




**Developments in employment law
for independent schools**
 Tuesday 7 March 2023

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Agenda

- 9.30 **Registration and refreshments**
- 10.00 Holiday pay for part year workers - The latest developments
- Staff accommodation
- 11.10 **Refreshment break**
- 11.30 TPS, changing terms and conditions and “fire and re-hire”- The current landscape for schools and beyond
- Flexible working - Legal developments and considerations for schools
- 12.50 **Lunch and networking**
- 1.40 Industrial relations - Understanding trade union recognition and industrial action
- Equality, Diversity and Inclusion
- 2.40 **Refreshment break**
- 3.00 Visiting Music Teachers and Employment Status
 Legal & Case law update
- 4.15 **Close**



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Current law on holiday entitlement and pay

- *Brazel* – no mechanism in the WTR to pro-rate permanently retained TTO and irregular hours workers' holiday pay according to hours worked
- Holiday pay must be calculated at the rate of a week's pay in respect of each week of leave.
- The calculation of a week's pay will depend on the worker's hours and how they are paid:
 - Normal working hours? Normal pay due under contract
 - Variable hours or pay? Rolling 52 paid week reference period
- Multiply one week's pay by 5.6 to calculate a year's holiday pay entitlement

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Practical challenges

- How does *Brazel* change the way you might contract with part-year and irregular hours workers?
- How do you manage the administrative burden of the rolling 52 paid week reference period to calculate a week's pay?
- How do you calculate holiday entitlement in hours/days for an irregular hours worker?
- How much holiday do you deduct from an irregular hours worker's holiday balance?
- To what extent can you control these uncertainties under the contract?



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Holiday pay consultation

- Government consultation open until **11.45pm on 9 March 2023**
- Proposal to pro-rate the statutory holiday entitlement of staff affected by *Brazel*
- Broadly – by introducing a 52 week **entitlement** reference period (to include unworked weeks)
- However, some of the detail of the consultation is complex
- VWV has produced a template response to be tailored and submitted by you



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Holiday pay consultation

Fixed 52 week holiday entitlement reference period

- Proposal to introduce a new holiday **entitlement** reference period
- Holiday entitlement would be 12.07% of the worker's total worked hours for the **previous** holiday year
- The current holiday **pay** reference period (based on the last 52 paid weeks) would not change
- Employers would therefore need to start using the two reference periods alongside one another. **The two reference periods will work differently**
- What could the practical implications be for different types of part-year and irregular hours worker?




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Responding to the holiday pay consultation

- We support legal reform to address the inequality highlighted by *Brazel*
- Holiday pay calculations for salaried part-year workers are currently straightforward. There is a risk of the position becoming more complicated for this category of worker. It should be possible to calculate holiday entitlement based on the current holiday year for salaried workers
- There will a new administrative burden associated with using the new holiday entitlement reference period alongside the existing holiday pay reference period.




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Considering your internal approach

We know the government wants to change TTO holiday entitlement. How should we proceed in the meantime?

- Consider contracts – existing and for new starters (we have updated our TTO contract and year-round casual employee/worker contracts)
- Side letter/communications to explain temporary approach to holiday pay?
- Consultation does not affect existing legal position – two year rolling liability period for back pay stands



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Staff accommodation



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Overview of Staff Accommodation

Service
Occupancy
Agreements

Assured
Shorthold
Tenancy

Licence to
Occupy



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Key aspects of Service Occupancy

Members of staff who fulfil the test:

- It is necessary for the proper performance of the employee's duties; or
- the accommodation is provided for the better performance of the employee's duties; it customary to provide accommodation; and requirement is set out in the employment contract

Benefit:

- Automatically ends on termination of employment contract:
- Unlikely to be tax consequences of below market rent



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Key Aspects of Assured Shorthold Tenancy

- If can't fulfil SOA test, likely to be Tenant and an AST is required
- Minimum £250 p.a. rent (£1,000 in London);
- Accommodation must be the employee's main residence;
- Cannot be granted to a company;
- Not specifically designed for Independent School sector:
 - 2 months notice to vacate in absence of breach;
 - Possession order unlikely in first 6 months but otherwise guaranteed possession route;
- Rent below market value likely to be benefit-in-kind for income tax purposes



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Recent Changes

- All residential properties (AST) require EPC 'E'. The threshold is likely to increase over the next few years and we recommend reviewing housing stock
- Schools with larger number of staff living on site are increasingly using a Housing Policy to help manage staff allocation of property and to impose regulations on use
- Charities Act 2011 – changes to property requirements coming into force in Spring 2023. Staff are no longer 'connected persons' for an AST
- On 6 April 2021, HMRC tax rules changed regarding the availability of tax exemptions for some staff members who live on site (particularly SLT posts created before 5 April 1977).



