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Employment Law Roadshow North Wales

March 20th, 2024

In collaboration with  gap personnel

Chester

Shrewsbury

Greater Manchester

Wirral

Overview



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- Independent Investigations
- Mediation
- Flexible Working Update
- Immigration Update
- Discrimination Update – including menopause and mental health
- Legislation and Forthcoming Changes
- Case Law Round-up



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Independent Investigations

Helen Watson, Partner and Head of Employment Law

What is an investigation?



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The ACAS Code

“An investigation is a fact-finding exercise to collect all the relevant information on a matter. A properly conducted investigation can enable an employer to fully consider the matter and then make an informed decision on it.”

Why investigate?



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- Requirement of ACAS Code
- Employment tribunals will consider whether there has been a **fair procedure**
- An effective investigation is **crucial** to have an **effective disciplinary or grievance meeting**

- “**Obvious guilt**” cases – perfectly plausible explanations can emerge
- Employee admits guilt – investigation might reveal **mitigating circumstances** that lessen culpability



Investigating Officer



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Who should this be?

- It should be someone other than the person who may be required to take formal/informal action
- Capability to act **fairly and objectively**
- May use an external investigating officer

- As far as possible they should be **independent** and should:
 - ✓ have had no personal involvement with the events being investigated
 - ✓ have no personal involvement with the individuals concerned
 - ✓ have suitable experience and training

- An investigator is **NOT** a decision maker

Dos and Don'ts



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Do

- Be **fair and objective**
- Consider the **nature and extent** of the investigation in light of the allegations
- **Look at evidence** which supports the allegation and evidence that contradicts it
- Take any decision/disciplinary action **after** a hearing is held
- Make sure everyone is **treated fairly**
- Get **as much information** on the case as reasonable

Don't

- Try to **prove the guilt** of any party
- Investigate into **matters beyond referral**
- Ask **leading** questions
- Make a decision on the **merit** of an allegation
- Take any **disciplinary action**
- Make **undertakings of confidentiality** to staff

Investigative Process – ACAS Guide

Step one: Organisational preparation

Step two: An investigator's preparation

Step three: Handling an investigation meeting

Step four: Gathering evidence

Step five: Report the investigation findings

Gathering evidence and reporting findings

1. Collect evidence that both supports and undermines the allegations
 - **Witness evidence** – interview witnesses or obtain witness statements
 - **Physical evidence** – e.g. CCTV or computer/phone records
2. Objectively analyse each piece of information
3. Prepare an investigation report
 - Uncontested facts
 - Contested facts
 - Unsubstantiated claims



Legal risks of not investigating

Procedural unfairness

- Any subsequent decisions or actions can be seen as unfair even if there is a fair reason for the dismissal

Conduct of disciplinary investigations can occasionally give rise to other claims

- Discrimination
- PIDA
- Breach of contract

Costs

- If an employer unreasonably fails to follow the ACAS Code, compensation can be increased by up to 25%

Training



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- We offer **in-house** training on how to conduct an effective investigation
- Covers in detail each stage of an investigation and includes **best practice advice**
- **Upskills your managers** and provides them with confidence in conducting internal investigations
- Interactive with **relatable case studies** tailored to your organisation's policies and practices

Independent Investigations

- Sometimes it is necessary to appoint an external investigator
- We offer **independent investigations** – in situations where we are not already advising you on the matter



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Mediation

Helen Watson, Partner and Head of Employment Law

What is mediation?



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ACAS and CIPD:

“Mediation is where an impartial third party (the mediator) helps two or more people in dispute to attempt to reach an agreement.”

Includes:

- **Workplace mediation**
- **Judicial mediation**

Benefits of mediation



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- ✓ **Effective** at resolving disputes
- ✓ **Quicker** than protracted tribunal proceedings
- ✓ **Cheaper** than litigation
- ✓ **Confidential**
- ✓ Maintains and repairs **relationships**
- ✓ Gives the parties **control**
- ✓ Allows **creative** solutions



How does workplace mediation work?



