

October employment law update

6 October 2021

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Senior associate, solicitor

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Our employment and business immigration lawyers

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This morning's agenda

Welcome and introduction	Matthew
Legislation update	Jenny
The new normal: working with Covid	Jenny
Recent case law decisions	Matthew
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Looking forward – what to expect in the coming months	Hayley
Q&A	All

Legislation update

Jenny Hawrot
Senior associate, solicitor

Legislation update

Since our last seminar (May 2021)

- 31 May - Health and safety detriment protection extended to workers
- August – Furlough rules changed
- September – Furlough ended
- 5 October - Deadline for gender pay gap reporting

Legislation Update

Upcoming changes

- 11th November – compulsory vaccinations for healthcare workers
- Lots of consultations to be acted on, in future

The 'new normal': working with COVID

Jenny Hawrot
Senior associate, solicitor

Working with COVID

The end of furlough

- Coronavirus job retention scheme ended 30 September 2021
- Government confirmed: 'no more lockdowns' = no more workplace closures = no more furlough
- If you don't have enough work for all your staff, and/or the workplace is closing, consider commencing redundancy consultation ASAP?

Working with COVID

Returning to the workplace

- Compulsory vaccinations for staff:
 - care homes – 11 November
 - other employers, only if:
 - reasonable justification
 - proportionate means of achieving a legitimate aim
- What if employees refuse?
 - disciplinary proceedings
 - alternative employment?
 - PPE?

Working with COVID

Returning to the workplace

Can you ask if employees are vaccinated?

- Why do you need to know?
- GDPR - Special Category Data - lawful processing:

For employment purposes (Part 1 of Schedule 1 to the DPA 2018):

- Necessary for carrying out rights and obligations under employment law or in connection with employment; and
- The employer has an appropriate policy in place; and
- Additional safeguards

Working with COVID

Employees who refuse to return to the workplace

- Breach of contract
- Employee duty to follow *'reasonable management instructions'*
- Duty to protect employees' health and safety
- Be mindful of any disability
- Alternative role?
- Disciplinary action

Working with COVID

The 'new normal'

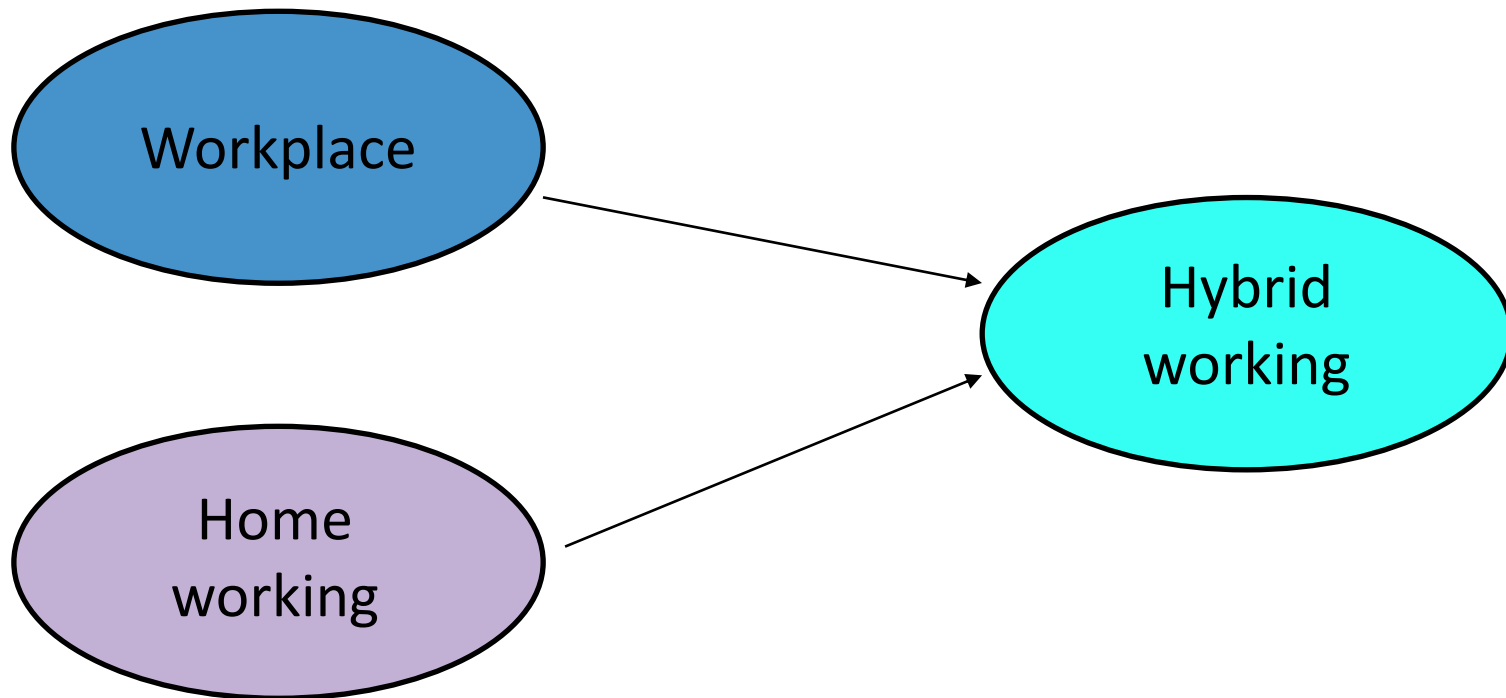
- Homeworking:
 - up in 2020 to 37% from 27% in 2019*
 - 50% during first lockdown*
- 85% of employees want 'hybrid' working – mix of home and office*
- 47% of businesses plan to take steps to enable more home and hybrid working**