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Refreshment Break

Seminar resumes at 11.30




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TPS, changing terms and conditions, and “fire and re-hire”




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Upcoming valuation

- When is the valuation likely to be? April/September 2023?
- Likely increases to employer and employee contribution rates
- When is implementation likely to be? April 2024 at the earliest




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What are the options going forward?

- Do nothing
- Withdrawal
- Phased withdrawal
- Hybrid/total pay and benefits approach
 - Pay reduction if employer contributions exceed certain triggers
 - Offsetting future increases in employer contributions against future pay awards



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Rationale for change

In support of change

- Cost savings and sustainability
- Increased certainty and control

Challenges

- Staff relations/communications
- Union involvement

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Increased union involvement

- Voluntary recognition requests
- Balloting and strike action
- Collective pay claims

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Changing terms and conditions of employment

- Pension membership will be an express contractual term

Options:

- Unilateral imposition of the change would be unfair
- Seek agreement with the employee (individual or collective agreement)
- If agreement is not possible – terminate and offer re-engagement on the new terms



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The planning stage

- Business case
 - Rationale and cost savings
 - Alternatives
 - Number of affected staff
 - New pension arrangements
 - Who will sign off on business case?
- Consultation timetable
 - Individual consultation?
 - Collective consultation? 20+ employees at risk?
 - Election of employee reps?
- Draft documentation
 - Briefings
 - Scripts and letters
 - S.188 letter and HR1 Form if necessary



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Consultation

Collective consultation

- Nominate/elect reps
- Issue s.188 letter and Form HR1
- Initial meeting with representatives and affected staff
- Collective consultation – minimum 30/45 days
- Individual consultation
- Agreement, or dismissal (on notice) and re-engagement

Individual consultation

- If collective consultation obligations do not apply, you can individually consult only
- No minimum timescales but consultation must be meaningful



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Fire and re-hire

- Draft Statutory Code of Practice published for consultation on 24 January
- Aims not to change the law but to set out good industrial practice, including recommendations to:
 - re-examine business case if agreement cannot be reached on changes to t&cs;
 - implement multiple changes to t&cs over time, and keeping the need for change under review
- Tribunals will be required to take Code into account and may uplift compensation by up to 25% in the case of an unreasonable failure to follow
- Consultation closes at **11.45pm on 18 April 2023**




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Flexible working


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The current framework

- In place in current form since 2014
- Statutory framework and ACAS Statutory Code of Practice and Guidance
- Employees with 26 weeks' continuous service can make a flexible work request
- Employer can only refuse request for one of eight statutory reasons



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What is a flexible work request?

The request can ask for changes to:

- working hours
- working times
- place of work

The request is a permanent change to terms and conditions

There is no prohibition on an employee requesting a temporary change to the above.



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Considering a flexible work request

- Employer can agree
- Or invite the employee to a meeting
- Right to be accompanied
- Must deal “reasonably” with the request
- ACAS guidance – consider other options, make decisions based on facts not opinions



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Responding to a flexible work request

- 8 specific grounds for refusal:
 - the burden of additional costs
 - detrimental effect on ability to meet customer demand
 - inability to reorganise work among existing staff
 - inability to recruit additional staff
 - detrimental impact on quality
 - detrimental impact on performance
 - insufficiency of work
 - planned structural changes
- Right of appeal
- Employer must notify the employee of the decision within three months
- No further requests in 12 month period



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Employment Relations (Flexible Working) Bill

- Not proposing an automatic right to work flexibly - remains a right to request
- Broadening scope of existing right:
 - day 1 right
 - increases number of requests that can be made to two per 12 month period
 - reduces employer response time from three months to two months
 - requirement on employers to consult where considering rejection
 - employee not required to set out impact of their request



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Flexible working meets sex discrimination

Glover v Lacoste UK Ltd [2023]

- Employee made flexible work request which was rejected. Appeal was unsuccessful
- Employer said it needed employee to work on a “fully flexible basis”
- Employee left before returning from maternity leave
- EAT held FWR outcome was a PCP for the purposes of an indirect sex discrimination claim
- FWR appeal outcome can result in disadvantage/detriment



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Flexible working case studies

- A Head of Department asks to work 4 days a week. How would you approach this? What would be the considerations?
- A member of the finance team asks if they can work from home 3 days a week to look after their new dog. How would you approach this? What would be the considerations?
- A small group of the teaching staff ask whether they choose to leave site during their PPA time. How would you approach this? What would be the considerations?



