Employment law dispatches

Willans LLP | solicitors

June | 2024

Welcome...

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

In a recent flurry of changes, we're pleased to announce that Jenny Hawrot is promoted to head of department and Hayley Ainsworth is promoted to senior associate, solicitor.

As always, we're here if you and your business need our support.

At a glance

Cases & news covering:

- Graduate visa routes
- Preserving evidence
- Biometric data
- Menopause

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Updates for you & your business

2024 continues to be busy for employment law. Our earlier edition set out the legislative changes in the first quarter of the year, and further changes are now being confirmed. We've set out a few additional points to have on your radar as the summer continues.

Fire & rehire statutory code to be in force from July 2024

The government has confirmed that the new statutory Code of Practice on Dismissal and Re-engagement ('code') will be brought into force by July 2024, subject to parliamentary approval. The code sets out best practice for employers who are considering utilising dismissal and re-engagement practices. It has, however, faced some criticism for not introducing any new legal obligations, nor banning the practice of 'fire and rehire' altogether. Nevertheless, it is likely to be approved by the House of Commons before the summer recess.

Paternity Leave (Bereavement) Bill passes to House of Lords

A new bill has been introduced for circumstances where the mother – or primary adopter – dies in the first year of a child's life, or in the first year of adoption. At the third reading, it was confirmed that the intention of this bill is that, regardless of their length of service, a bereaved father or partner will have up to 52 weeks' leave during the first year of their child's life, from the day on which the mother or primary adopter of the child has died (**continued on page 2**).

Updates for you & your business (continued)

Call for evidence on reform of 'fit notes'

The Department for Work and Pensions and the Department of Health and Social Care have issued a call for evidence to explore reforming the 'fit note' process, in advance of a full consultation later this year. This is intended to provide a better understanding of how the government can enable those with long-term health conditions to access timely work and health support when returning from absences that might require a more detailed assessment and discussion about their work and health.

Employers will be invited to comment on the current fit note process, how it can be improved and what additional information could be provided to support employees returning to work.

Sexual harassment: EHRC consultation on technical guidance expected in early summer

In October 2024, the Worker Protection (Amendment of Equality Act 2010) Act 2023 is coming into force, which will introduce a new mandatory duty on employers to prevent sexual harassment of their employees. In advance of this, the Equality and Human Rights Commission (EHRC) has expressed its intention to open a six-week consultation on changes to its technical guidance on sexual harassment and harassment at work.

The EHRC hopes to publish its final revised guidance in September this year, giving employers time to get to grips with the changes before the new duty is imposed the following month. It will be important for employers to familiarise themselves with the EHRC code as employment tribunals will have a new power to uplift an employee's compensation by up to 25% where an employer is found to have breached the duty to prevent sexual harassment of employees. ■

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Graduate visa routes review

The Migration Advisory Committee (MAC) has published their rapid review of the graduate visa route, following a request by the government.

Despite the government expressing concerns that the graduate visa in its current form was resulting in abuse and was undermining the integrity and quality of the UK higher education system, the review has found the opposite.

The MAC said it did not find evidence of widespread abuse of the graduate route, nor that its use is 'undermining'. The only mention of abuse in the review is in relation to agents, stating a belief that some agents are mis-selling UK higher education and might be exploiting students in the process.

The MAC recommended retaining the graduate route in its current form, stating that it broadly achieves the objectives set out by the Home Office and supports the government's education policy.

This will be a welcome relief for UK higher education providers, and international students alike. However, it remains to be seen whether the government will heed the review's advice. ■

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Strike out: the importance of preserving relevant evidence

Ms Kaur brought a claim of sex discrimination, sexual harassment and victimisation. A notebook and mobile phone recording were crucial to Ms Kaur's victimisation claim.