*ONS May 2021

**CIPD survey

Working with COVID

The 'new normal' – place of work



Working with COVID

The 'new normal' – flexible hours

Annualised
hours

Flexi-time

Term-time
working

Job share

Compressed
hours

Part-time
hours

Working with COVID

Adapting to the 'new normal'

Making permanent changes:

- Consult with employees to reach agreement
- If they don't agree:
 - contractual right to change arrangements?
 - dismiss and re-engage?
 - NB – potential collective consultation obligations

Recent case law decisions

Matthew Clayton
Partner

Recent case law

Mrs S Aleem v E-Act Academy Trust Ltd (EAT, 2021)

- Mrs A was a science teacher, unable to teach due to mental health = disability
- Alternative role as cover supervisor, lower rate of pay
- Mrs A's pay was protected for 3 months
 - Academy always pointed out this was temporary for probation period as cover supervisor
- Mrs A accepted cover supervisor role permanently; pay was then cut to lower level
- She claimed pay protection should have continued as a reasonable adjustment

Recent case law

Mrs S Aleem v E-Act Academy Trust Ltd (EAT, 2021)

- ET dismissed her claim
- EAT held –
 - temporary pay protection during probation period was a reasonable adjustment
 - permanent pay protection was not
- Established in earlier case law that it will rarely be reasonable to continue pay for a role the employee is no longer performing
 - purpose of legislation is to assist disabled to obtain employment and to integrate them into the workforce
 - not simply to put more money in their wage packets

Recent case law

Fallahi v TWI (EAT, 2021)

- Mr F dismissed on back of final written warning (FWW) after failing to meet targets
- Mr F challenged the fairness of the FWW, saying that it made his subsequent dismissal unfair
- ET declined to go behind the FWW and held dismissal fair



Recent case law

Fallahi v TWI (EAT, 2021)

- EAT said ET should have judged reasonableness of dismissal in all the circumstances
 - FWW was one of several relevant factors
 - performance process had covered a long period
 - only part of performance led to FWW
- ET had been entitled to find that FWW was not ‘manifestly inappropriate’ and thus within range of reasonable responses

Recent case law

Fallahi v TWI (EAT, 2021)

- Test for ‘going behind’ a FWW applies to both conduct and capability warnings
- But in conduct cases, validity of FWW is crucial
 - employee can be ‘hanging by a thread’ after FWW
 - at risk of dismissal for unrelated misconduct
- Lessons -
 - fairness of a WW or FWW can affect fairness of subsequent dismissal, so take care – but employee has to show quite a high level of ‘unfairness’
 - fairness of WW or FWW is much more crucial in conduct cases

Recent case law

Gwynedd Council v Barratt & others (CA, 2021)

