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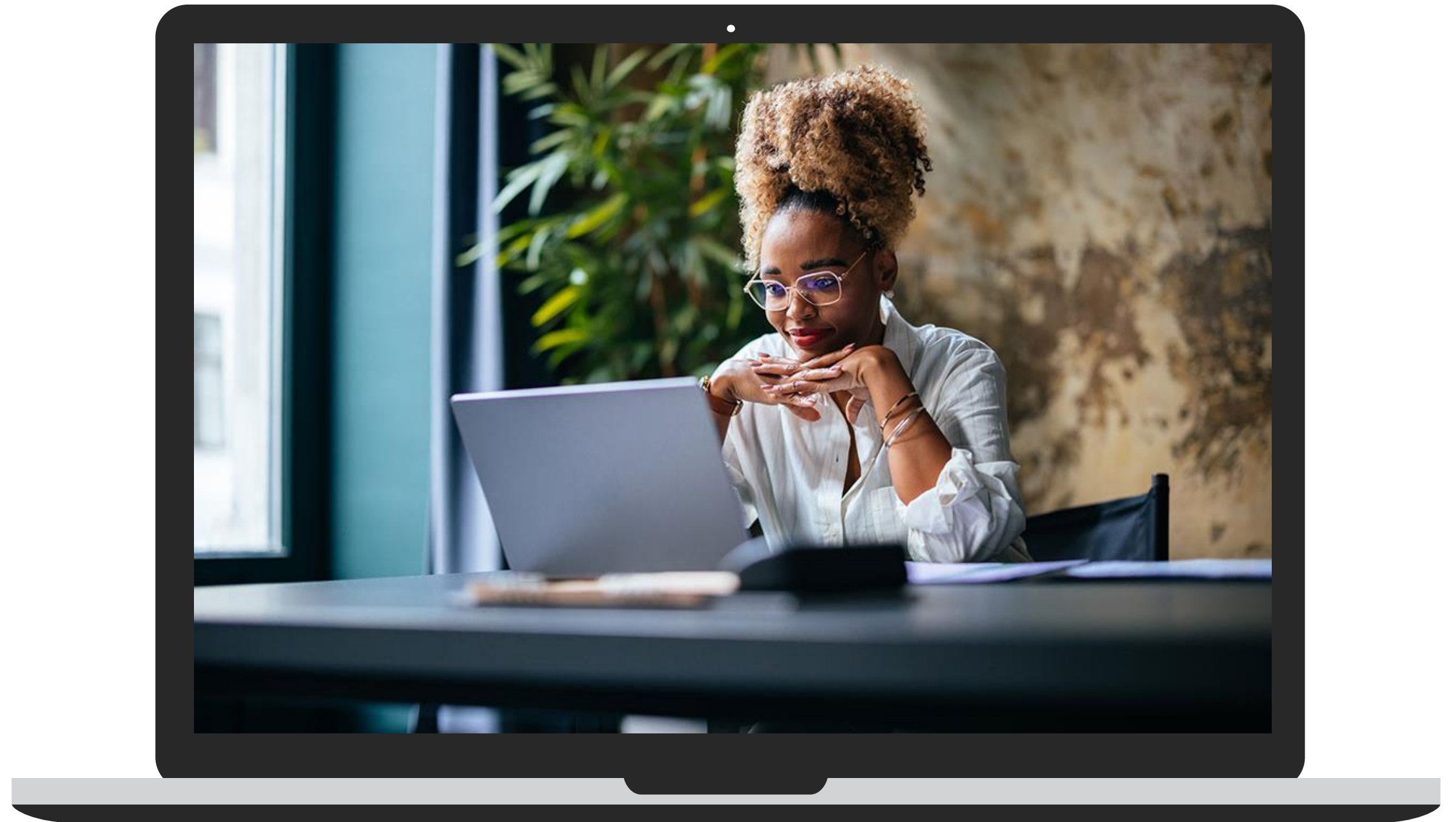
# On Demand: Employment law update

Spring 2024

# Overview

Developments since October 2023:

- Case law update
- Legislation update
- What's on the horizon?



