SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

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EMPLOYERS: WHAT TO EXPECT IN 2024

Employers should review their employment contracts, policies and processes to cater for the changes we are expecting in 2024. The key legislation for which we know the likely start dates is highlighted below and listed in the Horizon Scanning section; for a discussion of these and other developments, please see our Podcast: Employment Law in 2024 - Slaughter and May Insights.

- **Holiday pay:** changes came into force on 1 January, for holiday years on or after 1 April 2024. Details are in our Employment Bulletin November 2023 and the Government has since published non-statutory guidance on holiday pay and entitlement guidance. The key changes and clarifications of existing case law are:
    - A definition of pay for the statutory four weeks' leave, which includes payments which are "intrinsically linked" to the job, or are for length of service, seniority or professional qualifications, and other regular payments, such as overtime. The guidance says that this could include regular bonuses and commission.
    - Codification of the case law on the carry-over of leave due to sickness, family leave, or because the employer has failed to recognise the right to leave, has not provided a reasonable opportunity to take leave, or has failed to tell the worker about loss of unused leave.
    - A new regime for part-year and "irregular hours" workers: calculation of annual leave entitlements is by an accrual method and rolled-up holiday pay is allowed.

  The Government decided not to merge the basic (four weeks) and additional (1.6 weeks) statutory annual leave into a single entitlement; it will maintain the two existing rates of holiday pay so that workers continue to be entitled to four weeks at normal pay and 1.6 weeks at their basic rate of pay. However, the guidance says that if employers wish to pay different holiday rates for different periods of leave, they "*should consider explaining this clearly and consistently to the worker, for example in the worker's contract or staff handbook*".
- Regulations on **redundancy protection**, taking effect from 6 April 2024, will extend the circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy. The amendments change existing requirements where an employee is on maternity, adoption or shared parental leave, so that those requirements also apply during pregnancy (from the point of notification to the employer, where this is on or after 6 April) and for 18 months from birth/adoption. For those taking shared parental leave who have not taken maternity or adoption leave, there will be a six-week threshold of continuous leave that needs to be met for the requirements to apply after shared parental leave has ended. Those who take less than six weeks' leave will be protected only during the leave itself.

- Changes to **paternity leave** (where the expected week of childbirth or placement for adoption is on or after 6 April 2024) will allow it to be taken in two separate blocks of one week, and at any time in the first year after birth or placement for adoption. In addition, only 28 days' notice of intention to take paternity leave will be required.
- Under the ***Carer's Leave Act 2023***, also due to come into force on 6 April, employees will be entitled to one week's unpaid leave each year to provide or arrange care for a dependant with a long-term care need.
- *The Employment Relations (Flexible Working) Act 2023*, making changes to the procedure for dealing with the **right to request flexible working,** is expected to come into force in July. Employers will be required to consult with the employee before rejecting a request, an employee will be able to make two statutory requests in any 12-month period, and the employer will have to administer the request in two rather than three months. Under separate regulations, the right to request flexible working will apply from the first day of employment, for flexible working applications made on or after 6 April 2024. Meanwhile, the Labour Party has said that, if in Government, it would introduce a right to flexible working "as far as reasonable" (not just a right to request it).
- A new right for qualifying workers to apply for a change in terms and conditions if there is a **lack of predictability** in their work pattern, or they have a fixed term contract of 12 months or less, is expected to become law in September 2024, under the *Workers (Predictable Terms and Conditions) Act 2023*. Employers will only be able to refuse a request on one of the specified grounds, similar to those for refusal of a flexible working request. For details, please see our Employment Bulletin October 2023.
- **Consultation on business transfers:** for businesses employing fewer than 50 employees, or where there are fewer than 10 transferring employees, direct consultation with employees will be allowed if no existing employee representatives are in place. This applies to transfers under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) taking place on or after 1 July 2024.
- *The Worker Protection (Amendment of Equality Act 2010) Act 2023*, which introduces a **duty on employers to take reasonable steps to prevent sexual harassment** of employees in the course of their employment, will come into force in October 2024. A provision imposing employer liability for harassment by third parties was removed during the Parliamentary stages, and the duty to take steps to prevent sexual harassment was amended from "all reasonable steps" to "reasonable steps". The Labour Party has indicated that it would reverse these amendments. For more details, please see our Employment Bulletin November 2023.

SUPREME COURT CONFIRMS DELIVEROO RIDERS ARE NOT "IN EMPLOYMENT"

Summary: The Supreme Court has confirmed that an application for recognition for collective bargaining from a trade union representing a group of Deliveroo riders was correctly rejected. The riders did not fall within the scope of the trade union freedom right under Article 11 of the European Convention on Human Rights because they were not "in an employment relationship" with Deliveroo. They had a virtually unlimited right of substitution and were not under an obligation to provide their services personally (*Independent Workers Union of Great Britain v Central Arbitration Committee*).

