

HR/Employment law update



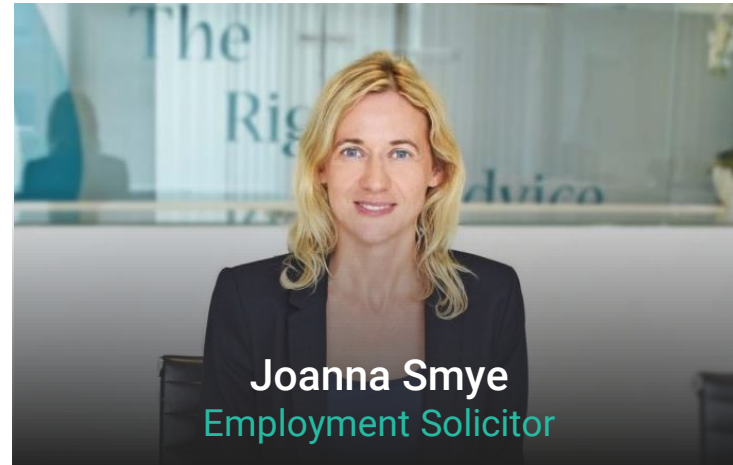
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Topics for discussion



Hot Topics

- » The impact of the cost of living crisis on both employers and employees:
 - > Potential for increased redundancies.
 - > The impact on the mental health of employees.
 - > Increase in commuting costs.
 - > Increase in risk of theft by employees.
 - > Second jobs.
- » Diversity, equality and inclusion in the workplace - how to create inclusion.
- » Remote working

What's on the horizon- legislation update

- » Flexible working.
- » Family-related legislation:
 - > Extension of redundancy rights.
 - > Neonatal care leave and pay.
 - > Carers' leave.
- » Harassment at work.
- » Retained EU law and related consultations.

Impact of cost of living crisis on both employers and employees

Potential for increased redundancies

Businesses are being forced to consider a wide range of cost saving measures, such as reducing hours and as a last resort, redundancies.

Definition of redundancy:

- > Business closure.
- > Workplace closure.
- > Diminished requirements for employees to do work of a particular kind.

Campbell v Tesco Personal Finance Plc 2023 EAT 68.

Facts

Tesco consolidated three teams into two. Two risk manager roles, which included C's, were replaced with two new risk roles.

C was put at risk of redundancy and later dismissed.

C claimed unfair dismissal, arguing that there was not a genuine redundancy as the requirement for risk managers remained the same.

Decision

The Employment Tribunal held that there was a redundancy situation and that the dismissal was fair.

C appealed. The Employment Appeal Tribunal remitted the case for a re-hearing. The Employment Tribunal failed to make any finding of fact that the requirement for employees to carry out risk management work of a particular kind had ceased or diminished. The fact that three risk teams became two was not enough.

Impact of cost of living crisis on both employers and employees

Potential for increased redundancies - continued

Redundancy should be the last resort

Redundancy process should involve:

- > **Consultation** – while the employees still have an opportunity to influence decisions.
- > **Selection pool** – the starting point is to consider which particular kind of work is ceasing or diminishing and which employees perform that work.
- > **Selection criteria** – should be both objective and capable of independent verification.
- > Consider alternatives to dismissal:

Lovingangels Care Ltd v Mhindurwa [2023] EAT 65 (12 May 2023).

Facts

C was put at risk of redundancy due to reduction in live-in care work. She asked to be furloughed but this was refused. She was dismissed by reason of redundancy.

Decision

Employment Appeal Tribunal upheld the Employment Tribunal's finding that it was unfair to make an employee redundant without considering furlough as an alternative.

Impact of cost of living crisis on both employers and employees

Impact on the mental health of employees

- > Employers have a duty of care towards their employees.
- > It is important for employers to support their employees.
- > The Equality Act sets out the duty on employers to make reasonable adjustments to ensure that individuals with a disability are not placed at a disadvantage.
- > Examples of reasonable adjustments: flexible working arrangements, changes to physical environment, training and support, adjustments to workplace expectations and pay rates.
- > Acas non-statutory guidance on reasonable adjustments.