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Lunch break

Seminar resumes at 1.40



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Industrial relations and trade unions


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Key requirements for valid industrial action

- A valid “trade dispute”
- Compliance with strict balloting and notice provisions
- At least 50% of those entitled to vote must turn out
- Of those who voted, a simple majority must vote in favour of industrial action
- Lawful or not – consequences?

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Is the ballot lawful?

- If yes - protection for both individuals and the union:
 - Individuals: from dismissal or detriment as a consequence of participation
 - Unions: from responsibility for inducing a breach in contract
- If no – employer can seek injunction (before the event) or damages (after the event)



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Participating in strike action

Who can participate in the strikes?

- Staff who are members of the striking union
- Staff who are not members at all
- Must be affected by the trade dispute
- No formal protection in relation to “unofficial strike action”
- In practice – this is a sensitive issue that requires balance
- What about action short of strike?



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Strikes (Minimum Service Levels) Bill

- Introduced on 10 January 2023
- Would allow Secretary of State to make “minimum service regulations” in “relevant services” including education
- Scope of “education” yet to be defined – may not include independent sector?
- Definition of “minimum service” yet to be confirmed
- Could lead to loss of union immunity and unfair dismissal protection in cases of non-compliance with “work notice”



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Using agency workers during industrial action

- Regulations passed – July 2022
- Employers (save for in the Welsh public sector) are now permitted to use agency staff to provide cover during industrial action
- But – Regulations currently subject to judicial review. Hearing expected in March 2023



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Picketing

What rules apply to picket lines?

- Union must appoint picket supervisor – trade union official or other member of the union
- Union will write to picket supervisor confirming approval. Employer can ask to see letter but it will contain limited information
- Picket must be at or near the place of work. Consider practical arrangements for schools located on main roads
- Intimidation or threatening behaviour is unlawful



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Picketing

What happens if people are afraid to cross the picket line?

- This could apply to other staff, or to parents or pupils
- Staff who do not cross the picket line will be regarded as participating in the action
- Be aware of lawful purpose of picketing – picketing activity must be carried out *peacefully*
- Possible to apply to the court to stop unlawful picketing
- BEIS - [Code of Practice on Picketing](#)



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School closures

What happens if staff cannot attend work due to childcare responsibilities?

- Consider impact on staff with school-aged children
- Flexible working
- Annual leave
- Time off for dependants
- Parental leave
- Engage early and keep communicating



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Unlawful inducements

What is an unlawful inducement?

- An **offer** to a worker or workers for the **sole or main purpose** of either:
 - Inducing a single worker to
 - join or not join a particular union, or
 - refrain from union membership,
 - refrain from taking part in trade union activities; or
 - refrain from making use of union services
 - Persuading the **worker and at least two of their colleagues** to forgo collective bargaining



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Unlawful inducements

- Includes express and implied offers
- What about threats?
- Distinction between inducing and persuading
- “Sole or main purpose” is a subjective test
- Mandatory Tribunal award (currently £4,554 **per claimant**)



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Detriment

- Day 1 right protecting any action short of dismissal for the following reasons:
 - a reason relating to independent TU membership, activities or services
 - a failure to accept unlawful inducements;
 - the purpose of enforcing a requirement that non-union members must make payments as a result of not being union members
- Compensation will be “just and equitable” and is uncapped
- There is separate statutory protection against dismissal for any of the above reasons



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Equality, diversity and inclusion

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What is equality, diversity and inclusion?

