SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

EMPLOYMENT LAW CHANGES FROM 2023

It appears that the Employment Bill will not now go ahead; instead, the Government is pursuing individual employment law initiatives, including in some cases supporting Private Members' Bills (introduced by individual MPs rather than Government ministers). A number of measures are currently making progress through Parliament or via the regulatory authorities. For a full list, please see our Horizon scanning section below. There have been three recent additions to the list:

Bonus cap: the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA) have announced joint consultation (closing on 31 March 2023) on the Government's proposal to remove the bonus cap that was first introduced in 2014 and is applicable to banks, building societies, and PRA-designated investment firms. Bonuses are capped at 100 per cent of salary (or 200 per cent with shareholder approval). The proposed changes outlined in the consultation papers would take effect on the FCA/PRA publication of the final policy, expected to be in the second quarter of this year, and would apply to firms' performance year starting after that, i.e. for most firms, the 2024/25 performance year.

Holiday entitlement for part-year workers: The Government has issued a consultation (closing on 9 March 2023) on calculating holiday entitlement for part-year and irregular hours workers, following last year's Supreme Court decision in *Harpur Trust v Brazel*. The Supreme Court confirmed that, under the Working Time Regulations, a permanent part-year worker was entitled to 5.6 weeks' holiday and her entitlement should not have been pro-rated to reflect actual hours of work, even though this meant that she was entitled to proportionately more holiday than other workers. The Government's proposal is to introduce a holiday entitlement reference period for both part-year workers and workers with irregular hours, based on the proportion of time spent working over the previous 52-week period. Holiday pay for workers with irregular hours is already calculated using a 52-week reference period, but weeks without work are excluded from the reference period in order to calculate the average pay per working week. Under the proposal, the weeks in which workers perform no work would be included in the holiday entitlement reference period.

Strikes in key services: The *Strikes (Minimum Service Levels) Bill* allows the Government to set minimum service levels (MSLs) during strike action in certain key services. The employer would be able to serve a "work notice" on the trade union, identifying the individuals needed to meet the MSL. The union would then be under a duty to take reasonable steps to ensure compliance by its members with the work notice. If it did not do so, it would lose its immunity in tort (for inducing workers to breach their contracts), with losses limited to those incurred as a result of its failure. Employees identified in the work notice who took part in the strike would lose their automatic unfair dismissal protection.

The services covered by the Bill are health, fire and rescue, education, transport, border security, and decommissioning of nuclear installations and management of radioactive waste and spent fuel. The Government says it will consult on MSLs for fire, ambulance and rail services, and that it hopes not to have to use its powers for the other sectors.

Key changes making progress through Parliament via the Private Members' route include:

Workplace harassment: The *Worker Protection (Amendment of Equality Act 2010) Bill* places a duty on employers to take reasonable steps to prevent sexual harassment, as well as re-introducing third party harassment as a specific form of unlawful discrimination under the Equality Act 2010. For details, please see our Employment Bulletin September 2022.

Right to request flexible working: The *Employment Relations (Flexible Working) Bill* introduces a requirement for employers to consult with the employee before rejecting a flexible working request, allows an employee to make two statutory requests in any 12-month period, and reduces the decision period within which an employer is required to administer the request, from three months to two months. Under separate legislation, the right to request flexible working will apply from the first day of employment. For details, please see our Employment Bulletin December 2022.

Redundancy protection: The *Protection from Redundancy (Pregnancy and Family Leave) Bill* extends the circumstances in which an employer must offer an employee at risk of redundancy suitable alternative employment if it is available, to cover not just those on leave but also pregnant women and those returning from maternity leave (or adoption or shared parental leave). For details, please see our Employment Bulletin November 2022.

SETTLEMENT OFFER AT GRIEVANCE HEARING WAS "WITHOUT PREJUDICE"

Summary: The Employment Appeal Tribunal (EAT) confirmed that an employee's grievance constituted an "existing dispute" for the purpose of the "without prejudice" rule, so that in subsequent tribunal proceedings the employee could not rely on evidence of a settlement offer made at a meeting about the grievance (*Garrod v Riverstone Management Ltd*).

Key practice point: The without prejudice rule can enable employers to have settlement discussions without those discussions being used as evidence in a court or tribunal. However, the rule applies only if there was an existing dispute at the time the statements were made and the discussions were a genuine attempt to settle that dispute. Employers should be cautious when initiating "without prejudice" discussions; they should not assume that a grievance is necessarily a dispute – that will depend on the content of the grievance and other surrounding facts.

Facts: In October 2019, the claimant submitted a grievance in which she raised allegations against three senior managers, including pregnancy and maternity discrimination, bullying and harassment. In November, she had a meeting with her employer's external HR and employment law adviser. They discussed the main part of the grievance, which was an assertion that her duties were changed when she returned from maternity leave. The adviser then said that he would like to have a "without prejudice" conversation about settlement with the possibility of a severance payment. He went on to offer £80,000 to terminate her employment. No agreement was reached at the meeting; subsequently the employer rejected the grievance and the claimant resigned.

The claimant brought tribunal claims of pregnancy and maternity discrimination, harassment, and unfair constructive dismissal and included references to the November meeting in her tribunal claim. The Employment Tribunal decided at a preliminary hearing that these references should be excluded on the grounds of without prejudice. The claimant appealed, relying on the decision in *BNP Paribas v Mezzotero*. The *Mezzotero* case involved a grievance followed by a meeting at which termination was discussed. The EAT in *Mezzotero* agreed that the tribunal should be allowed to hear evidence about the meeting.