Impact of cost of living crisis on both employers and employees

Higher commuting costs

- > Increase in requests to work from home.
- > Requests may amount to a flexible working request.
- > If so, the statutory procedure must be followed.



Impact of cost of living crisis on both employers and employees



Increased risk of theft by employees

- > Ensure contract of employment allows employer to deduct any such sums misappropriated from wages.
- > If no contractual right- follow county court process.



Impact of cost of living crisis on both employers and employees

Second jobs

- > Employees may take second jobs to meet their increased outgoings.
- > Often employers want to prevent second jobs for a variety of reasons.
- > Contracts of employment can specifically state that employees cannot work for others during their employment.
- > Disciplinary action can be taken if not adhered to.



Diversity, equality and inclusion in the workplace

- > Policies and procedures to promote LGBT+ equality are necessary, however they are not sufficient to ensure inclusion.
- > Workplace culture drives inclusion more than policies.
- > Circumstances when a criminal offence may be committed.
- > Gender reassignment is one of the 9 protected characteristics under the Equality Act 2010.



An inclusive culture is created when:

- > Leadership teams visibly promote diversity, equality and inclusion and communicate a zero tolerance approach.
- > This approach is reflected in formal statements released by the leadership team by other means such as in staff meetings, training, staff bulletins and policies.
- > Take allegations seriously and properly investigate them and take appropriate action.

The British Standards Institute (BSI) has published a new code of practice on diversity, equality and inclusion in the workplace.

Remote working

Implications:

- > Immigration – advance immigration permission may be required depending on the identity of the host country and the employee's nationality.
- > Tax and social security- whether there are implications will depend on the length of stay and the rules of the host country.
- > Intellectual property and confidential information- contracts need to be checked to ensure that intellectual property and confidential information is protected.
- > Employment law – employees may become subject to local mandatory employment protections.
- > Data privacy implication- need to be ensure that data protection laws are not breached by transferring data to the employee.



How to minimise the risk:

- > Only accept requests if the employee's role can be effectively performed.
- > The shorter the period the smaller the risks are likely to be.
- > For any arrangement of extended duration always take expert local advice on tax, social security, immigration and employment obligations.
- > Check what data processing the employee will be doing and whether this can be carried out lawfully.
- > Check relevant insurance policies.
- > Agree the terms of any overseas working arrangement in writing.

Flexible Working



New legislation on flexible working will mean that:

- > Employees will now be able to make two flexible working requests in any 12 month period.
- > Requests have to be dealt-with by employers within 2 months of receipt of a request if no extension is agreed.
- > Employers are not able to refuse a request until they have 'consulted' with the employee (although there is no legislative de minimis requirement of what that 'consultation' needs to include).
- > Employees will no longer, in their application, have to explain what effect the employee thinks agreeing to the request would have and how any such effect might be dealt with.

NB: The Act does not provide that requesting a flexible working pattern will become a "Day 1" right, but this is expected to be introduced by secondary legislation.

