SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

FUTURE EMPLOYMENT LEGISLATION

The Government's position on the Employment Bill, originally introduced nearly three years ago, continues to be that it will be brought forward "when Parliamentary time allows". However, over the last few weeks the Government has expressed its support for three Private Members' Bills (introduced by individual MPs rather than Government ministers) currently going through Parliament. This support means that, unlike most Private Members' Bills, they are likely to complete their Parliamentary progress and become law. All three Bills cover areas where the Government has made previous commitments to legislative change.

Changes to the right to request flexible working

Having consulted last year on reforming the rules on the right to request flexible working, the Government is now supporting the *Employment Relations (Flexible Working) Bill*. The Bill amends the right to request flexible working in Section 80 of the Employment Rights Act 1996 to:

- introduce a requirement for employers to consult with the employee before rejecting a flexible working request;
- allow an employee to make two statutory requests in any 12-month period (rather than the current one request);
- reduce the decision period within which an employer is required to administer the request, from three months to two months; and
- remove the requirement that the employee must explain in the statutory request what effect the change would have on the employer and how that might be dealt with.

Analysis/commentary: The consultation proposed to make the right to request flexible working a "day one" right by removing the current 26-week qualifying period. However, this is not included in the Bill as currently drafted. The existing list of business reasons for refusing a request for flexible working also remains unchanged and another potential amendment discussed in the consultation - that employers should have to set out, when rejecting a request, that alternatives (such as making the change for a limited period only) have been considered - is not included; replaced, in effect, by the requirement to consult. Finally, there is no indication that the current limited sanctions for breach of the statutory procedure will be strengthened. However, employers need to be aware of potential discrimination claims if a flexible working request is refused.

Redundancy protection for employees on family-related leave

The *Protection from Redundancy (Pregnancy and Family Leave) Bill* enables the Government, via changes to the existing regulations on maternity and parental leave, to extend the circumstances in which an employer must offer an employee at risk of redundancy suitable alternative employment if it is available.

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The regulations currently provide that, before making an employee on maternity leave (or adoption or shared parental leave) redundant, an employer must offer a suitable alternative vacancy where one is available with the employer or an associated employer. The obligation arises when the employee is told that the role is at risk of redundancy. Through regulations, the Bill will extend this protection to cover not just those on leave but also pregnant women and those returning from maternity leave (or adoption or shared parental leave).

The new regulations will apply the protections from when a woman tells her employer she is pregnant until 18 months after the birth. The 18-month window will also apply to parents on maternity leave (or adoption or shared parental leave). The protected period will be able to start after the pregnancy has ended, to allow a woman who miscarried before informing her employer of the pregnancy to access the redundancy protection she would have been entitled to had she first informed her employer.

Analysis/commentary: The priority right to be offered a suitable alternative vacancy generally means that the employee does not have to go through any competitive interview process for the alternative role. The extension of the length and scope of the protection will increase the likelihood of a scenario under which there are more employees on protected leave than suitable alternative vacancies, resulting in a selection process for the employer. These difficulties cannot be avoided by taking those with protection out of the redundancy selection pool, as this risks discrimination against other employees in the pool.

Carer's Leave

The *Carer's Leave Bill*, which if it completes its passage through Parliament is scheduled to come into force in 2024, allows employees to take up to one week of unpaid leave each year to provide or arrange care for a dependant with a long-term care need. A long-term care need will have to relate to an illness or injury lasting at least three months, a disability or old age. Details of how the right will operate will be set out in regulations. However, the Government has said that:

- All employees who meet the eligibility conditions will be entitled to the leave, regardless of how long they have worked for their employer.
- The leave will be available to take in increments of half-days or individual days, up to a week, to be taken over a 12-month period.
- Employers will not be able to require an employee to supply evidence in relation to the leave request but there will be a minimum notice period requirement.
- Employment protections will mirror those applying to other family-related leave.

In addition to support for these Bills, the Government has made recent announcements on other developments:

- **"Fire and rehire":** If changes to employees' terms and conditions of employment cannot be made by agreement or under the terms of the employment contract, one option is dismissal and re-engagement on the varied terms. "Fire and rehire" has become controversial, particularly in the light of the actions of P&O Ferries earlier this year. The Government has said recently that a Statutory Code of Practice on employers' obligations on dismissal and re-engagement will be published "in the near future". A court or employment tribunal would take it into account when considering relevant cases, including unfair dismissal, and there would be a power to apply an uplift of up to 25% of an employee's compensation if an employer unreasonably failed to comply with the Code. In the meantime, the Government has again expressed its view that dismissal and re-engagement should be used only "*as an absolute last resort if changes to employment contracts are critical and voluntary agreement is not possible*".
- **Exclusivity clauses:** Regulations coming into force on 5 December 2022 extend the current ban on exclusivity clauses in zero hours contracts, to cover employees and workers whose guaranteed weekly income is at or below the Lower Earnings Limit (£123 per week for 2022/23). The ban operates by making exclusivity clauses in employment contracts unenforceable. Those covered by the extension will also have the protection currently applying to those with zero hours contracts: a right not to be unfairly dismissed and not to be subjected to detriment for failing to comply with an exclusivity clause.