- **A shift from “equality” to “equity”?**
- Treating everyone equally does not take account of the fact that some individuals are more disadvantaged than others.
- Equity seeks to redress the balance by acknowledging that additional resources/opportunities may need to be allocated to under-represented groups
- **Diversity:** protected characteristics and beyond. Consider characteristics such as gender identity, social and demographic background, and neurodiversity
- **Inclusion:** respecting and welcoming differences between staff, without requiring conformity



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The current framework

Equality Act 2010

- Prevents discrimination on the grounds of any protected characteristic – both within and outside the workplace
- Direct discrimination
- Indirect discrimination
- Harassment and victimisation
- Duty to make reasonable adjustments



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EHRC Statutory Code of Practice 2011

- The Code encourages employers to have an equality policy and contains guidance on what should be included
- The Code can be used in evidence in legal proceedings brought under the Equality Act
- Breach of the Code may shift the burden of proof to the Respondent in discrimination claims
- Implementing the Code can help establish “reasonable steps” defence



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EHRC Technical Guidance on Sexual Harassment and Harassment in the Workplace - 2020

- Not currently a statutory code – Tribunals not obliged to take it into account, but it may still be used as evidence in legal proceedings
- Intended to help:
 - explain the extent and impact of harassment in the workplace
 - set out best practice for effective prevention and response
- Government has said it will be turned into a statutory code “in due course” – timescales not confirmed



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Worker Protection (Amendment of Equality Act 2010) Bill

- Private Members' Bill supported by government
- An employer will be treated as harassing an employee when a third party harasses an employee in the course of their employment and the employer has failed to take all reasonable steps to prevent the harassment
- Exception in case of expression of opinion that is not indecent or grossly offensive, and the harassment was not intentional
- New duty to take **all reasonable steps** to prevent sexual harassment of staff in course of employment
- Breach of duty could lead to compensation uplift of up to 25%



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Promoting EDI in the workplace

- Maintain up to date policies and ensure your workplace culture properly reflects them
 - Equality monitoring?
 - EDI targets?
 - Workplace equality champions?
 - Mentoring?
 - Diversity within recruitment
 - Up to date staff training



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EDI training

- Provide regular all-staff training on equality and anti-harassment policies
- Incorporate into staff inductions
- Run refresher training and keep content up to date. In the case of *Allay (UK) Ltd v Gehlen [2020]* EDI training that had been delivered 20 months previously, was held to be stale
- Keep records of who has completed the training, and when it was completed
- Run separate training for line managers so they know how to confidently respond to and manage EDI issues when they arise



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Emerging trends in protected belief discrimination

What is a protected philosophical belief (the *Grainger* criteria)?

1. the belief must be genuinely held
2. it must be a belief and not an opinion or viewpoint based on the present state of information available
3. it must be a belief as to a weighty and substantial aspect of human life and behaviour
4. it must attain a certain level of cogency, seriousness, cohesion and importance
5. it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others




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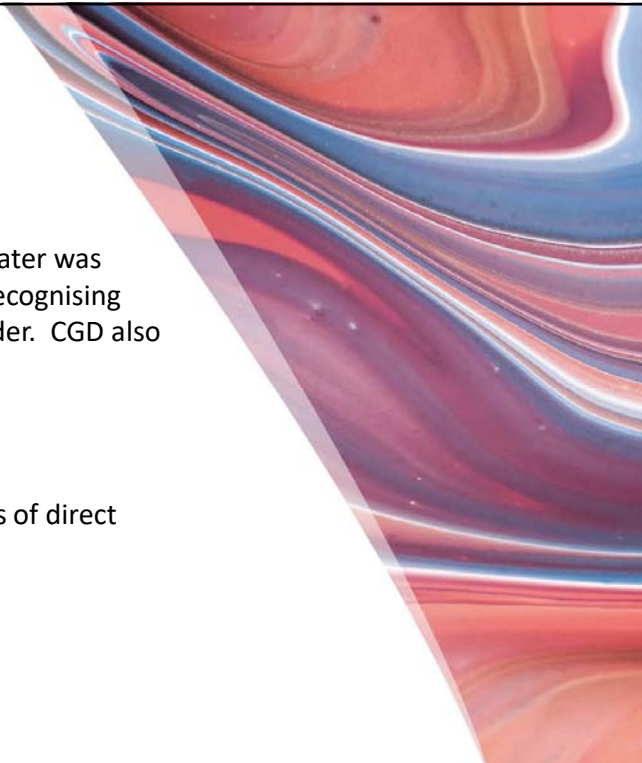
Protected belief discrimination

Forstater v CGD Europe

- Gender critical beliefs protected under the Equality Act
- Ms Forstater caused offence when she expressed her views on Twitter
- She added a disclaimer to her Twitter account, said she would tweet less and would not initiate discussions in the office about her beliefs. She also said she would express other people's preferred pronouns.