Decision: The EAT dismissed the appeal. The grievance constituted an existing dispute for the purposes of the without prejudice rule. *Mezzotero* was a very different case - the tribunal claim was based on what had happened at the meeting. In *Garrod*, there was no reliance on the November meeting in the claim; instead it was the grievance that formed the basis of the tribunal claim. The EAT also found that references in the grievance to infringements of legal rights and to Acas and to Early Conciliation were, given the claimant's legal training, clear signposts to the possibility of litigation and therefore the existence of a dispute.

The EAT also confirmed the Tribunal's decision that the claimant's allegation that the settlement proposal was made with a discriminatory motive was not enough to satisfy the "unambiguous impropriety" exception to the without prejudice rule. As the policy objective is to encourage parties to settle, the exception is narrowly construed. The EAT found that, given the lack of adverse findings about the way in which the meeting was conducted, any criticism that might be made of the employer fell far short of the threshold for "unambiguous impropriety".

Analysis/commentary: Under Section 111A of the Employment Rights Act 1996, evidence of "pre-termination negotiations" (even where there is no existing dispute) is inadmissible in claims of ordinary unfair dismissal. However, the evidence remains admissible in all other types of claim, such as discrimination, whistleblowing detriment and automatic unfair dismissal; consequently Section 111A is of limited use to employers.

NEED FOR CONSULTATION BEFORE DISMISSAL OF EMPLOYEE IN REDUNDANCY POOL OF ONE

Summary: The Employment Appeal Tribunal (EAT) held that an Employment Tribunal was wrong to reduce unfair dismissal compensation to zero on the basis that a redundancy selection "pool of one" meant that consultation would have made no difference to the decision to dismiss (*Teixeira v Zaika Restaurant Ltd*).

Key practice point: This is another reminder of the need for employers to consult on redundancy dismissals even where the outcome appears inevitable. The EAT quoted with approval the recent decision in *Mogane v Bradford Teaching Hospitals NHS Foundation Trust*, that the choice of a "pool of one" redundancy selection criterion without consultation was unfair (please see our Employment Bulletin October 2022).

Facts: The claimant was employed as one of a team of ten chefs. The pandemic caused a reduction in work at the restaurant. In April 2020, the employer informed the claimant, without any warning or consultation, that he had been selected for redundancy, in a "pool of one". The Tribunal found that the dismissal was procedurally unfair but that it would have been reasonable for the claimant to be placed in a pool of one, meaning that there was a 100% chance that the redundancy would still have occurred when it did. His compensation was therefore reduced by 100%. The claimant appealed.

Decision: The EAT upheld the appeal and sent the case back to the Tribunal. A fair dismissal would not necessarily have taken place at the time it did, because some warning and consultation would have been necessary, even in the case of a small employer and where a pool of one was chosen. Warning and consultation might have resulted in a change to the pool or even the outcome. Even if the dismissal would have been inevitable, it might have been delayed, which would have resulted in additional compensation. The EAT added that it was difficult to see how the choice of a pool of one would have been fair without consultation, given that the business continued and the other chefs were retained.

Analysis/commentary: The EAT commented on the importance of having objective criteria to prevent selection for redundancy being used as an opportunity to get rid of employees who are unwanted for some reason, and noted that there is a similar risk where a pool of one is chosen. The decision to have a selection pool of one appears to be coming under increasing scrutiny, so employers need to be able to justify it.

HORIZON SCANNING

What key developments in employment should be on your radar?

March 2023	Judicial review of the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations that removed (from 21 July 2022) the restriction on employment businesses supplying temporary workers to cover striking staff
2023-2024	Strikes (Minimum Service Levels) Bill: minimum service levels during strikes in certain 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

	• Employment Relations (Flexible Working) Bill: amendments to the flexible working request process; separate secondary legislation to make the right to request a "day one" right • 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
31 December 2023	Retained EU Law Bill: expiry of EU-derived secondary legislation on 31 December 2023 e.g. TUPE, Working Time Regulations and Regulations protecting part-time, fixed-term and agency workers, unless Government legislates to incorporate into UK law (or extends sunset to no later than 23 June 2026)
2023/24	Removal of the bonus cap applicable to banks, building societies, and PRA-designated investment firms.

Date uncertain	• Consultation on Statutory Code of Practice on "fire and rehire"
	• Legislation expected to provide for:
	  ○ Extension of permissible break in continuous service from one week to one month
	  ○ Right to request a more predictable contract

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 was 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); *Kocur v Angard Staffing Solutions Ltd* (Supreme Court: whether agency workers were entitled to same treatment on vacancies as directly recruited employees)
- **Redundancies:** *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees); *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:** *Mercer v Alternative Future Group Ltd* (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)
- **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)

CONTACT

- PADRAIG CRONIN
- PARTNER
- T: +44 (0)20 7090 3415
- E: Padraig.Cronin@SlaughterandMay.com

- PHIL LINNARD
- PARTNER
- T: +44 (0)20 7090 3961
- E: Phil.Linnard@SlaughterandMay.com

- LIZZIE TWIGGER
- SENIOR COUNSEL
- T: +44 (0)20 7090 5174
- E: Lizzie.Twigger@SlaughterandMay.com

- SIMON CLARK
- ASSOCIATE
- T: +44 (0)20 7090 5363
- E: Simon.Clark@SlaughterandMay.com

- LUCY DUANE
- ASSOCIATE
- T: +44 (0)20 7090 5050
- E: Lucy.Duane@SlaughterandMay.com

- PHILIPPA O'MALLEY
- ASSOCIATE
- T: +44 (0)20 7090 3796
- E: Philippa.O'Malley@SlaughterandMay.com

- DAVID RINTOUL
- ASSOCIATE
- T: +44 (0)20 7090 3795
- E: David.Rintoul@SlaughterandMay.com

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650

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For further information, please speak to your usual Slaughter and May contact.

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