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1. Opening phase

- Introductions followed by joint opening meeting
- Mediator identifies issues at stake and any areas of common ground, and establishes what parties wish to achieve



2. Private sessions

- Parties return to private rooms and mediator moves between them exploring issues
- Mediator shares agreed information between the parties which may lead to a further joint session



3. Resolution

- Ideally a settlement will be reached between the parties

When to consider mediation



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- In the early stages when a grievance has been raised or in a disciplinary situation
- If your business is being side-tracked by a frustrating, time-consuming dispute
- Even once a claim has been submitted to the employment tribunal
- Following the resolution of a dispute to rebuild relationships

Judicial mediation



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- Case may be identified as suitable for judicial mediation at the preliminary hearing stage
 - Generally, only cases listed for at least 3 days
 - Only offered if **both parties are keen** and actively want to participate
- Independent employment judge will act as mediator
- Entirely **voluntary** – party may withdraw at any point
- Success rate of 70-75%
- If successful, the settlement will include a withdrawal and dismissal of tribunal proceedings

Our mediation services



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- Our clear, methodical approach to mediation helps you to:
 - ✓ resolve conflicts
 - ✓ improve communication
 - ✓ restore trust
 - ✓ move forward
- Our trained mediators are also experts in employment law – their specialist knowledge and legal expertise can streamline the process



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Flexible Working Update

Leah Edwards, Employment Law Solicitor

What is Flexible working



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Flexible working arrangements can be used to change when, where or how an employee works.

An employee may want to make a flexible working request to:

- reduce their hours to work part-time
- change their start and finish time
- do their hours over fewer days
- work from home or elsewhere
- share the job with someone else



Changes to the current regime

Employment Relations (Flexible Working) Act 2023:

Pre 6 April 2024	From 6 April 2024 onwards
26 weeks continuous employment required before a request could be made	Day one right for employees to make a flexible working request
Only one flexible working request could be made in a 12-month period	2 flexible working requests can be made in a 12-month period
3 months to reach decision	2 months to reach decision
Employees required to explain the effect of their flexible working request	-
-	Employers required to consult with employees before refusing a request

Flexible Working Requests

An employees flexible working request must:

- State that it is a statutory request for **flexible working** ;
- Include the date of the request;
- Include the **change** the employee is requesting to the terms and conditions of their employment in relation to their hours, times or place of **work**;
- Include the date from which the employee would like the **change** to take effect; and
 - state if (and, if so, when) the employee has made a previous request for **flexible working** to the employer.

Employers should make it clear to employees that the above information must be included in any statutory request for flexible working.

Considering a response



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- Respond to and handle each request in a reasonable manner
- Make a decision based on facts and not personal opinion
- Only turn down a request if there is a valid business reason
- Ensure employees aren't discriminated against

Responding to a request (1)



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- Respond no later than 2 months
- Confirm the decision in writing
- Invite the employee to a further meeting to discuss if necessary
- Ensure the employee is fully aware of the impact their request will have on them

Responding to a request (2)

Rejection



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Business reasons under Employment Rights Act 1996

the burden of additional costs

an inability to reorganise work amongst existing staff

an inability to recruit additional staff

detrimental impact on quality

detrimental impact on performance

detrimental effect on ability to meet customer demand

sufficient work available for the periods the employee proposes to work

planned structural changes to the employer's business

Responding to a request (3)

Rejection

Steps for employers when rejecting a flexible working request:

- **must** consult the employee **before** making decision
- should invite the employee to a consultation meeting – consider other potential options
- should invite the employee to appeal the decision
- should keep a written record of all discussions

Top tips for employers



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- ✓ Review and update flexible working policies and practices
- ✓ Training and upskilling managers/HR
- ✓ Taking steps to ensure equality of experience between employees in the office and employees at home:
 - ✓ security and technology updates
 - ✓ assessing equipment and software available
 - ✓ providing additional tools and equipment where required



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Immigration Update

Leah Edwards, Employment Law Solicitor

Visitor Visa Reform



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- Permitted paid engagement visitor route incorporated into the standard visitor route from 31 January 2024
- Visitors can stay in the UK for up to 6 months
- Permitted activities expanded to include:
 - Advising and consulting
 - Trouble-shooting
 - Providing training
 - Sharing skills and knowledge
 - Remote working

