Employment law dispatches

Willans LLP | solicitors

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At a glance

Cases & news covering:

- Constructive dismissal
- Workplace 'banter'
- What to look out for in 2024
- Holiday reform

Welcome...

...to the latest issue of Dispatches, bringing you recent case news and updates from the world of employment law.

Meet the team below – our contact details can be found throughout the newsletter. As always, we're here if you and your business need our support.

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Carrying over statutory leave

From 1 January 2024, the following in regards to carrying over statutory leave will apply to all employees and workers:

1. Employees and workers can carry over their full statutory entitlement of 5.6 weeks into the next year if they've been on a period of maternity and/or other family leave.

2. Employees working regularly throughout the year can carry over 4 weeks statutory holiday into the next year if they've been on a period of sickness absence, if they use it within 18 months starting from the end of the leave year in which it accrued.

3. Irregular hours and part year workers can carry over their full statutory entitlement of 5.6 weeks into the next year if they've been on a period of sickness absence, if they use it within 18 months starting from the end of the leave year in which it accrued.

4. A worker will be entitled to carry forward 20 days statutory leave into the next year if:
    - the employer has refused to pay a worker their paid leave entitlement
    - the employer has not given the worker a reasonable opportunity to take their leave and encouraged them to do so
    - the employer failed to inform the worker that untaken leave will must be used before the end of the leave year to prevent it from being lost.

Carry-over will last to the first full leave year in which none of the above occurred.

We will be covering this in more detail in our employment law update in April. Keep an eye on our events page for a confirmed date in the near future.

2024: what should you look out for?

2024 is already shaping up to be a year full of change in employment law. To keep you updated, we've put together a brief guide to what you can expect and when. Please note, this is not a comprehensive guide. For an in-depth review of these legislation changes, please join us at our seminar in April.

Date	Area	Legislation	Description
1 January 2024	Discrimination	The Equality Act 2010 (Amendment) Regulations 2023	Equality Act 2010 has been amended to reflect EU discrimination law principles. Impacts on various areas, perhaps most notably the definition of 'disability', which will amend the evaluation of 'normal day-to-day' activities to consider a person's ability to participate fully and effectively in working life on an equal basis with other workers. Changes will also be seen in: • indirect discrimination • equal pay claims • discrimination in recruitment processes • protection for new mothers
1 January 2024	Holiday	The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023	The law has been clarified regarding: • the types of payments to include in the calculation of holiday pay • holiday carry-over • recording working hours
1 January 2024	TUPE	The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023	Where there are no existing representatives in place, the option to consult with affected employees directly will be extended to businesses: • with fewer than 50 employees • with any number of employees where a transfer of fewer than 10 is proposed. Note: despite these amendments coming into effect on 1 January 2024, they will only apply to transfers taking place on or after 1 July 2024.
31 March 2024	Carried over covid-19 holiday pay	Removal of The Working Time (Coronavirus) (Amendment) Regulations 2020	Any holiday pay carried over during covid (furlough) must be used by 31 March 2024 to avoid it being lost.
1 April 2024	National living wage & minimum wage	Government announcement	The National Living Wage is set to increase to £11.44 and will be inclusive of all workers aged 21 and over. Additionally, the National Minimum Wage is set to rise: • apprentices and workers aged 18 and under will be entitled to minimum of £6.40 (up from £5.28) per hour • 18 to 20-year-old workers will be entitled to £10.18 (up from £8.60) per hour.
1 April 2024	Holiday	The Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023	'Irregular hours' and 'part year' workers have been redefined. For leave years commencing on or after 1 April 2024, employers may introduce rolled up holiday entitlement and pay for irregular hours and part year workers.
6 April 2024	Carers	The Carer's Leave Regulations 2024	Employees who are recognised carers will be entitled to the following: • a day one right to take one week's unpaid carers leave (in days, half days or as a block) in any 12-month period to provide support/ make arrangements for a dependent requiring long term care (note – the notice period needs to be at least two times the length of the leave being taken) • the right to return to their original job • the right to claim damages if their employer unreasonably postpones, attempts to prevent or deny this leave • protection against dismissal for use of this leave.
6 April 2024	Paternity	The Paternity Leave (Amendment) Regulations 2024	All eligible employees will: • have the choice of taking their two weeks of paternity leave in either two one-week blocks or a single block of two weeks • be able to take their leave within one year of birth/placement of adoption • have to provide four weeks' notice prior to leave. Note – notice will still need to be given at least 15 weeks prior to the expected week of birth.

