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# Employment Law Roadshow

## Daresbury

April 25th, 2024

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

Adam Haines, Employment and Business Immigration Partner

# 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

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Debbie Coyne, Employment Law Senior Associate

# 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

Debbie Coyne, Employment Law Senior Associate

# 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

Adam Haines, Employment and Business Immigration Partner

# 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 25<sup>th</sup> percentile to **50<sup>th</sup> 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

Adam Haines, Employment and Business Immigration 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.

## *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 Changes

Debbie Coyne, Employment Law Senior Associate

# 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

Adam Haines, Employment and Business Immigration Partner

Debbie Coyne, Employment Law Senior Associate

# 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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