Immigration Health Surcharge

On 6 February 2024, the Immigration Health Surcharge increased to:

- **£1,035** for adults
- **£776** for children, students and Youth Mobility Scheme applicants



Penalty increase for illegal working

Since 13 February 2024, the civil penalty amount has increased to:

- **£45,000** per illegal worker in respect of a **first breach**
 - Previously £15,000 per illegal worker
- **£60,000** per illegal worker for **repeat breaches** within 3 years
 - Previously £20,000 per illegal worker

Skilled Worker Salary Increase

- Minimum salary threshold increase from £26,200 to **£38,700** on 4 April 2024
- Exemption for Health and Care visas and education workers on national pay scales
- Occupation-related going rates of pay increase from 25th percentile to **50th percentile** of the salary band



Shortage Occupation List

- On 14 March 2024, 20% salary discount for shortage occupations abolished
- On 4 April 2024, Shortage Occupation List replaced with reduced Immigration Salary List

Health and Care Visa Reform

From 11 March 2024:

- Care homes sponsoring new care workers must register with the Care Quality Commission
- Dependants of carers and senior carers prohibited

Sponsor Licence Renewal

- Sponsor licences with an expiry date **after 6 April 2024** automatically **extended by 10 years**
- No requirement to apply to renew sponsor licences after this date
- Sponsor licences with an expiry date on or before 6 April 2024 require renewal as normal

Family Visa Income Increase

- Minimum main income requirement increase from £18,600 to **£29,000** from 11 April 2024
- By early 2025 this will increase to **£38,700** per year



Immigration Documents



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- Physical immigration documents (e.g. Biometric Residence Permits and Cards) set to be phased out from 31 December 2024
- Holders will need to obtain a UKVI account to provide their immigration status after this date



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Discrimination Update

Claire Brook, Employment Law Partner

Disability

Borg-Neal v Lloyds Banking Group

ET finds that a bank unfairly dismissed and discriminated against employee who used offensive racial term during equality training session and awards over £470,000 in compensation.

Disability – Menopause

Lynskey v Direct Line Insurance Services Ltd

Unfavourable treatment because of something arising from disability and failure to make reasonable adjustments.

Age and Sex – Menopause

Thomas v Bibimoney Global Ltd

ET held that a comment about an employee being '*menopausal*' was direct age and sex discrimination and harassment.

Religion and Belief

Corby v Advisory, Conciliation and Arbitration Service

ET finds that a claimant's opposition to critical race theory is a protected belief.

Religion and Belief

Miller v University of Bristol

ET held that anti-Zionist beliefs qualified as a protected philosophical belief.

Religion and Belief

Cave v The Open University

Belief in a form of English nationalism that would deny rights to those without the 'requisite ancestry' was not worthy of respect in a democratic society.

Religion and Belief

Phoenix v The Open University

ET upheld claims by a former employee against her former employer for direct discrimination, harassment, victimisation and constructive dismissal in relation to her gender critical beliefs.

Gender Reassignment

Fischer v London United Busways Ltd

ET finds that use of gendered swearword to insult trans member of staff may be discriminatory.

Gender Reassignment

AB v Royal Borough of Kingston upon Thames

ET holds that a trans employee who was deadnamed following transition was subject to direct gender reassignment discrimination.

Gregory v Petrotrace Ltd

ET holds that 62-year-old geophysicist referred to as a “pensioner” and put in the “relegation zone” was directly discriminated against and victimised.

Kalam v The Chief Constable of West Midlands Police

ET held that ‘poster girl’ for the Firearms Operations Unit was directly and indirectly discriminated against, harassed and victimised on the ground of sex.

Sex

Earl Shilton Town Council v Miller

EAT upheld direct sex discrimination claim based on the provision of inadequate toilet facilities.

Dobson v North Cumbria Integrated Care NHS Foundation Trust

ET held that requirement to work weekends was indirect sex discrimination against community nurse with caring responsibilities for her disabled children.

Sexual Harassment

Miss L Thomas v Jelsons Ltd

ET awarded over £90,000 in compensation to claimant who suffered a series of incidents of sexual harassment during her employment.