6 April 2024	Flexible working	The Flexible Working (Amendment) Regulations 2023	The Flexible Working (Amendment) Regulations 2023 will make the right to request flexible working a day one right. Additionally, (before the end of July 2024) the following changes will take place: • employees can make two requests per year • employees no longer have to explain the effects of their request on the business • employers will have two months to respond • employers must consult with the employee before rejecting their request. There is new ACAS guidance here.
6 April 2024	Redundancy	The Maternity Leave, Adoption Leave and Shared Parental Leave (Amendment) Regulations 2024	It will extend to protect pregnant employees as soon as they notify their employer of pregnancy to 18 months after childbirth. It will be inclusive of those who on or after 6 April 2024 are notifying their employer: • they are pregnant and/or • their maternity/adoption leave ends and/or • those whose shared parental leave ends. The above listed employees will also have the right to claim automatic unfair dismissal if their employer fails to adhere to these new obligations.
2 May 2024	Tips	The Employment (Allocation of Tips) Act 2023	Employers will have the duty to: • ensure tips are allocated fairly amongst staff • ensure payment of tips are made before the end of the following month • ensure there is a written policy in place • ensure workers have the right to bring a claim if the employer fails to comply.
September 2024	Predictable working	The Workers (Predictable Terms and Conditions) Act 2023	Agency workers and qualifying workers will have the option to request a more predictable work pattern in instances where: • their work pattern isn't predictable • the changes sought are linked to their working pattern • the goal is to achieve a more predictable working pattern. Up to two applications can be made separately throughout the year (inclusive of being separate to flexible working requests which aspire to have a similar effect).
October 2024	Sexual harassment	The Worker Protection (Amendment of Equality Act 2010) Act 2023	Employers will have a statutory duty to take reasonable steps to prevent sexual harassment in the workplace. If employers breach this duty: • employment tribunals will have the power to increase compensation by 25% • the Equalities and Human Rights Commission will have the power to investigate these breaches and take enforcement action.

Fire & Rehire: government responds to consultation on Code of Practice

The Government has published its response to the consultation on the draft Statutory Code of Practice on Dismissal and Re-engagement, which includes minor amendments to the draft code.

The consultation, which came after public outcry around employers using 'fire and rehire' practices to force changes in employee terms and conditions, closed in spring 2023.

The Government's response contains an amended draft code, along with an explanatory memorandum, to be presented to Parliament for approval. The key provisions remain the same as in the original draft code, summarised here, but there have been some minor amendments as follows:

Original draft code	New draft code
Employers must contact Acas if unable to reach agreement with employees about fire and re-hire	Employers must contact Acas at an early stage, before raising fire and re-hire with employees
Phasing-in changes are obligatory	Phasing-in changes are best practice
No reference to employers providing information in writing	Good practice for employers to provide information in writing

Failure to follow the code can be taken into account by tribunals in relevant cases, and tribunals will be able to uplift any compensation awarded by up to 25% for unreasonable failure to follow the code.

New legislation to simplify holiday entitlement & pay

The Government has introduced new legislation to simplify holiday entitlement and holiday pay calculations. We have summarised the most pertinent ones below.