The employer, Sun Mark, insisted that they wanted to forensically examine this evidence, however Ms Kaur continuously declined the request. As such, the tribunal made an order for disclosure. It was then revealed that Ms Kaur had *"destroyed"* the evidence. Sun Mark applied to have the claim struck out on this basis.

The tribunal found that Ms Kaur had either destroyed the evidence when the disclosure order was made or lied about doing so. Her explanation lacked credibility and was possibly a mere fabrication.

Consequently, Ms Kaur's remedy claim was struck out for being *"scandalous, unreasonable or vexatious,"* which diminished the possibility of either party having a fair hearing.

This was upheld by the Employment Appeal Tribunal (EAT), who deemed the strike out order to be an appropriate and proportionate outcome.

What should you do?

The ruling in this case demonstrates that preservation of all relevant (or potentially relevant) evidence to your case is paramount, even if it is damaging to your argument. It also emphasises the power of the tribunal to strike out claims in instances of non-compliance with their disclosure orders. ■

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Monitoring employees through the use of biometric data

The Information Commissioner's Office (ICO) recently issued Serco Leisure an enforcement notice ordering them to cease using facial recognition technology and fingerprint scanning for monitoring employee attendance.

Serco Leisure resorted to using biometric data to monitor employee attendance after finding that manual sign-in sheets and swipe identification cards were inappropriately used by their employees.

Serco sought to rely on 'legitimate interest' and 'contractual necessity' as the lawful basis for using biometric data to monitor its employees. Biometric data is considered 'special category data', which attracts greater protection, so Serco also produced a relevant data protection impact assessment, and later a legitimate interests assessment. The ICO rejected both and found that Serco failed to adequately consider the intrusive nature and the high risks of processing biometric data. They held that this monitoring was neither necessary nor proportionate, especially as less intrusive methods could achieve the same result.

Additionally, employees were not provided with any clear alternatives, and it was presented to them as a requirement for receiving pay. Given the imbalance of power between Serco Leisure and its employees, it was unlikely that employees would feel able to object, even if informed.

The ICO ordered Serco to cease using facial recognition technology and fingerprint scanning to monitor employee attendance.

What should employers do?

The use of biometric data technology for monitoring purposes is gaining popularity, however this recent decision demonstrates that employers must always consider their legal obligations and their employees' rights before implementation.

Becoming familiar with the ICO's guidance on monitoring employees, along with its recently published new guidance on the use of biometric recognition systems, is a good starting point.

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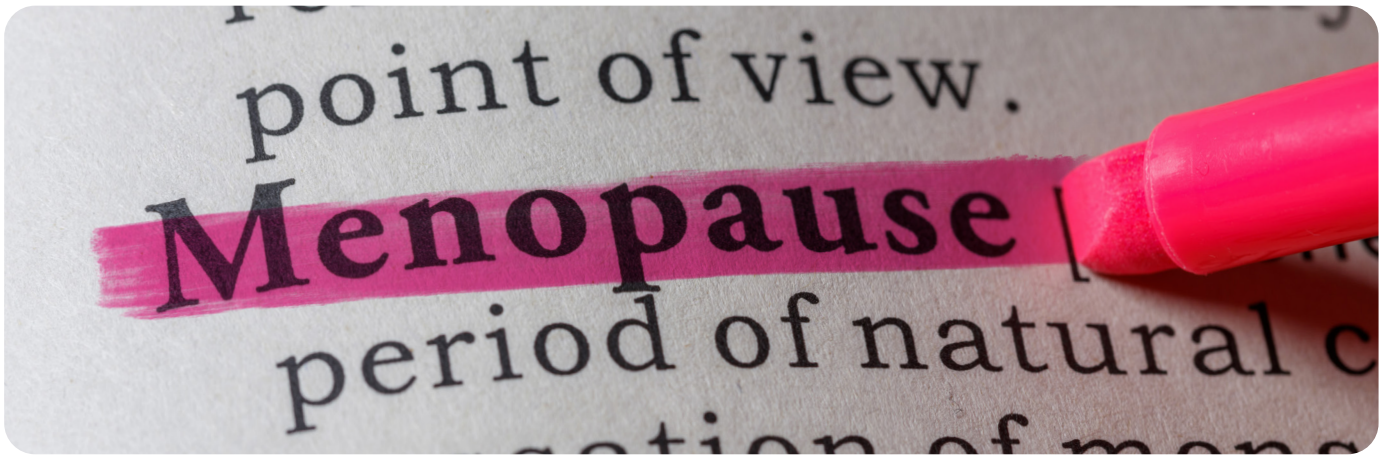
Allocation of Tips Act delayed