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Protected belief discrimination

Forstater v CGD Europe (cont.)

- CGD decided not to renew her contract. Ms Forstater was told her beliefs were contrary to CGD's policy of recognising the right to self-identify in respect of sex and gender. CGD also removed her profile from its website
- Ms Forstater's beliefs were protected
- The Tribunal has now upheld Ms Forstater's claims of direct discrimination and victimisation



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Protected belief discrimination

Mackereth v DWP and Anor

- EAT held that the belief that a person cannot change sex or gender, and lack of belief in transgenderism are protected beliefs
- However, the requirement to use service users' preferred pronouns was not belief discrimination.
- The Claimant had not suffered discrimination or harassment and his appeal was dismissed.
- Seeking permission to appeal to Court of Appeal



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Protected belief discrimination

Free Miles v Royal Veterinary College

- Tribunal (first instance) decision about ethical veganism
- Ms Free Miles' belief included a belief that ethical veganism includes a moral obligation to take action to reduce animal suffering – this includes belief in an obligation to break the law
- The belief was not protected in law as it was not worthy of respect in a democratic society (the 5th Grainger criteria)



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Protected belief discrimination

- Respect that staff may hold opposing views and understand the low threshold applicable to the fifth Grainger criteria
- Consider whether the view that is being expressed undermines the rights of others
- Consider engagement with staff and sharing expectations, policies, procedures, and training



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Refreshment break

Seminar resumes at 3.00




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**Visiting Music Teachers and
Employment Status**


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What is employment status?

- Under current employment law, three categories of individuals provide their services in the job market:
 - employees;
 - workers; and
 - the self-employed
- From the perspective of the individual – status determines the income tax and NICs on earnings, and well as their statutory rights
- From the perspective of the school – miscategorisation may trigger PAYE and NICs assessments as well as employment/statutory rights claims.



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Why does employment status matter?

- Sliding scale of rights and statutory protection
- Employers and employees owe implied contractual duties to each other
- Vicarious liability of employers for acts done by employees in the course of employment
- TUPE transfers will only affect employees and some workers
- Different tax treatment attaches to employee v self-employed status



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Right	Employee	Worker	Self-employed
Particulars of employment	Yes	Yes (for those who started on or after 6 April 2020)	No
SSP	Yes	Sometimes	No
NMS/NLW	Yes	Yes	No
Paid annual leave	Yes	Yes	No
Rest breaks/max working week	Yes	Yes	No
Unfair dismissal	Yes	No	No
Discrimination	Yes	Yes	Yes
Minimum notice	Yes	No	No
Statutory redundancy pay	Yes	No	No
Family related leave	Yes	No	No
Right to be accompanied	Yes	Yes	No
Pension	Yes	Yes	No

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Scott v Chigwell School [2019]

- Mrs Scott was engaged under a standard peripatetic contract as a self-employed contractor
- Mrs Scott was responsible for her own financial arrangements and parents paid her direct
- She marketed herself as freelance
- Contract contained a qualified right of substitution
- Mrs Scott brought a number of ET claims. Employment status was a preliminary issue



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Scott v Chigwell School [2019]

- ET decided that Mrs Scott was a worker
- She worked under a contract, was obliged to carry out the work, and was required to render personal service
- Mrs Scott was a worker because:
 - Her independence was limited – she did not set her own fees and pupils were allocated by the School
 - The contract established a level of control, such as the requirement to teach 30 minute classes
 - She was well integrated into the School – had a school email address, used the School's equipment
 - VMTs were part of the School's "offer" to parents



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Contractual considerations

- Ensure your contracts of employment and worker contracts are sufficiently different
- Consider use of clauses that support employment status:
 - Probationary period
 - Notice entitlement
 - Continuity of service
 - Statutory sick pay – subject to eligibility
 - Pension
 - Eligibility for other benefits
- Permanent contract or assignment model?
- Right of substitution?



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An artistic background featuring a dark blue textured surface with a white diagonal line. Two colorful, elongated shapes, one yellow and one red, are positioned above the line, resembling stylized figures or abstract forms. The overall aesthetic is modern and creative.