# Case law update

# Case law update

- Holiday pay

## Chief Constable of the Police Service of Northern Ireland and another v Agnew and others

- Police officers and civilian staff brought claims for holiday pay going back to November 1998 on the basis their holiday pay had been calculated using basic pay rather than their normal pay which included overtime
- The case went up to the Supreme Court which held:
  - A gap of more than 3 months, or a correct payment of holiday pay, does not necessarily break a series of deductions
  - There is no order in which leave should be taken, and
  - Holiday entitlement under the Working Time Directive, the Working Time Regulations and the worker's contract all form part of a composite whole
- However, new Regulations in England, Wales and Scotland confirm holiday pay for the additional 1.6 weeks' entitlement under the Working Time Regulations can be paid using basic pay. Employers in these jurisdictions also have the benefit of the 2-year backstop

## Key learning:

- Employers need to assess potential holiday pay liability in light of this decision and ensure that the calculation of holiday pay is carried out correctly going forwards. It is also advisable to clearly set out in contracts the order in which holiday is expected to be taken to show the correct pay has been applied to that leave

# Case law update

- Settlement agreements

## Bathgate v Technip Singapore PTE Ltd

- Mr Bathgate signed a voluntary redundancy agreement on 29 January 2017 which settled claims against his employer
- The agreement contained a specific waiver which set out a list of claims, including age discrimination. There was also a general waiver which included future claims
- Under the agreement, he was to receive a redundancy payment together with an additional payment calculated by reference to a collective agreement. However, the collective agreement stated that the additional payment only applied to employees aged under 61
- At the time of his dismissal, Mr Bathgate was 61 and was therefore not paid the additional payment. He claimed age discrimination, arguing that at the time of signing the agreement he had an unknown future claim which had not been effectively settled
- Held by the Court of Session: the agreement covered age discrimination claims even if they could not be known at the time of signing

## Key learning:

- Future claims can be settled if the types of claim are clearly identified in the settlement agreement for employers in Scotland.  
However, the Court of Session decisions are not technically binding on Tribunals in England and Wales although are likely to be persuasive. Care should be taken to specifically identify the relevant claims as plainly as possible



# Case law update

- Redundancy

## De Bank Haycocks v ADP RPO UK Ltd

- Mr De Bank Haycocks was one of 16 people responsible for recruitment for a particular client. Due to the Covid-19 pandemic, demand for new employees at the client reduced. ADP RPO UK decided to reduce the team and his manager was asked to score the team by reference to 17 subjective criteria provided by the US parent company
- Mr De Bank Haycocks scored the lowest and a decision was taken to reduce the team by 2. An initial consultation meeting then took place, at which he was told of the need for redundancies and given the opportunity to suggest alternatives. Following a short consultation, he was dismissed, but he was unaware of how he had been scored against the selection criteria
- He appealed, and by the time of the appeal hearing he had his own scores, but his appeal was unsuccessful. He brought a claim for unfair dismissal. The EAT held the dismissal was unfair due to the absence of meaningful consultation at the formative stage of the process

## Key learning:

- To ensure fairness in a redundancy process, it is important to give employees the opportunity to influence the employer's decision at a formative stage of the process

# Case law update

- Religion and belief

## Corby v Advisory, Conciliation and Arbitration Service

- Mr Corby was employed as a senior mediator at Acas. He opposed the Black Lives Matter movement and claimed that it portrayed white people as racists. He published several posts on a private workplace forum that suggested that racism could be tackled by learning from Martin Luther King's proposal to consider character, rather than race
- Acas requested that he remove these posts, but he refused saying he had a genuine opposing view to the critical race theory
- Mr Corby brought a discrimination claim on the basis that his beliefs were protected
- Held: his beliefs with regard to critical race theory qualified for protection as a protected belief

## Key learning:

- Employers need to be mindful that beliefs held by employees and aired on public platforms may be protected and must be careful to consider all beliefs held by employees and how this may affect them at work, no matter how polarising they may appear to be in the current social context

# Case law update

- Gender reassignment

- Miss AB v Royal Borough of Kingston upon Thames

- Miss AB gave her employer eight months' notice of her transition. However, her employer failed to update her details (including her name) on their internal system and delayed in rectifying the issue for over almost two years
- She also raised safety concerns about highway lighting schemes as part of her work but was reprimanded in a way that was found to be to be 'derogatory' and 'unprofessional'
- She brought a claim of discrimination which was upheld by the Tribunal. In particular, it was noted that:
  - a series of Kingston Council's policies relating to Equality & Diversity and Dignity at Work had not been updated for several years and were not compliant with current legislation
  - there had been a severe lack of action from Kingston Council (as a local authority) in regards to this matter
  - Kingston Council had failed to support her which was considered to be incongruous given the size and scale of the council and had failed to apologise or acknowledge any wrongdoing