The government has announced that the introduction of the Employment (Allocation of Tips) Act 2023 will be delayed from 1 July to 1 October 2024. The delay is due to changes that still need to be approved by parliament.

Menopause: can it amount to disability discrimination?



Ms Johnson was employed by Bronzeshield Lifting Ltd as an administrator. In 2018, she started experiencing menopausal symptoms that affected her resilience and ability to cope with the stresses of daily work and life.

In 2021, she requested to reduce her working days to four. One of the reasons stated was to cope with her menopause symptoms, and the company agreed to this for a trial period.

Shortly before the end of the trial period, Ms Johnson submitted a further request, asking for her working days to be reduced to three-and-a-half days, with Fridays off. Again, she stated that this was partly due to her menopausal symptoms.

The company rejected her request, citing Friday as their busiest day and that it would not be fair to expect her part-time colleague to take over her work. It was also not feasible to recruit someone for one day a week.

Ms Johnson resigned and brought claims for sex and disability discrimination and constructive unfair dismissal.

During the proceedings, the manager who rejected the request admitted that he had little knowledge of Ms Johnson's daily responsibilities, nor of the symptoms of the menopause, and he had failed to consider the link between the two. This amounted to direct disability discrimination, and she was also successful in her constructive unfair dismissal claim. Interestingly, the employment tribunal found that the refusal of her flexible working request was reasonable and not discriminatory.

What should employers do?

This is a first instance decision, but it's one of the growing numbers of cases confirming that menopausal symptoms could amount to a disability. It also emphasises that employers should try to understand how conditions affect employees and why changes are requested before making any decisions.

With recent legislative changes, employers can expect more flexible working requests, so it's crucial to become familiar with the new flexible working rules and update relevant policies and procedures. ■

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Webinar: business immigration for employers

Tuesday 25 June | 9:30-11am

Join our highly rated employment law & business immigration team for a free webinar on what you and your business need to know when employing non-UK workers.

Covering right-to-work checks, sponsoring workers, business visit visas and more, this webinar is perfect for directors, senior executives, business owners, HR professionals and in-house legal advisors.

Click here to book your place now!

Dismissing staff & avoiding age discrimination

Mr Edreira was employed by Severn Waste Services (the company), performing an operative role until he was eventually dismissed following 15 months of sickness absence in October 2023.

Mr Edreira made claims of age discrimination and harassment claiming he was treated unfavourably once he reached age 66 (the age of retirement per company policy) in a bid to get him to leave the company. In particular, he claimed that he was offered a chair to use while working by his manager. Mr Edreira declined this offer and observed that no younger employees were treated this way. He, therefore, believed he had been discriminated against because of his age.

The employment tribunal dismissed all claims on the basis that the treatment of Mr Edreira was not related to age, nor was the offer "unusual." It found that this treatment may have been unwanted, but it was not "unpleasant or rude" and instead had a closer link to his health. Additionally, the tribunal highlighted that, contrary to his claims, the company carried out an in-depth welfare process during his sickness absence demonstrating that they were working towards retention.

What should you do?

To avoid miscommunication and unwanted tribunal attention, it is best practice to have a one-on-one discussion with employees to identify if there is anything you can do to support them, rather than assuming how you may be able to offer support. ■

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

Contact

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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