- **"One-sided flexibility":** The Government has confirmed that it is currently analysing the results of its 2019 consultation on addressing "one-sided flexibility". Proposals in the consultation included giving workers a right to reasonable notice of work schedules and providing compensation for shifts cancelled without reasonable notice.

CAC'S JURISDICTION OVER EUROPEAN WORKS COUNCILS POST BREXIT

Summary: The Employment Appeal Tribunal (EAT) has confirmed that the Central Arbitration Committee (CAC) can hear a complaint by a European Works Council (EWC) made against a multinational employer about its failure to inform and consult, even though the employer had designated its German business as the central management because of Brexit (*easyJet PLC v easyJet EWC and Secretary of State for BEIS*).

Key practice point: The decision means that where an EWC was established before the end of the Brexit transition period and central management remains in the UK, the employer must continue to operate the EWC in accordance with the Transnational Information and Consultation of Employees Regulations (TICER), even where the employer is obliged to run a parallel EU-based EWC under the requirements of the EU Directive on EWCs.

Background: Prior to Brexit, TICER imposed EWC consultation obligations where, under Regulation 5, either (1) "central management" was actually situated in the UK, or (2) central management was "deemed" to be in the UK because it was designated as such, or there were more employees in the UK establishment than any other member state establishment. Regulation 5 was amended with effect from exit day (31 December 2020), to remove limb (1) but limb (2) was retained. Regulation 4(1) was amended to say that the provisions of TICER apply "*only where, in accordance with regulation 5, the central management is situated in the United Kingdom*". The case centered on how amended Regulation 4(1) should be interpreted.

Facts: The CAC Panel hearing the case decided that the CAC had jurisdiction to hear a complaint from the easyJet EWC in relation to the employer's failure during 2020 to inform and consult with the EWC about redundancy proposals, even though the employer had designated its German business as the central management with effect from exit day. The CAC found that Regulation 4(1) is not, as it might appear on first reading, confined to situations where the central management is deemed to be situated in the UK on the basis of Regulation 5; it also applies if central management is in fact situated in the UK, as in this case. The only requirement is that the EWC should have been established before exit day. The employer appealed.

Decision: The EAT confirmed the CAC's decision. Taking into account the debates in Parliament at the time, which indicated that the intention was that EWCs established before the end of the Brexit transition period were to continue in operation in accordance with TICER, the EAT concluded that the words "situated in the UK" in Regulation 4(1) includes situations where central management is deemed by Regulation 5 be situated in the UK in addition to where it is, in fact, situated in the UK.

DISMISSAL "VANISHED" ON SUCCESSFUL APPEAL EVEN THOUGH EMPLOYEE DID NOT WANT REINSTATEMENT

Summary: The Employment Appeal Tribunal (EAT) held that an employee who successfully appealed against her dismissal for gross misconduct was automatically reinstated, even though she indicated during the appeal process that she did not wish to return to work for the employer. The employee had not withdrawn her appeal, so the successful appeal meant that original dismissal "vanished" (*Marangakis v Iceland Food Ltd*).

Key practice point: A successful appeal against a dismissal will automatically result in reinstatement unless the employee unequivocally withdraws their appeal against dismissal prior to the appeal being decided. Even if an employee intends to resign, there may be other reasons why the employee might want to pursue an appeal, for example to establish that they had not committed gross misconduct.

Facts: The claimant was summarily dismissed for gross misconduct. She appealed, indicating that she wished to be reinstated. She then sent an email in which she challenged the disciplinary process and stated that she no longer wished to be reinstated because she believed that mutual trust had been broken. Later, at the appeal hearing, she said again that she did not want to work for the employer. However, the employer decided to allow the appeal and told the claimant that she was to be reinstated with continuity of service and backpay. A final written warning was substituted

for the original decision to dismiss. The claimant failed to return to work and was dismissed. The claimant relied on the original dismissal in an unfair dismissal claim. The Employment Tribunal dismissed the claim, finding that the original dismissal "vanished" as a consequence of the appeal succeeding. The claimant appealed.