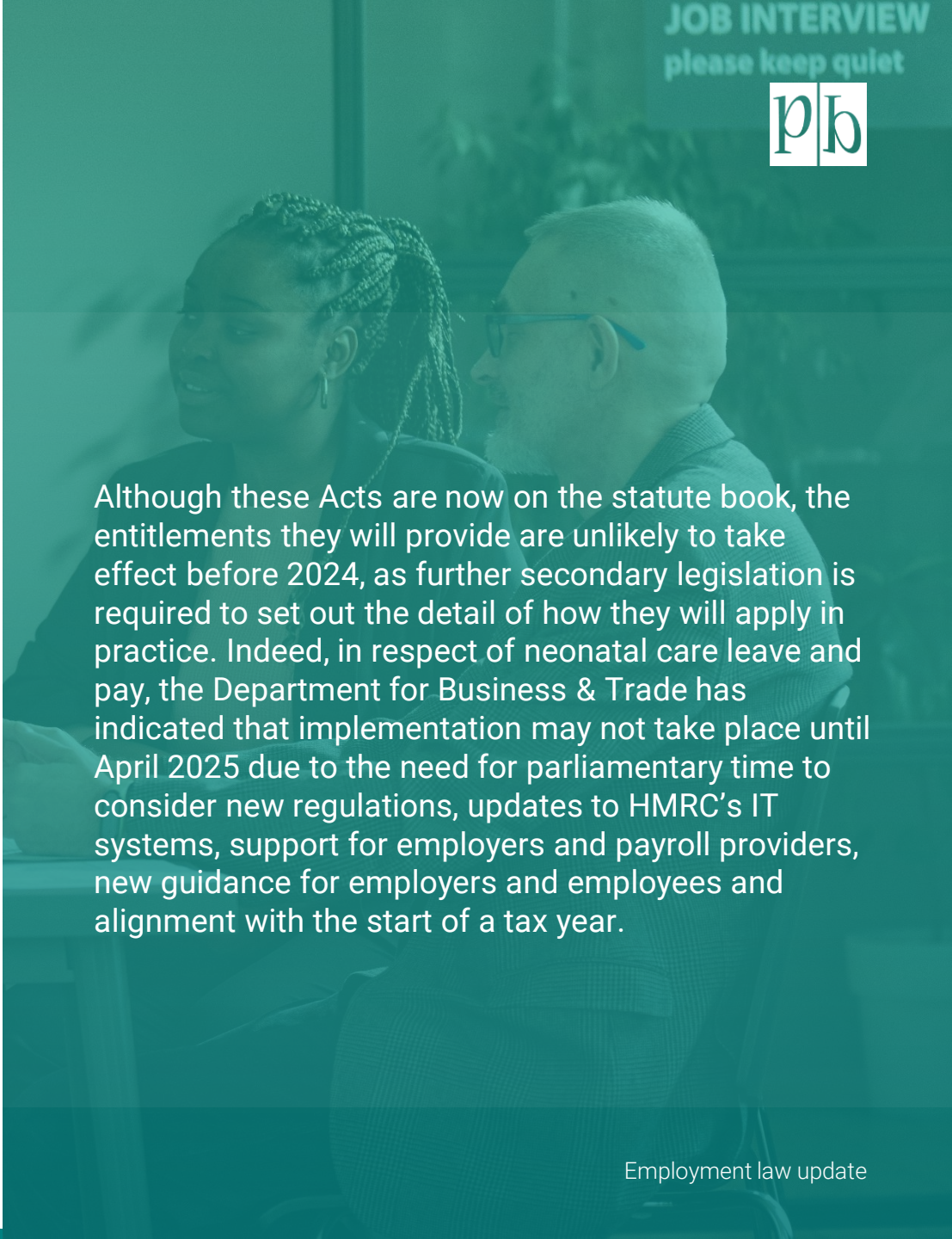
A draft ACAS code on flexible working is currently under consultation.



Family-related legislation

Three Government-backed Private Members' Bills received Royal Assent in May, becoming:

- > **the Protection from Redundancy (Pregnancy and Family Leave) Act 2023** which will extend the redundancy protections that currently apply to employees on maternity, adoption and shared parental leave to employees who are pregnant or who have recently returned to work from such leave.
- > **the Neonatal Care (Leave and Pay) Act 2023** which will allow eligible employed parents whose new-born baby is admitted to neonatal care to take up to 12 weeks of paid leave, in addition to other leave entitlements such as maternity and paternity leave. The right to leave will apply from day one of employment, although the right to pay will be subject to a 26-week service requirement.
- > **the Carer's Leave Act 2023** which will give employees who have a dependant with a long-term care need a statutory right to one week's unpaid care leave per year. This right will apply from day one of employment and employees will not be required to provide any evidence of their entitlement to the leave.