## Key learning:

- Employers must ensure that policies and procedures are reviewed and updated to reflect any changes in law. Employers will also do well to act promptly when receiving complaints, either informal or formal, and are obliged to investigate matters promptly and thoroughly



# Case law update

- Resignations

## Omar v Epping Forest District Citizens Advice

- Mr Omar resigned from his employment on 19 February 2020 during an altercation with his line manager. Later that day, Mr Omar spoke to the CEO who he said recognised that he wanted to continue in employment and told him to consider an offer of an alternative role. On 21 February, however, Mr Omar was told that his line manager no longer wanted to work with him so his resignation would still stand. He was asked to put his resignation in writing, which he said he would do but instead he tried to formally retract it. His employer refused to accept the retraction and his employment ended. He brought claims for wrongful and unfair dismissal on the basis he had not resigned
- The original ET held Mr Omar had resigned, but on appeal the EAT remitted the case to a fresh tribunal. The EAT gave useful guidance on how to evaluate resignations given in the heat of the moment, requiring an objective analysis of whether the employee really intended to resign

## Key learning:

- Although normally notice of resignation or dismissal, once given, cannot be retracted without the agreement of the other party, employers need to be mindful of “heat of the moment” resignations and consider whether, in the circumstances, it is reasonable to conclude that an employee really intends to resign

# Legislation update

# Legislation update

- Equality Act 2010 (Amendment) Regulations 2023
  - In force 1 January 2024
  - Reproduce into domestic law various key rights and principles of equality and discrimination law from previously retained EU law relating to:
    - Direct discrimination related to pregnancy, maternity and breastfeeding
    - Indirect discrimination where a person without a relevant protected characteristic suffers substantively the same disadvantage as those with that protected characteristic
    - Direct discrimination in the context of access to employment and occupation as regards public statements outside of an active recruitment process
    - The right to equal pay where employees' terms are attributable to a single source
    - The definition of disability in relation to employment and occupation

# Legislation update

- National Minimum Wage
  - Rates to increase from 1 April 2024

Age range	Current rate	New rate
Age 21 and over:		£11.44
18 – 20-year-old:		£8.60
16 – 17-year-old:		£6.40
Apprentice rate:		£6.40
Accommodation offset:		£9.99

- Regulations made which remove live-in domestic worker NMW exemption from 1 April 2024

# Statutory rates of pay

- Statutory sick pay

- The weekly rate of statutory sick pay (SSP) will be £116.75 (up from £109.40)
- Rate to increase from 6 April 2024

- Statutory family leave pay

- The weekly rate of statutory maternity pay (SMP), maternity allowance, statutory paternity pay (SPP), statutory shared parental pay (ShPP), statutory adoption pay and statutory parental bereavement pay will be £184.03 (up from £172.48)
- Rates to increase from 7 April 2024



# Legislation update

- Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023
  - In force 1 January 2024
  - Changes to holiday entitlement and pay
    - Calculation of a week's pay for leave under Regulation 13 (4 weeks) to include payments intrinsically linked to performance of tasks under the contract, payments for professional or personal status and payments regularly paid to the worker in the previous 52 weeks
    - New holiday rules for irregular-hours and part-year workers to apply in leave years starting on or after 1 April 2024, including holiday accrual based on 12.07% of the hours worked in the previous pay period and a right for employers to implement a system of rolled-up holiday pay
    - Recognising carry over of holiday where worker unable to take due to statutory leave or sickness, or where they have not been given the right to paid holiday or have not been informed by their employer that holiday not taken will be lost at the end of the leave year
    - Rules allowing carry over of holiday due to COVID-19 repealed

# Legislation update

- **Employment Rights (Amendment, Revocation and Transitional Provision) Regulations 2023**
  - DBT has published guidance on calculating holiday entitlement and holiday pay, focused on the rights of part-year workers and those with irregular hours, following the Regulations
- **Changes to TUPE**
  - Requirement to elect employee representatives will be removed for employers with fewer than 50 employees or for employers of any size involved in a transfer of fewer than ten employees
  - Applies to transfers taking place on or after 1 July 2024
- **Changes to WTR**
  - Employers don't have to keep a record of daily working hours if they can demonstrate compliance without doing so