Sexual Harassment

Worker Protection (Amendment of Equality Act 2010) Act 2023

- Comes into effect in October 2024
- Mandatory duty on employers to take reasonable steps to prevent sexual harassment in the workplace
- Discretionary compensation uplift of up to 25% if duty breached

Equality Act 2010 amendments

Equality Act 2010 (Amendment) Regulations 2023

1. **Associative indirect discrimination** – where a person without a relevant protected characteristic suffers substantively the same disadvantage
2. **Definition of disability** – normal day-to-day activities includes the ability to participate fully and effectively in working life
3. **Direct discrimination related to maternity and breastfeeding protected**
4. **Discriminatory statements outside a recruitment process prohibited**
5. **Single source test in relation to equal pay**

New ACAS Guidance

Reasonable adjustments for mental health

- Guidance on handling reasonable adjustments for mental health at work
- Practical steps and considerations to be aware of



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Legislation and Forthcoming Change

Helen Watson, Partner and Head of Employment Law

National Minimum Wage Increases

The following new rates will apply from 1 April 2024:

- 21 and over - £11.44 per hour
- 18-20 - £8.60 per hour
- 16-17 and apprentices - £6.40 per hour
- Accommodation offset - £9.99 per day



Employment Claim Fees

Government proposes to re-introduce Employment Tribunal fees

- Employment claims: £55 fee
- Appeals: £55 per judgement/decision/direction appealed
- No hearing fees

Employment Right Reforms

The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023

Key changes to holiday rights for irregular-hours and part-year workers, which will take effect for holiday years beginning on or after 1 April 2024.



Additional leave entitlements for employees

Employees will have further statutory leave enforcement under the following Acts:

- The Carer's Leave Act 2023
- The Neonatal Care (Leave and Pay) Act 2023

Paternity Leave Changes

The Paternity Leave (Amendment) Regulations 2024 are set to change the current statutory paternity leave entitlements:

As of 6 April 2024:

- Leave can be taken as two separate one-week blocks
- Leave can be taken at any time in the 52 weeks after birth
- Only 28 days' notice required

Redundancy Protection

Protection from Redundancy (Pregnancy and Family Leave) Act 2023

This new legislation extends the priority status to pregnant employees and those who have recently returned from maternity/adoption leave and shared parental leave

Right to predictable terms

The Workers (Predictable Terms and Conditions) Act 2023

Workers and agency workers will be entitled to request a predictable work pattern if:

- They have a minimum of 26 weeks continuous service;
- There is a lack of predictability with regards to any part of their work pattern
- The change relates to their work pattern;
- Their purpose in applying for the change is to get a more predictable work pattern;
- They haven't made more than 2 requests in a 12-month period

Compensation Limits

From 6 April 2024, tribunal compensation limits increases:

- Maximum compensatory award for unfair dismissal – **£115,115** from £105,707
- Limit on a week's pay - **£700** from £643



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Case Law Round-up

Helen Watson, Partner and Head of Employment Law

Whistleblowing Protection

Sullivan v Isle of Wight Council

Whistleblowing protection does not extend to external job applicants.

Spur of the Moment Resignations

Omar v Epping Forest District Citizens Advice

The recent Employment Appeal in this case set out key principles for employers to consider when an employee resigns in the heat of the moment.

Constructive Dismissal

Leaney v Loughborough University

EAT held that a tribunal was not correct to conclude that a contract of employment had been affirmed, following a 'last straw' breach by the Respondent and when a Claimant waited three months to resign.

Union recognition and worker status

Independent Workers Union of Great Britain v CAC

The Supreme Court's decision brings an end to a seven-year legal battle by the Deliveroo riders and clarifies the law on trade union recognition applications.

Sean Pong Tyres Ltd v Moore

Liability under the Equality Act 2010 will only transfer to the new Employer, if the claimant also transfers.

Flexible Working

Miss Wilson v Financial Conduct Authority

The ET held that the FCA had legitimately rejected a flexible working request for permanent homeworking due to a detriment to the quality and performance of the employee's work.

Thank you



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