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Legal and case law update

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EU Law (Revocation and Reform) Bill

- Major piece of legislation – could change the whole employment law landscape
- Would revoke retained EU law at the end of 2023 – unless the government takes positive action to save certain laws
- Rights that could be affected include: holiday pay, part-time and fixed-term workers' protection, TUPE and the 48 hour maximum working week
- Criticism of the Bill so far has not hampered its progress



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Protection from Redundancy (Pregnancy and Family Leave) Bill

- Extension of protected period for redundancy purposes
- Proposes to extend beyond the duration of leave to also cover employee:
 - for a period following return from maternity, adoption or shared parental leave; and
 - in the case of expectant mothers, during period of their pregnancy
- New protected period would be from date of notifying employer of the pregnancy, to six months after the end of the leave



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Neonatal (Leave and Pay) Bill

- Up to 12 weeks' leave and statutory pay
- For parents of babies admitted to neonatal care up to the age of 28 days, and who stay in hospital for at least 7 days
- Day one right
- 26 weeks' service required for the leave to be paid
 - normal weekly earnings must not be less than the lower earnings limit – currently £123 per week
 - current prescribed statutory rate - £156.66
- Protection from detriment and/or dismissal for exercising right or seeking to exercise it



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Carer's Leave Bill

- One week's unpaid leave per year for employees who are providing care or arranging care for a dependant
- May be taken flexibly (individual days or half days, up to a block of one week)
- Day one right
- Criteria around relationship with person being cared for and nature of the care need
- Protection from dismissal and/or detriment



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Lloyd v Elmhurst School [2022]

- Demonstrates the value of a TTO over a year-round contract
- National Minimum Wage for TTO worker engaged on a year round contract
- Contract provided for “all school holidays” to be taken as “holiday with pay”
- Dispute arose as to what the worker’s basic hours should be for NMW purposes
- Employment Appeal Tribunal has confirmed worker was entitled to receive NMW for time spent not working during holidays



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R v Andrewes [2022]

- Consequences of CV fraud
- Hospice CEO faked relevant qualifications and experience and would not have been employed without them
- Performed well in the role but employment terminated when truth started to emerge
- Confiscation order and proportionality
- The Supreme Court upheld the compensation order to the value of almost £97,000




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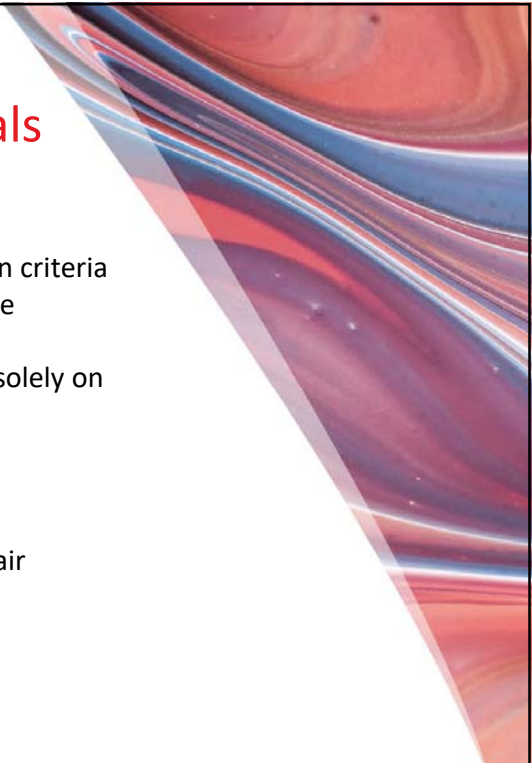


Chakraborty v University of Dundee [2022]

- Question as to whether different versions of a draft investigation report needed to be disclosed in litigation
- Legal privilege does not apply retrospectively to protect an original version of a document that attracted neither litigation nor legal advice privilege
- In order to benefit from legal advice privilege, schools must seek legal advice on a report at the time it is created




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Mogane v Bradford Teaching Hospitals NHS Foundation Trust [2022]

- Highlights importance of consulting on redundancy selection criteria where the criteria inevitably led to a redundancy pool of one
- Selection criteria was that employee was redundant based solely on her fixed term contract being due to expire first
- No consultation took place on the selection criteria
- Consultation was not meaningful and the dismissal was unfair