Decision: The EAT dismissed the appeal. The Tribunal was bound by previous case law to find that an employee can only "escape" the consequences of a successful appeal if they withdraw the appeal, and that dismissal "vanishes" on reinstatement regardless of the motives or subjective intention of the employee. If an appeal is lodged, pursued to its conclusion and is successful, the employer and employee are bound to treat the dismissal as not having occurred, irrespective of the employee's wishes.

The EAT rejected the claimant's argument that, by stating that she no longer wanted to be reinstated, she was withdrawing from the appeal. She had not clearly stated that she wished to withdraw her appeal and there might have been other reasons, apart from seeking reinstatement, for pursuing the appeal - for example, to appeal against dismissal for gross misconduct in order to make it easier to find a new job. In addition, despite stating that she did not wish to return to work, she continued to participate in the appeal. In these circumstances, the Tribunal was entitled to conclude that the words used did not, on an objective analysis, indicate a decision to withdraw from the appeal.

HORIZON SCANNING

What key developments in employment should be on your radar?

21 July 2022	Removal of the restriction on employment businesses supplying temporary workers to cover striking staff
5 December 2022	Extension of ban on exclusivity clauses to lower paid workers
2022-2024	• Transport Strikes (Minimum Service Levels) Bill: minimum service levels on specified transport services Private Members' Bills with Government support: • Worker Protection (Amendment of Equality Act 2010) Bill: duty to take reasonable steps to prevent sexual harassment of employees; protection from harassment by third parties • Protection from Redundancy (Pregnancy and Family Leave) Bill: extension of circumstances in which employers must offer suitable alternative employment to parents at risk of redundancy • Carer's Leave Bill: entitlement to one week's unpaid leave for employees who are carers (expected to come into force in 2024) • Employment (Allocation of Tips) Bill: obligations on employers to deal with tips, gratuities and service charges • Neonatal Care (Leave and Pay) Bill: right to paid leave to care for a child receiving neonatal care • Employment Relations (Flexible Working) Bill: amendments to the flexible working request process
31 December 2023	Retained EU Law Bill: expiry of EU-derived secondary legislation e.g. TUPE, Working Time Regulations and Regulations protecting part-time, fixed-term and agency workers, unless

	Government legislates to incorporate it into UK law (or extends sunset to no later than 23 June 2026)

Date uncertain	• Consultation on Statutory Code of Practice on "fire and rehire"
	• Legislation expected to provide for:
	  ○ Trade unions required to put employer pay offers to a member vote
	  ○ Extension of permissible break in continuous service from one week to one month
	  ○ Single enforcement body for employment rights

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

- **Employment status:** *Griffiths v Institution of Mechanical Engineers* (EAT: whether trustee of professional body is worker for whistleblowing protection); *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes)
- **Employment contracts:** *Cox v Secretary of State for the Home Department* (Court of Appeal: whether employer withdrawal of check-off arrangements was in breach of employment contract; *Benyatov v Credit Suisse Securities (Europe) Ltd* (Court of Appeal: whether employer had duty of care to protect employee from criminal conviction)
- **Discrimination / equal pay:** *Higgs v Farmor's School* (EAT: whether a Christian employee's gender critical beliefs were protected under Equality Act 2010); *Arvunescu v Quick Release Automotive Ltd* (Court of Appeal: whether claim for aiding discrimination caught by COT3 settlement agreement); *Kocur v Angard Staffing Solutions Ltd* (Supreme Court: whether agency workers were entitled to same treatment on vacancies as directly recruited employees)
- **Redundancies:** *R (Palmer) v North Derbyshire Magistrates Court* (Court of Appeal: whether administrator could be prosecuted for failure to notify Secretary of State of collective redundancies);
- **Trade unions:** *Morais v Ryanair DAC* (Court of Appeal: whether workers are protected from detriment for participating in industrial action during working hours)
- **Unfair dismissal:** *Fentem v Outform* (Court of Appeal: whether bringing forward the termination date on payment of a contractual PILON was a dismissal); *Rodgers v Leeds Laser Cutting Ltd* (Court of Appeal: whether dismissal of an employee who had refused to return to work due to his concerns about exposure to COVID-19 was automatically unfair); *Hope v BMA* (Court of Appeal: whether dismissal for raising numerous grievances was fair)
- **Working time:** *Chief Constable v Agnew* (Supreme Court: whether a gap of more than three months in a series of unlawful deductions from holiday pay breaks the series)

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