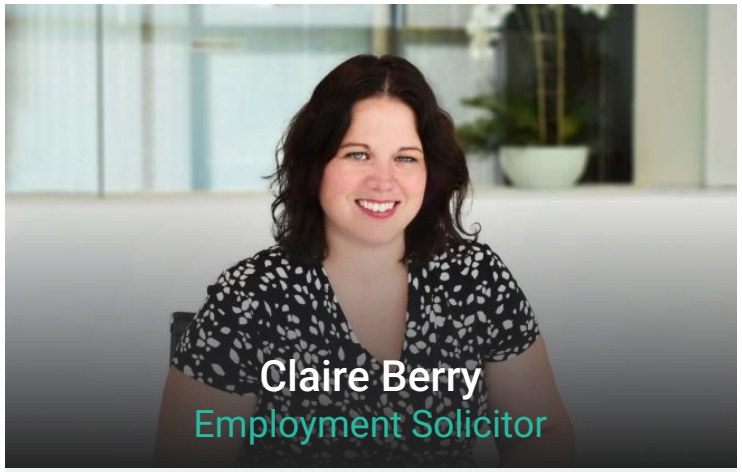
Price Bailey
CHARTERED ACCOUNTANTS

HR/Employment law update

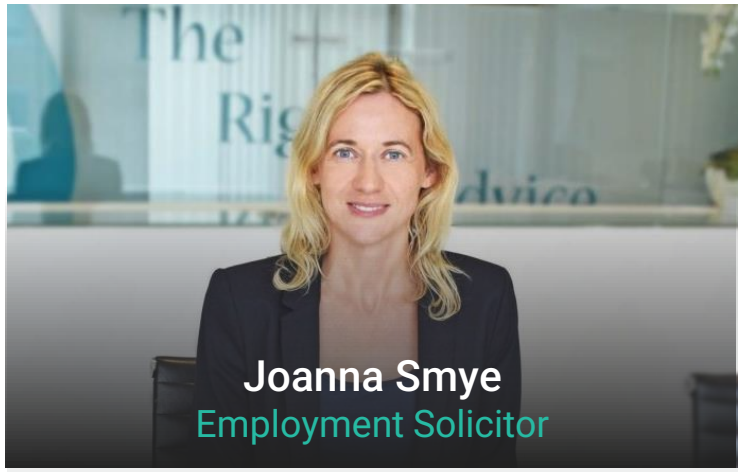
Spring 2024

Our team



Claire Berry
Employment Solicitor

+44 (0) 7826 992 601
+44 (0) 1223 941 293
claire.berry@pricebailey.co.uk



Joanna Smye
Employment Solicitor

+44 (0) 7880 202 473
+44 (0) 1223 941 278
joanna.smye@pricebailey.co.uk

Topics for discussion

Recent cases

- A round up of some of the latest Employment Appeal Tribunal (EAT) cases.
- A focus on a recent EAT case which considered the issue of reasonable adjustments in relation to alternative roles.

Employment law changes in 2024 and beyond. Including:

- Flexible working.
- Family-related leave.
- Preventing Sexual Harassment at work.

De Bank Haycocks v ADP RPO UK Limited

Redundancy dismissal was unfair because consultation was not carried out at a formative stage

Legal background:

- **Consultation** – while the employees still have an opportunity to influence decisions.
- **Selection pool** – the starting point is to consider which particular kind of work is ceasing or diminishing and which employees perform that work.
- **Selection criteria** – should be capable of independent verification.
- **Consider suitable alternative roles**

Facts

Mr De Bank Haycocks worked in a team which was impacted by reduced demand from its sole client. He was put at risk based on scoring lowest against subjective selection criteria. He was given the opportunity to comment on alternative ways to approach the issue of reduced demand, but he was not provided with his scores until appeal stage.

Decision

The Employment Appeal Tribunal found that although the appeal process could remedy the failure to provide the scores, it could not remedy the fact that consultation had not happened at a formative stage.