Although these Acts are now on the statute book, the entitlements they will provide are unlikely to take effect before 2024, as further secondary legislation is required to set out the detail of how they will apply in practice. Indeed, in respect of neonatal care leave and pay, the Department for Business & Trade has indicated that implementation may not take place until April 2025 due to the need for parliamentary time to consider new regulations, updates to HMRC's IT systems, support for employers and payroll providers, new guidance for employers and employees and alignment with the start of a tax year.

Extension of redundancy protection – an explanation

What is the current protection being extended, and what does this mean in practice?

- > The right to first refusal of suitable alternative roles.
- > Means that you may not be able to offer a suitable alternative role to your preferred candidate.



Harassment at work



An important revision to the Worker Protection (Amendment of Equality Act 2010) Bill:

- > The initial drafting meant that an employer would be treated as harassing an employee (engaging in unwanted conduct related to a relevant protected characteristic) when a third party, such as a customer or client, harassed an employee in the course of their employment and the employer had failed to take all reasonable steps to prevent that harassment.
- > This clause has been recently removed by the House of Lords.

Harassment at work



Sexual harassment at work

- > The Bill will insert a new section 40A into the EqA 2010, introducing a mandatory duty on employers to prevent sexual harassment of their employees.
- > Employers will be required to take reasonable steps to prevent sexual harassment of employees in the course of their employment. The EHRC will be able to enforce the new duty and employment tribunals will be able to award an uplift to an employee's compensation where it finds there has been a breach of the duty



EU retained law and related consultations



Impact of Brexit on employment law:

- > The Retained EU law (Revocation and Reform) Bill provides an opportunity to review the EU-derived legislation which remains on the statute book as retained EU law. Although the "sunset clause" in the Bill has now been scrapped, meaning that retained EU law will not be automatically revoked at the end of 2023, the government has instead set out a list of some 600 pieces of legislation which will be revoked once the Bill is enacted.
- > As far as employment law is concerned, on 12 May 2023, the DBT published a consultation on reforms to the WTR 1998, holiday pay and the TUPE regulations. This consultation confirms that the government is not intending to weaken workers' rights through this process. The vast majority of retained EU employment law will be preserved.

Employment-related regulations to be amended

The government has identified three areas where it considers the obligations created by regulations impose an administrative burden on business, or are too complex for workers to understand or use effectively.

It is therefore consulting on:

- > Removing the record-keeping requirements under the WTR 1998.
- > Simplifying annual leave and **holiday pay** calculations in the WTR 1998.
- > Reforming the **consultation** requirements under the TUPE regulations for smaller businesses.



The WTR 1998



Proposed changes:

- » Removal of the record-keeping requirements under the WTR 1998, but records will still be necessary, for example, for the purposes of showing compliance with the minimum wage regulations.
- » Making holiday simpler, including the creation of a single entitlement, and allowing rolled up holiday pay.

Reforming TUPE consultation requirements for smaller businesses

Currently, micro businesses with fewer than ten employees may inform and consult affected employees directly if there are no existing appropriate representatives in place (for example, if there is no recognised trade union) Larger businesses, however, are required to arrange elections for affected employees to elect new employee representatives if they are not already in place, which can add to the complexity of the TUPE transfer process.

The government is proposing to remove the requirement to elect employee representatives for the purpose of TUPE consultation for:

- > Businesses with fewer than 50 employees.
- > Businesses of any size involved in a transfer of fewer than ten employees.

In both situations, businesses meeting these criteria will be able to consult directly with employees, where no existing employee representatives are in place.

The consultation states that the government wants to ensure that businesses are not unduly burdened by the current requirement to hold elections for employee representatives.

No other changes are being proposed to the TUPE consultation requirements.

Thanks for
watching



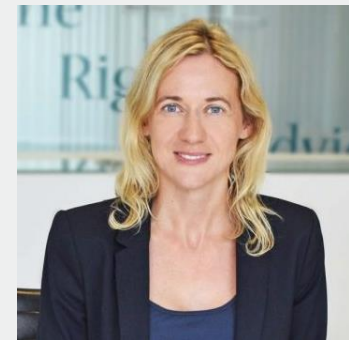
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