- Claimant teachers dismissed when school closed and a new one opened on the same site
- No consultation over closure, no appeal offered
- Applications for new roles at new school rejected
- ET and EAT both found dismissals unfair
- Council appealed on various grounds



Recent case law

***Gwynedd Council v Barratt & others* (CA, 2021)**

- CA said it would be wrong to find a dismissal unfair following a fair process, just because there was no appeal procedure
- But all the relevant circumstances must be considered when assessing fairness – including opportunity to be consulted, raise a grievance, or appeal
- Original unfair dismissal decision had been correct



Recent case law

Gwynedd Council v Barratt & others (CA, 2021)

- Lessons –
 - not always obligatory to offer an appeal against redundancy
 - what will you do if appeal is successful - would you really revisit redundancy selection?
 - right of appeal may not be appropriate in every redundancy scenario
 - could offer 'soft appeal' e.g. *“there is no formal right of appeal, but if you have concerns about any aspect of the process, you can speak to [name].”*

Recent case law

Forth Valley Health Board v Campbell (EAT, 2021)

- Mr C was a part-time phlebotomist working 16 hours pw on a 6-week rota
- Workers received a paid 15-minute break during shifts of 6 hours or more
- Mr C did receive a paid break when working 6-hour weekend shifts but not during 4-hour shifts in the week
- He argued unlawful as full-time workers received paid break for all shifts they worked
- Tribunal found in his favour at first instance

Recent case law

Forth Valley Health Board v Campbell (EAT, 2021)

- EAT dismissed his claim
- ET had erred in applying a 'but for' test. His p/t status was not the sole reason why he did not always receive paid breaks
- Correct test - why he was treated less favourably? Not 'because of' his p/t status, but instead due to length of shifts he worked
- He did sometimes receive the paid break. P/t workers could always receive paid break if they worked longer shifts

Recent case law

Mhindurwa v Lovingangels Care (ET, 2021)

- First instance decision – not binding on other ETs but shows general approach
- Ms M was a care assistant with just over two years' service
- Providing live-in care to an elderly woman who moved into a care home in February 2020
- Ms M's role was prima facie redundant
- May 2020 – request for furlough refused
- July 2020 - dismissed for redundancy

Recent case law

Mhindurwa v Lovingangels Care (ET, 2021)

- Dismissal held to be unfair
- ET said in July 2020 a reasonable employer would have considered furlough in order to avoid redundancy
- N.B. at that time, employee could not be furloughed if not previously been furloughed
- But in May 2020 she could have been furloughed for the first time (and rules also changed since July 2020)

Recent case law

Mhindurwa v Lovingangels Care (ET, 2021)

- Lessons -
 - furlough scheme now ended
 - but may need to take this into account in any redundancy appeals



you're hired



~~you're fired~~

Immigration law update

Hayley Ainsworth
Solicitor

Immigration Law Update

End of Settled Workers Scheme

- From 1 July 2021, any EEA citizens not already with settled or pre-settled status will need to evidence right to work
- What does this mean for employers?
 - right to work obligations
 - rise in sponsor licence applications
 - no turkey for Christmas

Immigration Law Update

New UK Graduate Visa Route launched July 2021

- For international students with eligible UK degree
- 2 year visa with allowances for Covid 19 barriers

Global Business Mobility Route

- To be launched in Spring 2022 for overseas businesses establishing a presence in the UK

Immigration Law Update

Changes to the Sponsorship Process

- On 26 August, Home Office released detailed plan of improvements to take place from end of 2021 to 2024
- In 2021:
 - supporting evidence for applications to be reviewed and simplified
 - new support for small and microbusinesses
 - eligibility tool to be introduced
 - salary check pilot
- 2022 to 2024:
 - review of service standards, engagement of SMEs, system simplification
 - break process into three stages
 - pre-populated application forms for workers
 - licence management functionality improvements
 - data validation checks

Looking forward: what to expect
in the coming months

Hayley Ainsworth
Solicitor

Looking forward

Employment Law Bill

- A new Bill was announced in December 2019
- Expected to be passed in 2020, may still be passed this year
- Expected to include:
 - introduction of single labour market enforcement body
 - changes to tips and service charges
 - right to request more predictable and stable contract after 26 weeks' service
 - extension of redundancy protection for pregnant employees
 - extended neonatal leave and pay
 - leave rights for employed carers

Looking forward

Good work plan – other changes to expect

- Published December 2018
- Flexible working: businesses need to do more in terms of flexible working options (upcoming consultations)
- Consultation on extending ban on exclusivity clauses in contracts of employment

Further developments

- The EHRC's technical guidance on sexual harassment and harassment in the workplace is expected to become statutory guidance in due course.