Omar v Epping Forest District Citizens Advice

Resignation in the heat of the moment

Legal background:

- Where notice is properly given by either the employer or the employee, there is no right to unilaterally withdraw notice.
- However, if the resignation is in the heat of the moment, employers should allow a cooling off period.

Facts

Mr Omar resigned following an altercation with his manager. When asked to confirm his resignation in writing, he refused to do so. His employer would not allow him to retract his resignation.

Decision

The Employment Appeal Tribunal held that the Tribunal should have applied an objective test to determine whether it would have appeared to a reasonable employer that Mr Omar had "really intended" to resign. It remitted the case for a fresh hearing.

Williams v Newport City Council

The definition of disability

Legal background

> A person (P) has a disability if P has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities

Facts

The employee worked in a team that assessed prospective foster carers. She was not initially required to attend court but this became a requirement of her job, caused her to be signed off with work-related stress and anxiety. The employer declined to remove the requirement to attend court from the employee's role.

Decision

The Employment Tribunal held that the Claimant was not disabled on the basis that attendance at court was not a normal activity. However the EAT disagreed and decided that the Claimant met the legal definition of a disabled person for the purposes of the Equality Act.

Learning points

- Remember that the definition of a disabled person for the purposes of the Equality Act is very wide. Medical advice which confirms an inability to carry out a normal activity will mean that the employee is disabled, if that inability meets the definition of long-term.
- If an employee cannot carry out an aspect of their role, it is not necessarily mean that there is an automatic obligation to remove that aspect. This subject will now be explored in more detail.

Reasonable adjustments

The duty can arise where a disabled person is placed at a **substantial disadvantage** by:

- An employer's **provision, criterion or practice** (PCP).
- A **physical feature** of the employer's premises.
- An employer's failure to provide an **auxiliary aid**.

However, an employer will not be obliged to make **reasonable adjustments** unless it **knows or ought reasonably to know** that the individual in question is disabled and likely to be placed at a substantial disadvantage because of their disability.

Some examples of PCPs

- Assessments used in a recruitment process
- Requirements around working practices
- Policies, such as a dress code
- Selection criteria used in a redundancy process

Reasonable adjustments

- The test of reasonableness is objective and to be determined by the Tribunal.
- There is no duty to take measures that would place a disproportionate burden on the employer.
- There are factors listed in the EHRC code which might be taken into account when assessing reasonableness, for example the employer's financial resources.

Examples of reasonable adjustments (DWP Guidance)

- A more flexible working arrangement, for example, allowing someone to work from home for some of the time or changing their hours so they do not have to travel to work during rush hour.
- Arranging one-to-one supervision, additional training or providing a mentor.
- Making a physical change to the workplace or workstation, for example, changing a desk height or moving office furniture to improve access.
- Providing extra equipment or assistance, such as a new chair or specific software.
- Using accessible meeting rooms, allowing the employee longer to prepare and allowing them to be accompanied to provide support during performance management processes, such as appraisals.

Examples of reasonable adjustments (EHRC Code)

- **Allocating some of a disabled person's duties to another worker.** For example, a job involves occasionally going onto the open roof of a building, but the employer transfers this work away from an employee whose disability involves severe vertigo.
- **Transferring a disabled worker to fill an existing vacancy.** An employer should consider whether a suitable alternative post is available for an employee who becomes disabled (or whose disability worsens) where no reasonable adjustment would enable the employee to continue doing their current job.
- **Allowing a disabled worker to be absent during working or training hours for rehabilitation, assessment or treatment.** An employer might consider allowing a person who has become disabled more time off work or training than would be allowed to non-disabled employees to enable him to have rehabilitation, assessment or treatment.
- **Modifying procedures for testing or assessment.** For example, a person with restricted manual dexterity would be disadvantaged by a written test, so the employer might give that person an oral test instead.
- **Providing a reader or interpreter.** For example, a colleague reads mail to a person with a visual impairment at particular times during the working day. Alternatively, the employer might hire a reader.
- **Employing a support worker to assist a disabled worker.** For example, an adviser with a visual impairment is sometimes required to make home visits. The employer employs a support worker to assist her on these visits.
- **Adjusting redundancy selection criteria.** When an employer is taking absences into account as a criterion for selecting people for redundancy, it might consider discounting periods of disability-related absence.