Irregular hours and part-year workers

1. New definition of 'irregular hours worker'
    - In relation to a leave year, a worker is an irregular hours worker if the number of paid hours they work in each pay period during the term of their contract is wholly or mostly variable.
2. New definition of 'part-year worker'
    - In relation to a leave year, a worker is a part-year worker if they are required to work only part of that year. There are periods within that year (during the term of the contract) of at least a week which they are not required to work and for which they are not paid. This includes part-year workers who may have fixed hours – for example, teaching assistants who only work and are paid during term time.
3. Holiday entitlement accrual for part-year and irregular hours workers
    - For leave years beginning on or after 1 April 2024 – holiday entitlement for these workers will be calculated as 12.07% of actual hours worked in a pay period (this is based on the statutory minimum holiday entitlement only).
4. Rolled up holiday pay for part-year and irregular hours workers
    - For leave years beginning on or after 1 April 2024, employers may use rolled-up holiday pay as an additional method for calculating holiday pay for irregular hour and part-year workers
    - The calculation of holiday pay by employers is 12.07% of a worker's total pay, based on a worker's total pay in a pay period
    - The holiday pay should be paid in addition to and at the same time as the worker is paid for the work done in each pay period. ■

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Case law watch

Constructive dismissal & delayed resignation

Mr Leaney was a lecturer and halls warden at the University of Loughborough for over 40 years.

In January 2019, Mr Leaney was put under disciplinary investigation due to concerns over how he handled a situation in one of his designated halls of residence. The investigation found that there was "no formal case to answer".

There was then a long series of communication between the legal representatives of Mr Leaney and the university about the matter, as well as the possibility of mediation. On 29 June 2019, the university stated that it did not want to discuss the matter any further and that "the time to discuss [Mr Leaney's] role of warden had passed".

Discussions of mediation continued to take place, but a meeting was never organised. As a result Mr Leaney resigned on 28 September 2019, relying on this failure as the "last straw".

The tribunal concluded that he had affirmed his contract of employment by waiting three months to resign, and therefore his constructive unfair dismissal claim failed.

However, on appeal, the Employment Appeal Tribunal (EAT) held that the delay did not constitute affirmation. The EAT considered that the delay was concurrent with the university's summer holidays and a period of illness, and the fact that Mr Leaney had over 40 years' service.

As such, a longer decision time was justifiable. Additionally, as there were ongoing mediation discussions, the delay allowed more time for the matter to be resolved. As a result, the claim was remitted back to the tribunal.

What does this mean?

When dealing with a constructive dismissal claim, it is important to assess the individual circumstances of a case before assuming that delay means affirmation of the contract of employment, especially where an employee has long service. ■

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Settlement agreements & future claims

Mr Bathgate worked for Technip Singapore PTE Ltd as a chief officer for over 20 years. In January 2017, Mr Bathgate accepted enhanced voluntary redundancy by way of a settlement agreement. The agreement also contained a clause which waived future claims in relation to age discrimination.

After the agreement was signed, Technip decided that they were not required to make an additional payment to Mr Bathgate because he was over the age of 60, in accordance with a collective agreement. As a result of this decision, Mr Bathgate brought a claim for age discrimination.

In the first instance, the Scottish tribunal held that the claim had been settled by the agreement. On appeal, the EAT found that no future claims could be waived under the agreement.

The Court of Session disagreed and found that the claim had been settled by the agreement because it specified that it waived "all claims… of whatever nature [whether past, present or future]" and that this applied in all scenarios where "it is plain and unequivocal that this was intended".

What does this mean?

Despite this being a Scottish judgment, it is expected that this will take precedence in the tribunals in England and Wales. Therefore, it is important as an employer if you are wishing to settle future unknown claims that any settlement agreement wording drafted is precise and ensures your intentions to settle future claims are clear. ■

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The price for 'workplace banter'

Miss Hunter had been employed by Lidl since she was a teenager. From a very early stage, she was subjected to unwanted physical contact, including having her bottom slapped and her waist and thighs touched by colleagues. She was also subjected to inappropriate comments from her colleagues, who referred to her underwear or expressed their desire for sexual intercourse with her. She raised the issue with her manager but was told that she should "take it as a compliment". No action was taken.

