissals made by P&O Ferries without due consultation attracted high levels of scrutiny
- Resulted in Transport Secretary introducing a 9-point plan, including primary legislation, to tackle these issues

“Fire and re-hire” Draft Code of Practice

What does it do?

- The Code does not make the practice of “fire and rehire” illegal, but tells employers that it should be a last resort
- It will supplement ACAS guidance from 2021
- It encourages employers to engage through an open and transparent information and consultation process
- Failure to adhere to the Code may result in employment tribunals being able to award an uplift of 25% to unfair dismissal claims

“Fire and re-hire” Draft Code of Practice

Content of the Code

- Recommendation for employer to actively re-examine business strategy if agreement cannot be reached
- Recommendations for sharing information
- Implementation of changes over a period of time
- Need for change to be kept under review.

“Fire and re-hire” Draft Code of Practice

What stage is it at?

- The Draft Code of Practice was published by Government on 24th January 2023
- Open for consultation until 18th April 2023
- It will then need to be presented before Parliament before it can take effect.



Other Proposed Changes

Other Proposed Changes for 2023

Holiday Pay Calculations

- Government launched a consultation on the calculation of holiday entitlement, following *Harpur Trust v Brazel*
- Proposal would introduce a holiday entitlement reference period for part-year and irregular hours workers
- Aims to ensure holiday pay and entitlement is directly proportionate to the time employees spend working
- Consultation closed on 9 March 2023

Other Proposed Changes for 2023

The Protection from Redundancy (Pregnancy and Family Leave) Bill

- Regulation 10 of the Maternity and Paternity Leave Regulations 1999 – obligation to offer suitable alternative employment
- Regulation 10 protection period limited to duration of maternity leave
- Estimated to effect approximately 54,000 new parents.

Other Proposed Changes for 2023

The Protection from Redundancy (Pregnancy and Family Leave) Bill

- Aims to extend Regulation 10 of the Maternity and Paternity Leave Regulations 1999 to cover a longer period of time during, or after, a period of pregnancy
- 2nd reading in House of Lords on 3 March 2023
- Unlikely to see changes to existing protections before 2024.

Other Proposed Changes for 2023

The Strikes (Minimum Service Levels) Bill

- Introduced in Parliament on 5 January 2023 in response to significant public sector industrial disputes during 2022
- Allows Secretary of State to make regulations setting out “minimum service” required in certain sectors during strikes
- Allows employers to give a “work notice” to a trade union specifying which workers the employer required to work
- Unions and workers who failed to comply would face losing protections against being sued or dismissed

Other Proposed Changes for 2023

The Strikes (Minimum Service Levels) Bill

- Affected industries include:
 - Health services
 - Fire and rescue services
 - Education services
 - Transport services
 - Decommissioning of nuclear installations and management of radioactive waste and spent fuel
 - Border security
- Committee Stage in House of Lords on 9 March 2023

Recent Case Law Decisions

Disciplinary Processes

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

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

Direct Sex Discrimination

Earl Shilton Town Council v Miller [2023] EAT 5

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

Reasonable Adjustments

Hilaire v Luton Borough Council [2022] EAT 166

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

Anticipated Case Law Decisions

Upcoming Case Law Decisions in 2023

Rooney v Leicester City Council

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

Upcoming Case Law Decisions in 2023

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

- Awaiting Supreme Court Judgment re gaps of more than three months' would not interrupt a “series” of unlawful deductions from holiday pay.

Mercer v Alternative Future Group Ltd

- Permission granted to appeal to Supreme Court – protection from detriment for participation in strike action.



Questions