Alternative role – a previous case

- In *Wade v Sheffield Hallam University*, the EAT held that an employer did not fail in its duty to make **reasonable adjustments** when it did not waive its requirement for a competitive interview process in respect of an internal vacancy.

- A disabled employee, whose existing role was redundant, was considered by the employer to be "not appointable" in respect of the vacant role as they did not meet the majority of the eight essential criteria for the role. The EAT held that it would not be **reasonable** to require an employer to automatically appoint someone to a role when it genuinely believed the person was not suitable for the job

Rentokil Initial UK Limited v Miller

Alternative role on a trial basis would have been a reasonable adjustment

Facts

The claimant had worked as a pest control technician. After he was diagnosed with multiple sclerosis, various adjustments were made to his working arrangements and terms and conditions to try to mitigate the ongoing impacts of his disability on his ability to continue in his role. However, the employer ultimately concluded that there was no viable way in which he could continue in the pest control technician role.

Facts

The claimant applied for a service administrator role, for which there were two vacancies. Following a process involving an interview and written tests, the employer decided not to offer him that role. As the claimant had been unsuccessful and there was no other suitable alternative role, he was dismissed. At Tribunal, he won his claim for failure to make reasonable adjustment, specifically on the basis that it would have been reasonable to allow a trial period. The employer appealed to the EAT.

Decision

The EAT dismissed the appeal. Although evidence of unsuitability in each particular case is relevant and to be considered carefully, the Tribunal was not automatically obliged to defer to the employer's conclusion that the employee was not qualified for the role. Any concerns the employer had could have been met by offering the claimant a trial period.

Learning points

- If an employee is unable to carry out their normal role, it may be reasonable to allow them the opportunity to try out an alternative role.
- The alternative role would usually be an existing vacancy, but in exceptional cases, creating a new role may be considered to be a reasonable adjustment.

Any questions?

NLW and NMW

- As of 1 April 2024, National Living Wage increased to £11.44 an hour (from £10.42), and has been adjusted to include those aged 21 and over.
- The National Minimum Wage increased to:
  - £8.60 an hour (from £7.49 for workers aged 18-20
  - £6.40 an hour (from £5.28) for workers under the age of 18; and
  - £6.40 an hour (from £5.28) for apprentices.

Holiday pay

New rules for calculating holiday pay and leave for irregular hours and part year workers for holiday years starting on or after 1 April 2024:

- Holiday will accrue holiday in hours, proportionate to the number of hours worked at a rate of 12.07 %. Employers must therefore adopt an accrual system for calculating leave entitlement when dealing with irregular hours or part year workers.

- Employers will also have the option to pay their irregular hours and part-year workers rolled up holiday pay by paying an additional 12.07% on top of their hourly pay, provided they itemise this separately on pay slips.

- The government has published guidance on calculating holiday entitlement and pay for part-year and irregular hours workers : https://www.gov.uk/government/publications/simplifying-holiday-entitlement-and-holiday-pay-calculations/holiday-pay-and-entitlement-reforms-from-1-january-2024#holiday-entitlement-for-irregular-hours-workers-and-part-year-workers

- Contracts of employment will need to be amended in light of these new provisions.

Flexible Working

New legislation on flexible working came into force on 6 April:

- The right to flexible working became a day one right.
- Employees can make two flexible working requests in 12 months, but only one at a time.
- Employers have two months in which to respond.
- Employers must consult with employees before refusing a request and explain the reasons behind their decision to refuse.
- Employees no longer need to explain the impact of their request.

