



Brachers Bitesize: Employment law update 2021

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Presented by:
Catherine Daw and Abigail Brightwell

Brachers
With you all the way



Today's presenters



Catherine Daw | Partner and Head of Employment and HR, Brachers LLP

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Catherine joined Brachers on qualification in 1999 and became a Partner in 2003. She leads the Employment and HR Team and has a reputation for providing clear, practical and client-focussed advice. She is an experienced and pragmatic lawyer and has been representing employers on all aspects of employment law including restructures, TUPE transfers, employment tribunal claims and contracts of employment since 1999.

Catherine is noted in leading legal directory Chambers and Partners for her expertise advising clients in the healthcare sector on complex employment issues. A client interviewed by Chambers described Catherine as "*an exceptional lawyer who is extremely responsive and always delivers the required outcome.*"



Abigail Brightwell | Associate - Employment, Brachers LLP

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Abigail joined Brachers as a trainee in 2009 and qualified into the Employment team in September 2011. She has represented several NHS Trusts in cases covering unfair dismissal (including constructive dismissal), unlawful deduction from wages, discrimination and whistleblowing.

Abigail advises on a broad range of day-to-day workplace issues, both contentious and non-contentious, and is regularly called upon to give advice on settlement agreements.

Today's Session

01

Employment Law
Changes

02

Key Case Law Update

03

Future Developments

Covid-19

- CJRS formally extended to 30 September 2021
- After 30 June 2021 employers required to contribute to wages for hours not worked:
 - 10% from July 2021
 - 20% for August and September
- New Public Health shielding guidance in place from 1 April 2021
- Extremely clinically vulnerable no longer advised to shield and no longer eligible for SSP as a result of being advised to shield.

Rates and Limits

- Compensation Limits in Employment Tribunal
- Applicable where “appropriate date” is on or after 6 April 2021
- Limit on compensatory award for unfair dismissal - £89,493 (from £88,519) or 52 weeks’ pay (whichever is lower)
- Minimum basic award where dismissal for a specified reason £6,634 (from £6,562)
- Weeks’ pay - £544 (from £538)
- Maximum statutory redundancy payment increased to £16,320 (from £16,140)

Rates and Limits

Update to Vento Bands for Injury to Feelings Awards

- From 6 April 2021
- Lower Band - £900 - £9,100
- Middle Band - £9,100 to £27,400
- Upper Band - £27,400 to £45,600

Most exceptional cases capable of exceeding £45,600.

Rates and Limits

Increase to Statutory Payments

- NLW increase to £8.91 per hour from 1 April 2021
- Age threshold for NLW applies to 23- and 24- year old workers from 1 April 2021
- NMW increase to £8.36 for workers aged 21 to 22, £6.56 for workers aged 18 to 20 and £4.62 for workers aged 16 and 17.
- Family related pay increases to £151.97 from 4 April 2021
- SSP increases to £96.35 per week from 6 April 2021.

NMW Record Keeping



- From 1 April 2021, record keeping period is increased from 3 to 6 years
- Employer must keep records for this period sufficient to establish that workers are being paid at a rate at least equivalent to applicable NMW rate

Future Developments – Brexit and immigration

- Since 11.00pm on 31 December 2020, EU and non-EU citizens coming to the UK have been treated equally under the UK's new points-based immigration system.
- Under the new system, the focus is on providing a route to the UK for skilled workers. There is no general low-skilled work route into the UK.

Government Statement:

“All applicants, both EU and non-EU citizens, will need to demonstrate that they have a job offer from an approved sponsor, that the job offer is at the required skill level, and that they speak English.”

Points based immigration – skilled workers

Replaced Tier 2 (General)

Score points

RQF level 3 (equivalent to A Level)

£25,600

“tradeable” – i.e. it is possible to “trade” higher qualifications for more points (salary needs to be more than £20,480), shortage occupations etc.

English language requirement

Points based immigration

– points

Characteristics	Tradeable	Points
Offer of job by approved sponsor	No	20
Job at appropriate skill level	No	20
Speaks English at required level	No	10
Salary of £20,480 (minimum) – £23,039	Yes	0
Salary of £23,040 – £25,599	Yes	10
Salary of £25,600 or above	Yes	20
Job in a shortage occupation (as designated by the MAC)	Yes	20
Education qualification: PhD in subject relevant to the job	Yes	10
Education qualification: PhD in a STEM subject relevant to the job	Yes	20

Sponsorship



- Home Office website
- Key personnel
- Fee
- Checks
- 8 weeks
- Priority service

Sponsor duties

- Monitor migrant employees
- Maintain records
- Immigration Skills Charge (ISC) - £1,000 PA charge for Skilled Workers

- From 6 April 2021, off-payroll working rules extended to medium and large clients in the private sector
- Entity engaging the contractor is now responsible for determining their employment status and assessing if IR35 applies
- Engagers must issue a Status Determination Statement (SDS) and pass it to the worker and the next entity in the supply chain (if applicable)
- Failure to take “reasonable care” completing the SDS could see liability for PAYE and NICs remain with the engager.