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Marangakis v Iceland Frozen Foods [2022]

- An original dismissal “vanishes” after a successful appeal, even if employee no longer wants to be reinstated
- Employee appealed against dismissal for gross misconduct. During appeal process said she no longer wanted to be reinstated, but instead wanted an apology and compensation
- Appeal was successful but she did not return to work. She was dismissed for unauthorised absence
- EAT confirmed that where an appeal against dismissal is successful, the dismissal is treated as not having occurred. The only way to avoid this is to withdraw the appeal



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Hilaire v Luton Borough Council [2022]

- Disabled employee affected by proposed restructure
- Could not attend interview for new role and provided a FIT note. Employer proceeded with appointment and dismissed employee without an interview
- Claim for failure to make reasonable adjustments
- EAT found failure to attend interview was not because of disability but because employee believed process was a sham
- The employee should not have been given a role without an interview. The duty to make reasonable adjustments must not be used to create an advantage



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Rodgers v Leeds Laser Cutting Ltd [2022]

- Court of Appeal confirmed an employee was not automatically unfairly dismissed when he refused to attend work during the pandemic
- Employee had vulnerable children
- Claimed his dismissal was automatically unfair because he “reasonably believed” danger to be “serious and imminent” and not able to be averted
- Claim was unsuccessful. There was a general danger due to the pandemic, but the employee did not believe this created a serious and imminent danger at his workplace



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HR & Employment Law for Line Managers

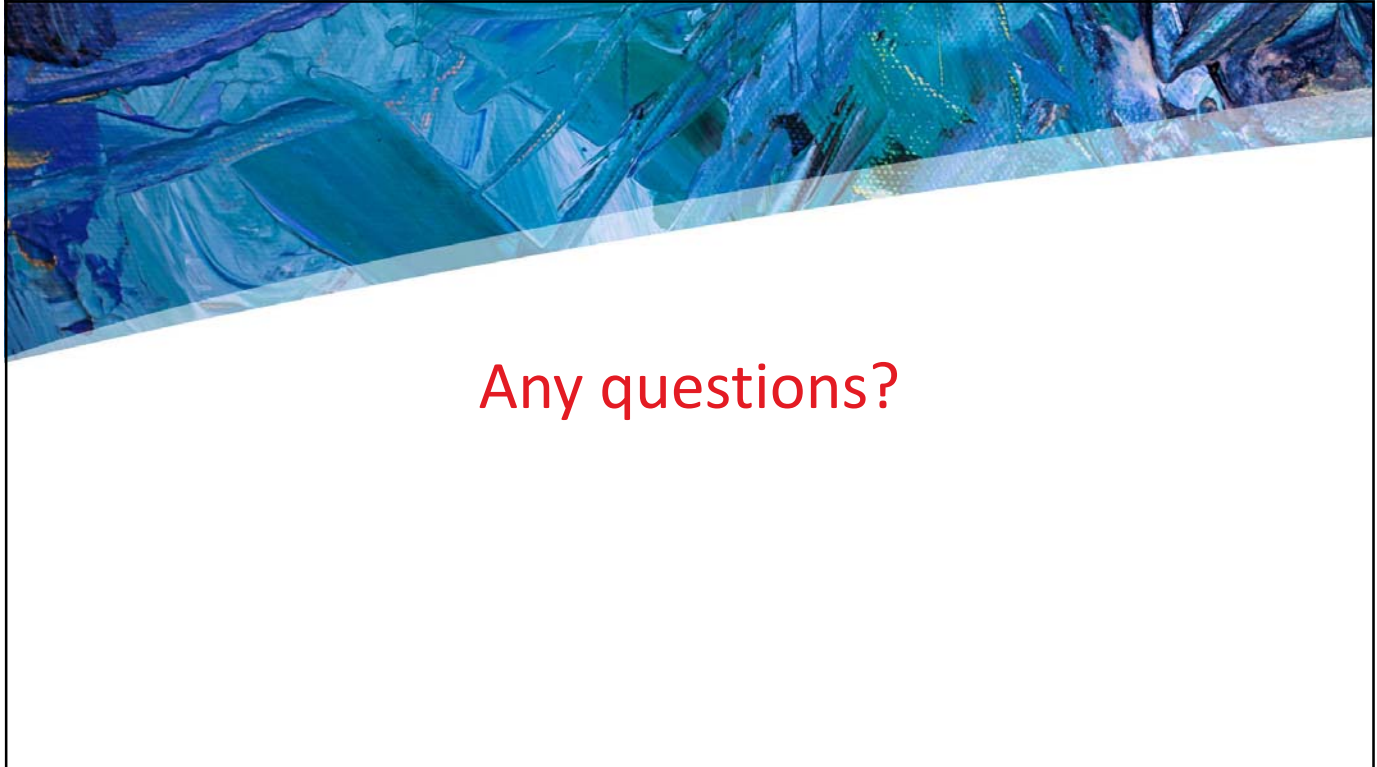
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- Carrying out an investigation
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- Holding effective appraisals
- Holding a protected conversation
- Addressing performance issues
- Managing sickness absence
- Right to work checks