Key practice point: The decision reinforces the principle, often key to employee and worker status cases in the UK, that a genuine and unfettered right of substitution will defeat a claim for employment or worker status. The position in some other European countries is different - for example, the Dutch Supreme Court found last year that Deliveroo riders qualified as employees under Dutch law.

Facts: Riders work for Deliveroo under non-negotiable "supplier agreements", which describe them as independent self-employed contractors. The agreements provide for a flexible work model, whereby there is no obligation on Deliveroo to provide work, no obligation on the rider to be available at any time or to accept jobs, and freedom for the riders to provide a substitute at any time and without the need for approval by Deliveroo. The Independent Workers Union of Great Britain (IWGB) applied for recognition for collective bargaining in respect of a group of Deliveroo riders, but this was rejected by the Central Arbitration Committee (CAC) on the basis that the riders were not "workers" and were genuinely self-employed.

IWGB challenged the CAC's decision, arguing that the right to collective bargaining, protected by Article 11, meant that the riders had to have recognition rights. The High Court and Court of Appeal dismissed the challenge because the riders were not in an "employment relationship" with Deliveroo, as required by Article 11. IWGB appealed to the Supreme Court.

Decision: The Supreme Court has confirmed the CAC's decision. The riders had a virtually unlimited right of substitution – "totally inconsistent" with the obligation to provide personal service that is essential to the existence of an employment relationship – and the provisions in the contract genuinely reflected the reality of the relationship. Other factors that pointed away from an employment relationship were:

- Deliveroo did not monitor a rider's decision to use a substitute and riders would not be criticised or sanctioned for doing so.
- Contracts were not terminated for riders' failure to accept a certain percentage of orders or to make themselves sufficiently available. The riders were free to work or not as convenient to them.
- Deliveroo did not object to riders working simultaneously for its competitors.

Analysis/commentary: The distinction between an unfettered right to substitute, inconsistent with an obligation of personal performance, and a conditional substitution right that may or may not be inconsistent with personal performance depending on the nature and degree of the conditionality, was also relevant in a recent case on agency workers - *Ryanair DAC v Lutz*. The Employment Appeal Tribunal (EAT) confirmed that a pilot contracted through an intermediary to provide services to Ryanair was an "agency worker" within the Agency Workers Regulations 2010, entitling him to the same basic working and employment conditions as directly employed pilots. The EAT found that he had a contract with the intermediary to perform work or services personally, and that the right to substitute did not negate the obligation of personal performance. Any substitute had to be "agreed, acceptable and qualified", shifts could only be swapped with another Ryanair pilot and requests were occasionally refused. The EAT also found that the supply to Ryanair for a five-year fixed term meant that the pilot was supplied to work "temporarily" (a requirement for the Agency Workers Regulations to apply).

As mentioned above, later this year workers whose working pattern lacks predictability will get the right to request a more predictable working pattern. Meanwhile, the Labour Party has promised to abolish zero hours contracts and contracts without minimum number of guaranteed hours and create a single status of "worker" for all but the genuinely self-employed. If enacted, these proposals could have significant implications for how employers engage their workers.

REDUNDANCY CONSULTATION MUST TAKE PLACE AT A FORMATIVE STAGE

Summary: The Employment Appeal Tribunal (EAT) decided that a dismissal for redundancy was unfair because consultation had not taken place at a formative stage, where the employee had adequate information and time to respond and where the employer gave genuine consideration to that response (*Haycocks v ADP RPO UK Ltd*).

Key practice point: Although the EAT did not elaborate on what it meant by a "formative" stage, it appears clear from this and other recent cases that, irrespective of the numbers affected by a redundancy exercise and whether there are employee representatives, the absence of meaningful consultation at a stage when employees have the potential to affect the outcome will be seen as indicative of an unfair dismissal. Another point to bear in mind is that the use of a selection system which reflects good industrial relations in another country will not necessarily be regarded as good practice in the UK.

Facts: The claimant was one of a recruitment team of 16 employed by the UK subsidiary of a US company. In May 2020, the decision was taken to reduce the recruitment workforce. The US parent company gave the UK manager a standard matrix of (entirely subjective) selection criteria for scoring the team. The scoring took place at the beginning of June and on 18 June a decision was taken that there would be a reduction from 16 to 14. On 19 June the employer set a timetable for the redundancy process: the initial consultation meeting on 30 June, followed by a consultation period of 14 days, with those leaving being informed at a meeting on 14 July.

At the 30 June meeting, the claimant was told there was a requirement for redundancies, that the purpose of the meeting was to inform him of the situation and that he could ask questions and suggest alternative approaches. He was invited to a further meeting a week later and was given a letter of dismissal at a final meeting on 14 July. His dismissal was confirmed

at an appeal meeting on 10 August. (One other member of the team took voluntary redundancy.) Although the claimant had been given his own scores by the time of the appeal meeting, he was never shown the comparative scores of the rest of the team. The Employment Tribunal rejected his unfair dismissal claim and he appealed to the EAT.