If you want to know more...

Today's speakers and their contact details:

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The graphic is a promotional poster for a webinar. It features a dark blue header with the Willans LLP logo and the word 'WEBINAR'. The main title is 'Restrictive covenants: Drafting, enforcement top tips'. Below this is a subtitle 'Considerations for your business'. The date and time are 'Tuesday 16 November 2021 | 10:00 - 11:30 am'. It also states 'Online webinar' and provides the URL 'willans.co.uk/events'. The background of the header shows a close-up of a pen on a document. The main body of the graphic is white with a light blue border. It contains the title 'Restrictive covenants: drafting and enforcement top tips (webinar)' in a large, teal font. Below the title is the date and time '16 NOVEMBER 2021 @ 10:00'. A paragraph describes the webinar as 'A practical look at drafting restrictive covenants for employers plus top tips on enforcement and dealing with breaches.' At the bottom, there is a link '> Read more' with a horizontal line underneath.

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WEBINAR

**Restrictive covenants:
Drafting, enforcement top tips**

Considerations for your business

Tuesday 16 November 2021 | 10:00 - 11:30 am

Online webinar
willans.co.uk/events

**Restrictive covenants:
drafting and enforcement
top tips (webinar)**

16 NOVEMBER 2021 @ 10:00

A practical look at drafting restrictive covenants for employers plus top tips on enforcement and dealing with breaches.

> Read more

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Redundancy and the alternatives – snapshot for employers (webinar)

20 OCTOBER 2020 @ 10:00

Ahead of the furlough scheme ending soon our employment lawyers will run through the key considerations around redundancy for businesses.

[> Read more](#)



Brexit and the end of free movement on 31 December 2020 (webinar)

12 NOVEMBER 2020 @ 10:00

The UK has left the EU, and the transition period after Brexit comes to an end this year. Our employment lawyers are running a free webinar for businesses to look at the new rules from January 2021 and how you can prepare.

[> Read more](#)



Flexible working – is your business ready? (webinar)

19 NOVEMBER 2020 @ 10:00

With the seismic shift in the numbers of the UK workforce now working from home, our employment lawyers are running a free webinar for businesses to talk you through the considerations for your organisation.

[> Read more](#)

Keep up-to-date

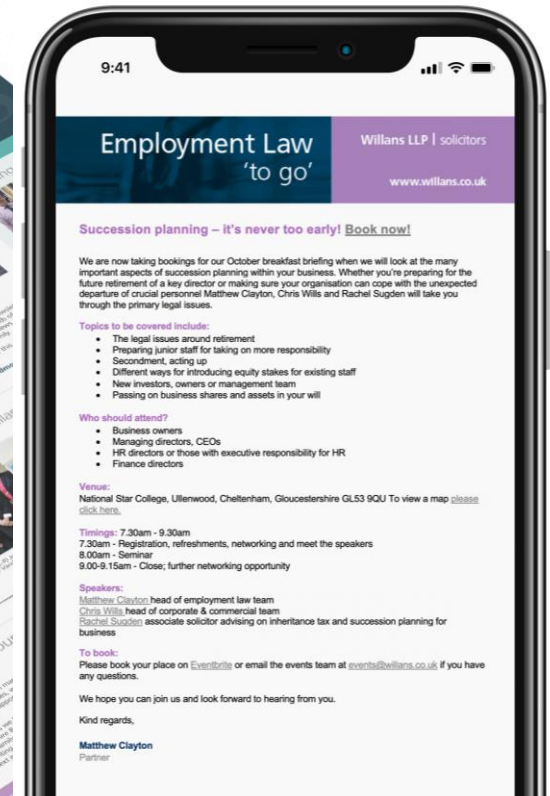
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