The revised statutory Acas Code of Practice on requests for flexible working is now in force: https://www.acas.org.uk/acas-code-of-practice-on-flexible-working-requests/html

Employers should ensure that their policies and procedures are updated to reflect these changes.

Carer's Leave

The Carer's Leave Regulations 2024 came into force on 6 April. These give employees the right to apply for up to one week of unpaid carer's leave in any 12-month period:

- There is no service requirement for taking carer's leave (i.e it's a day one right)
- The leave must be used to care for a dependent who has:
  - A physical or mental illness that means they're expected to need care for more than three months;
  - A disability as defined by the Equality Act 2010 (mental or physical impairment which has a substantial and long-term impact on a person's ability to do normal day to day activities)
  - Requires care because of their old age.
- The minimum period of leave that can be taken is half a working day, up to a maximum of one week. It does not need to be taken in consecutive blocks.
- Employees must give notice of their wish to take carer's leave. Either twice as long as the period of leave requests or 3 days' notice, whichever is longer.
- Employers may postpone carer's leave if they reasonably consider it will unduly disrupt their business, but must allow it to be taken within one month of the initial request.
- Employees do not need to provide evidence in relation to a request for carer's leave.

Employees who take carer's leave will be protected from detriment or dismissal as a result.

Employers should ensure that their relevant policies are updated to reflect this change.

Protection from redundancy

The Protection from Redundancy Act 2023 came into force on 6 April.

Historically, in a redundancy situation, women on maternity leave and employees on adoption or shared parental leave had to be the offered a suitable alternative vacancy where available , where they have been selected or put at risk of redundancy, over other employees at risk.

As of 6 April, the law has extended this right to both:

- Pregnant employees, from the date they inform their employer of their pregnancy; and
- Those returning from long-term family leave (i.e maternity leave, adoption leave and statutory parental leave if over 6 consecutive weeks long). The period of the protection will last for 18 months after the date of childbirth/ adoption, regardless of how much leave the employee takes.

Paternity leave

New parents will have more flexibility to choose when to take statutory paternity leave under the new legislation.

As a result of which:

- Paternity leave can be taken in 2 separate one week blocks and may be taken at any time within the first year after birth or adoption (previously it leave could only be taken in a block of one or two weeks within the first 8 weeks).
- Employees need to give 28 days' notice of their intention to take leave (or seven days of being matched in cases of adoption).

Employees must still give notice of their entitlement to take leave 15 weeks before the expected week of birth.

Paternity policies should be updated in light of these changes.

Rates of pay

From 6 April 2024 the following rates of pay have increased:

- **Statutory sick pay** has increased to £116.75 per week.
- **A week's pay**, the limit on one week's pay when calculating redundancy pay, has increased from £643 to £700.

From 7 April 2024 the following rates have increased:

- **Statutory maternity pay and adoption pay** (after the first six weeks) has increased to £184.03 a week.
- **Statutory paternity leave, shared parental pay and parental bereavement pay** have also increased to £184.03 a week.

What’s on the horizon?

TUPE

TUPE consultation changes from 1 July 2024:

- Businesses with less than 50 employees undergoing a TUPE transfer will be able to consult directly with employees if there are no representatives in place already.
- Businesses of any size undertaking a transfer that will impact fewer than 10 employees will be able to consult directly with employees if there are no representatives in place already.
- Where representatives are already in place, they will still need to be consulted.

This change aims to streamline the TUPE transfer process where small transfers are taking place.

Right to request predictable working

The Workers (Predictable Terms and Conditions) Act 2023 is due to come into force in September 2024. This will introduce a new statutory right for workers and agency workers to request a more predictable pattern of work.

A worker may apply to their employer for a change in terms and conditions of employment (and an agency worker may apply to either the temporary work agency or the hirer under whose supervision and direction they are working) if all of the following apply:

- They have a minimum of 26 weeks' continuous service
- There is a lack of predictability in relation to the work that they do as regards any part of their work pattern
- The change relates to their 'work pattern' such as the number of hours they work, the days of the week and the time they work and the length of their contract.