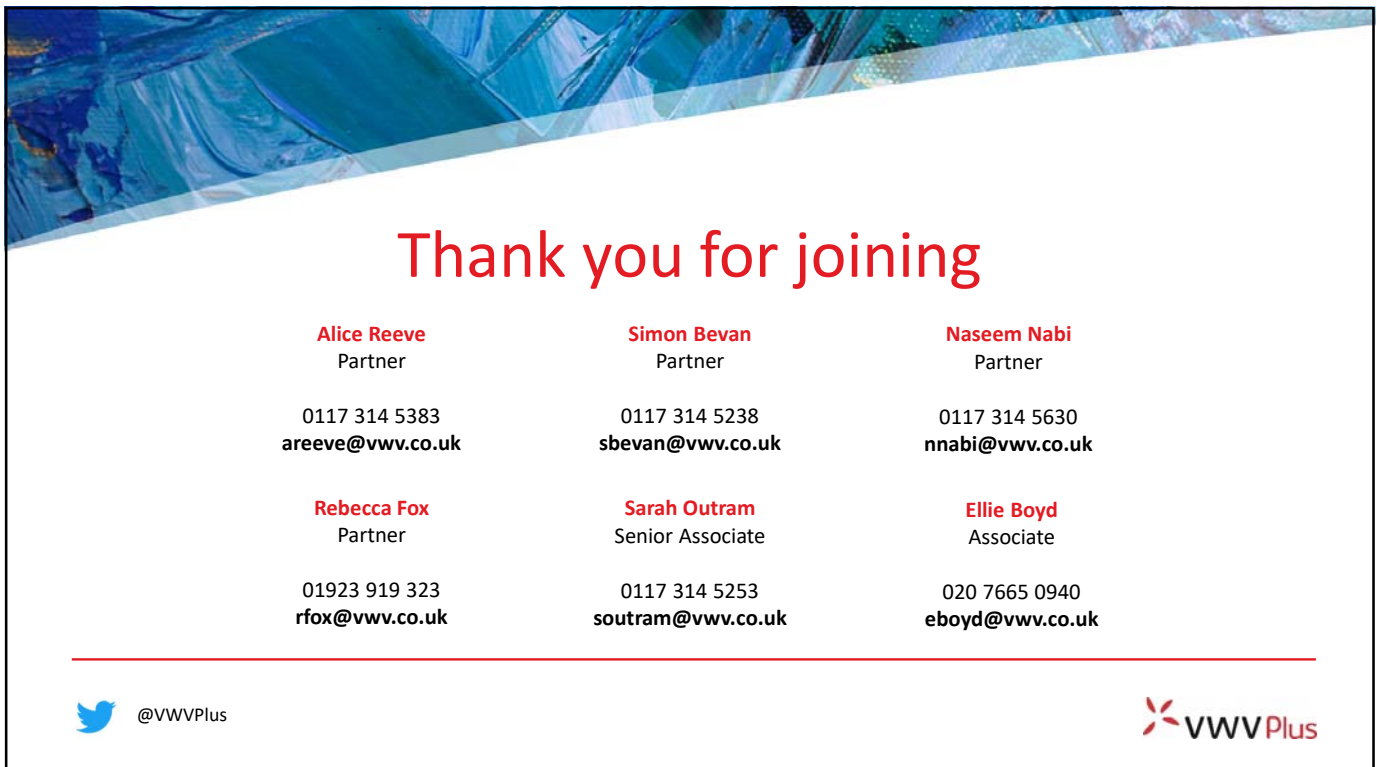
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