Public Sector Exit Payments

- Public Sector Exit Payments Regulations 2020 revoked from 19 March 2021
- £95,000 cap on public sector exit payments
- In force since November 2020.

Employment Tribunal Roadmap

- Key points:
- New Tribunal software system to be rolled out by end May 2021
- 16 new “Legal Officers” start work imminently – delegated case management powers
- Introduction of new virtual region
- Medium and long term will see a mixture of remote, hybrid and in-person hearings

Employment Tribunal Roadmap

- Key points:
- Default position for 2021/2022:
- Preliminary Hearings will be held by telephone or video (depending on purpose)
- Judicial Mediations will be held by telephone or video
- Final hearings will vary across regions – in person to return where possible
- London and South East will default to video for unfair dismissal claims, and video for discrimination and whistleblowing claims due to backlog.

ACAS Early Conciliation



- From 1 December 2020
- Standard early conciliation period extended from 1 month, to 6 weeks
- Previously, 1 month could be extended by 14 days with both sides' agreement
- Rules also amended to allow ACAS to contact the Claimant and correct any errors on the early conciliation forms.

Worker Status



Uber BV and Others v Aslam and Others

- Supreme Court decision - Uber drivers were “workers”
- Working from when app switched on and were ready and willing to accept trips
- As workers, entitled to limited employment rights including paid holiday and national minimum wage
- Supreme Court focused on factors including Uber’s significant control over the drivers and how they deliver their services

Uber BV and Others v Aslam and Others

- Uber argued that there was a written contract between Uber and the drivers, and a separate contract between the drivers and passengers - the drivers worked for the passengers
- Supreme Court held that Uber engaged the drivers to carry out the bookings
- Supreme Court held that contractual terms should not be starting point for determining employment status. In this case, the purpose of the legislation for protecting workers was more important.

Royal Mencap Society v Tomlinson-Blake

- Supreme Court Decision
- Held that “sleep-in shift time” is not work for the purposes of the National Minimum Wage Regulations 1999 and 2015.
- Considered whether overnight sleep-in shifts qualify for national minimum wage following earlier case decisions

Working Time

Royal Mencap Society v Tomlinson-Blake

- Supreme Court found:
- For the purposes of whether someone is “working” under the NMW provisions, it does not matter that a worker is required to follow employer’s directions or instructions;
- There is a distinction in the Regulations between carrying out “actual work” and being “available for work”

Equal Pay

ASDA Stores Ltd v Brierley

- Supreme Court Decision
- Held that shop floor workers and warehouse staff can be compared for purposes of assessing equal pay, despite being based at different establishments and on different terms
- Statutory test – are there common terms between comparators at their establishment?
- Must still prove work is of equal value and consider whether there is a non-discriminatory justification for the difference.

Allay (UK) Limited v Gehlen [2021]

- EAT decision
- Claimant claimed harassment related to race
- “Reasonable steps” defence, s.109 (4) Equality Act 2010
- Employer’s defence rejected – training was “stale” and needed updating
- EAT highlighted all reasonable steps need to have been taken.

Sex Discrimination

Price v Powys County Council [2021]

- EAT decision
- Direct sex discrimination claim
- Confirmed man on Shared Parental Leave not comparable to woman on Adoption Leave
- Adoption leave held to be *materially different* to SPL
- Was not direct sex discrimination to pay male Claimant less.

Kubilius v Kent Foods

- ET decision
- Claimant dismissed for gross misconduct for refusal to wear face mask at a client site
- Tribunal found dismissal was fair – dismissal was in the range of reasonable responses available to the employer

Rodgers v Leeds Laser Cutting Ltd

- ET decision
- Claim under S.100 (1) (d) and (e) Employment Rights Act 1996
- Protection from dismissal for exercising rights to leave workplace and take steps to protect themselves from “serious and imminent danger”.
- Claimant’s dismissal was found not to be automatically unfair.

Future Developments

Health and Safety Detriments - Extension to Workers

- New Regulations extend s.44(1) (d) and (e) Employment Rights Act 1996 to workers
- Resulting from decision in *R (on the application of the IGWU) v Secretary of State for Work and Pensions*
- Apply to detriments taking place on or after 31 May 2021.

Future Developments



- Race reporting
- Pregnancy and Maternity Redundancy Protection Bill
- Gender pay gap reporting deadline extended to 5 October 2021