The statutory framework is modelled on the existing flexible working regime as the worker has to make a formal application. The worker is limited to two applications a year (this limit includes any flexible working applications asking for a change in terms and conditions which would have the effect of delivering a more predictable work pattern).

Right to request predictable working

An employer on receipt of an application for a predictable work pattern:

- Must deal with the application in a reasonable manner
- Must notify the decision within one month beginning with the date on which the application is made
- May only reject the application because they consider that one or more of the following grounds applies:
  - Burden of additional costs
  - Detrimental effect on ability to meet customer demand
  - Detrimental impact on the recruitment of staff
  - Detrimental impact on other aspects of the employer's business
  - Insufficiency of work during the period the worker proposes to work
  - Planned structural changes
  - Such other grounds as may be specified in the regulations
- A worker / agency worker will be able to bring a claim relating to the employer's procedural failings and/ or if they suffer a detriment or are dismissed because of their request.

Acas has published a draft Code of Practice on handling such requests under the new legislation.

It is important that internal processes are put in place to deal with requests.

Tips

Employment (Allocation of Tips) Act 2023 is now due to be implemented on 1 October 2024.

- Hospitality, leisure and service employers will be required to fairly allocate tips, gratuities and service charges to staff without deductions.
- There is a statutory Code of Practice on Fair and Transparent Distribution of Tips to provide guidance to employers on what amounts to fair allocation of tips: https://assets.publishing.service.gov.uk/media/66224bfb11d9f57e3ba7e503/updated-draft-statutory-code-of-practice-on-fair-and-transparent-distribution-of-tips.pdf
- Where tips are paid on more than an occasional and exceptional basis, employers will be required to have a written policy in place covering matters such as how it allocates tips.
- Affected employers will also be required to keep records of their tipping practices for at least three years beginning with the date on which the tips were paid.

Sexual harassment at work

The Worker Protection (Amendment of Equality Act 2010) Act 2023 will come into force on 26 October.

It introduces a duty on employers to take “reasonable steps” to prevent sexual harassment of their employees. This means that employers will have a new, proactive duty to prevent sexual harassment in the workplace.

Where sexual harassment cases reach the employment tribunal, tribunals will also have the power to uplift compensation by up to 25% if an employer is found to have breached this new duty.

Steps for employers to take:

- Ensuring that you have a reporting register for complaints about all forms of harassment.
- Proactively identify the risk of harassment in each set of roles and circumstances and thinking through specific measures to protect each employee.
- Update and re-circulate your anti-harassment policy and undertake tailored training to help employees avoid the threat of harassment and to give those who witness harassment the means to safely intervene.
- Ensure there is a clear avenue for reporting complaints and that all complaints are dealt with effectively.

The EHRC has indicated that it will update its technical guidance in sexual harassment and harassment at work in due course to reflect the new duty.

Neonatal Care Leave

The Neonatal Care (Leave and Pay) Act 2023 is expected to come into force in April 2025.

- The Act will grant parents of new born babies who are hospitalised in their first 28 days of life for 7 days or more, the right to take neonatal leave and pay for up to 12 weeks. This is in addition to any other statutory family leave to which they may be entitled.
- There is no minimum continuous service requirement, therefore is a day one right to take leave however pay will be based on employees meeting the minimum earnings and length of service criteria, similar to statutory maternity pay and paternity pay. The amount of pay is likely to be the same as the prescribed rate of statutory maternity and statutory paternity pay.

As with other times of family related leave, employers should put in place processes and policies to follow in such circumstances.

Any questions?

Thanks for watching

Claire Berry
Employment Solicitor

+44 (0) 7826 992 601
+44 (0) 1223 941 293
claire.berry@pricebailey.co.uk

Joanna Smye
Employment Solicitor

+44 (0) 7880 202 473
+44 (0) 1223 941 278
joanna.smye@pricebailey.co.uk