Miss Hunter resigned, claiming constructive dismissal and sexual harassment. The Employment Tribunal found in Miss Hunter's favour, noting that despite Lidl having a policy stating that such behaviour is not to be tolerated, a 'laddish culture' was prevalent in the workplace.

The tribunal highlighted that the lack of training and awareness allowed for this to happen and for Miss Hunter to be sexually harassed by her manager and other members of staff.

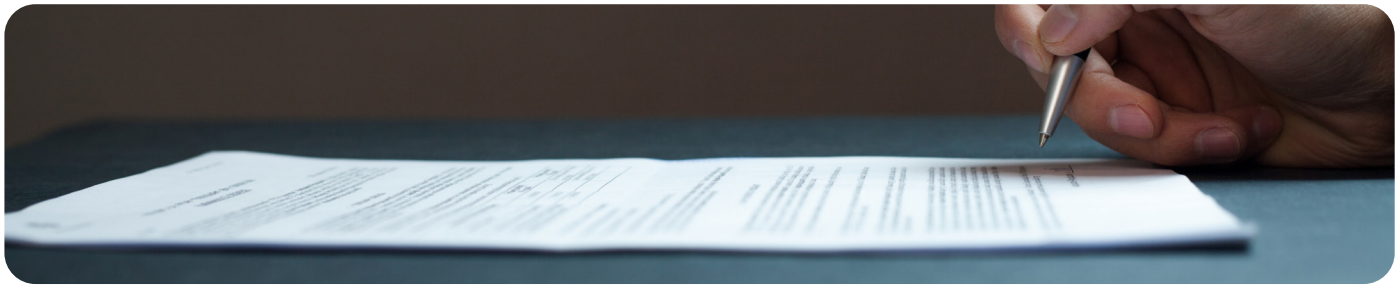
Miss Hunter was awarded £50,884, inclusive of a substantial £22,000 injury to feelings award.

What should I do?

This case serves as a reminder that it's not enough to simply have policies in place. Employers need to ensure that staff are properly trained on those policies and that those policies are followed.

Employers should also be aware that new legislation is due to come into force in October 2024, imposing a new requirement on employers to take reasonable steps to prevent sexual harassment in the workplace. Failure to do so could result in additional claims and significant compensation awards. ■

Employment status: EAT confirms approach



The EAT has provided useful guidance on the approach to determining employment status in Plastic Omnium Automotive Ltd v Horton. Mr Horton was engaged by Plastic Omnium via a written contract with his service company, ProMan Design Limited. The contract did not allow for a right of substitution (although this did happen in practice), but did state that Mr Horton was not an employee and that he'd receive no payment for holiday, sickness or other absence.

Mr Horton worked regular hours for Plastic Omnium, attended training days and was treated the same as other programme managers. He was given a laptop, access card, email address, and was able to request holiday, for which he paid a 'daily fee'.

However, he did not have to clock in or out the way employees did, he didn't have appraisals and he was paid by his company – ProMan Design Limited – submitting invoices. He would then draw dividends and a salary from his company.

The Employment Tribunal originally found that Mr Horton was a worker of Plastic Omnium Automotive Ltd and not a self-employed contractor because he was fully integrated into Plastic Omnium's business and acting as a subordinate.

However, the EAT found that Mr Horton was self-employed. The EAT drew attention to the importance of first considering the contract between parties, making careful findings of fact, and only then deciding how much weight to give factors such as subordination which might suggest worker status. A presence of subordination and dependency did not mean other key factors – such as contract terms – should be ignored.

What should I do?

This case serves as a reminder that when assessing worker status, the starting point should be the contract between the parties. Only then should other factors, such as subordination, be considered, and that they do not overshadow contract terms. ■

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More news on our website www.willans.co.uk

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For advice on any of the issues covered in this bulletin or any other area of law, please contact these people in the first instance.

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