Decision: The appeal was allowed, the EAT finding that the dismissal was unfair.

The EAT explained that, for a fair consultation to occur, it must take place at a time when proposals are at a "formative" stage, the employee must be given adequate information and time in which to respond, and the employer must give "conscientious consideration" to the employee's response. A key element of a fair redundancy process is that a reasonable employer will seek to minimise the impact by limiting numbers, mitigating the effect on individuals or avoiding dismissals, by engaging in consultation, generally at the formative stages of a process. This applies in workplaces where there is no employee representation as well as to those where there are representatives (or where, for large-scale redundancies, the law requires the election of representatives). The EAT also commented on the fact that the selection criteria were set by the US parent company, noting that the use of a system which reflects good industrial relations in another country may not reflect the usual practice in the UK.

The EAT concluded that there was a clear absence of workforce level consultation at the formative stage. There was never any opportunity to discuss the possibility of a different approach to any aspect of the redundancy process chosen by the employer. The EAT said that the absence of meaningful consultation at a stage when employees have the potential to impact the decision is indicative of an unfair process. There was no good reason why consultation had not taken place; there was no particular time pressure because the numbers to be dismissed were not settled until a major part of the selection process had been concluded. The EAT also found that the lack of consultation could not be corrected by the appeal hearing.

HMRC WARNING ABOUT FILING ERS RETURNS

HMRC has updated its guidance for companies on the HMRC returns required to report the award, vesting or exercise of employment-related shares or share options and to "self-certify" the tax-advantaged status of Sharesave, Share Incentive and Company Share Option Plans and Enterprise Management Incentive options. These returns are commonly known as "employment related securities" (or ERS) returns. The guidance warns that, before submitting an ERS return online, copies of the documents filed must be saved, as the online service will not publicly retain these details and further access by the filing company will not be possible. This advice applies to all notifications using the ERS return system.

HORIZON SCANNING

What key developments in employment should be on your radar?

April 2024	Right to request flexible working becomes a "day one" right
April 2024	Amendments to the Working Time Regulations, including to provide that employers do not have to keep a record of daily working hours and to allow the use of rolled-up holiday pay
April 2024	Regulations under the Protection from Redundancy (Pregnancy and Family Leave) Act 2023 to extend the circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy
April 2024	Changes to paternity leave to allow it to be taken in two separate blocks of one week, and at any time in the first year after birth or placement for adoption, and employees will have to give only 28 days' notice
April 2024	Carer's Leave Act 2023 expected to come into force: entitlement to one week's unpaid leave per year for employees caring for a dependant with a long-term care

Spring 2024	Statutory Code of Practice on Dismissal and Re-engagement expected to be issued
July 2024	Employment (Allocation of Tips) Act 2023 expected to come into force: obligations on employers to deal with tips, gratuities and service charges, including having a written policy and keeping records
July 2024	Amendment to TUPE to allow small employers, and all employers where a transfer of fewer than 10 employees is proposed, to consult directly with employees if there are no employee representatives
July 2024	Employment Relations (Flexible Working) Act 2023 expected to come into force: amendments to the flexible working request process
September 2024	Workers (Predictable Terms and Conditions) Act 2023 expected to come into force: right to request a more predictable working pattern
October 2024	Worker Protection (Amendment of Equality Act 2010) Act 2023 expected to come into force: duty to take reasonable steps to prevent sexual harassment of employees
April 2025	Neonatal Care (Leave and Pay) Act 2023 expected to come into force: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care
Date uncertain	Proposed three-month limit on non-compete clauses in employment and worker contracts Economic Crime and Corporate Transparency Act 2023: for large organisations, new offence of failure to prevent fraud

We are also expecting important case law developments in the following key areas during the coming months:

Employment status: *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes

Discrimination / equal pay: *Rollet v British Airways* (EAT: whether the Equality Act 2010 protects against indirect associative discrimination); *The Royal Parks Ltd v Boohene* (Court of Appeal: whether end-user had indirectly discriminated against contract workers on grounds of race by paying them a lower minimum level of payment compared to direct employees); *Bailey v Stonewall Equity Limited* (EAT: whether a campaigning group had instructed, caused or induced religion or belief discrimination by the employer)

Redundancies: *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees)

Industrial action: *Secretary of State for Business and Trade v Mercer* (Supreme Court: whether protection from detriment for participating in trade union activities extends to industrial action)

Unfair dismissal: *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Hope v BMA* (Court of Appeal: whether dismissal for raising numerous grievances was fair); *Accattatis v Fortuna Group (London) Ltd* (EAT: whether it was automatically unfair to dismiss for concerns about attending the office during lockdown); *Charalambous v National Bank of Greece* (Court of Appeal: whether a misconduct dismissal was fair when the decision to dismiss was taken by a manager who did not conduct the disciplinary hearing)

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