# Legislation update

- Carer's Leave Regulations 2024

- Implements the Carer's Leave Act 2023
- In force 6 April 2024 in England, Wales and Scotland
- Employees entitled to one week's (five working days) unpaid leave in each rolling 12-month period
- Eligibility will depend on:
  - Employee's having a dependant needing long-term care
  - Absence is to provide or arrange care for that dependant
  - Notice conditions are complied with (being either twice as many days as period of leave required or three days, whichever is greater)
- Leave can be taken in half days, days or up to a block of one week
- Employer may postpone leave in certain limited situations
- Employee protected from detriment or being dismissed for taking or seeking to take carer's leave
- Apply to employees who give notice of intention to take carer's leave on or after 6 April 2024

# Legislation update

- **The Maternity Leave, Adoption Leave and Shared Parental Leave (Amendment) Regulations 2024**
  - Implements the Protection from Redundancy (Pregnancy and Family Leave) Act 2023
  - In force 6 April 2024 in England, Wales and Scotland
  - Currently the right to be offered suitable alternative employment in a redundancy situation where such a vacancy exists applies to those employees on maternity leave, adoption leave and shared parental leave
  - Regulations extend that entitlement so that the right also applies during pregnancy and for a period after taking relevant leave

# Legislation update

- Protected period applies:
  - In pregnancy cases, from notification of pregnancy up to the start of statutory maternity leave or, if there is no entitlement to SML then 2 weeks after the end of the pregnancy
  - In maternity leave cases, from the start of the leave up to 18 months after the date of birth
  - In adoption cases, from the start of the leave up to 18 months from the date of placement or the date the child enters GB
  - In shared parental leave cases of 6 or more continuous weeks (where no maternity or adoption leave has been taken), from the start of leave up to 18 months after birth or date of placement or date the child enters GB
- Will apply where employee notifies employer of pregnancy on or after 6 April 2024, where maternity and adoption leave ends on or after 6 April 2024 and where a period of 6 consecutive weeks shared parental leave starts on or after 6 April 2024



# Legislation update

- **The Paternity Leave (Amendment) Regulations 2024**
  - In force 8 March 2024 in England, Wales and Scotland
  - Allow father or partner to take paternity leave in either one or two weeks or two non-consecutive periods of a week each
  - Extend the period in which paternity leave can be taken to 52 weeks after birth or adoption
  - Shorten the period of notice to be given – in most cases employees will need to give 28 days' notice period to each period of leave (NB: For domestic adoption cases the notice period remains within 7 days of the notice of matching being received)
  - Allow father or partner who has given notice to vary any dates by giving 28 days' notice
  - Apply in relation to children where EWC, expected date of placement or expected date of entry into GB is on or after 6 April 2024

# Legislation update

- Employment Relations (Flexible Working) Act 2023 & Flexible Working (Amendment) Regulations 2023
  - Regulations will make right to request flexible working a day one right from 6 April 2024
  - Further implementing regulations required to bring the Act fully into force. Once in force:
    - Employees able to make 2 statutory requests in any 12-month period
    - Employees no longer need to explain what effect the change will have nor suggest how it might be dealt with
    - Employers required to consult with employee before making a decision, including looking at alternative options or modifications to the original request
    - Employer must agree to the request unless it is rejected for one of the genuine reasons set out in ERA 1996
    - Decision on the request, including an appeal, must be made within 2 months from receipt of request
    - Employee protected from detriment or dismissal for making a request
  - ACAS has issued an updated Statutory Code of Practice on handling flexible working requests to reflect changes

# Legislation update

- **Employment (Allocation of Tips) Act 2023**

- Requirement for employers to pass on all tips and service charges to workers without deductions within a month
- Tips to be distributed in a fair and transparent way having regard to a statutory Code of Practice on Tipping
- Employers to have a written policy setting out how tips are to be dealt with in their workplace
- Employers to keep a record of tips received and how they have been allocated
- Consultation on a draft Code of Practice on Tipping launched on 15 December 2023 – consultation closed 22 February 2024
- Expect the Code and the full measures of the Tips Act will come into force on 1 July 2024

# Legislation update

- Immigration changes

- Visa application fees increased in October 2023, by 15-35% depending on the application category
- The Immigration Health Surcharge (IHS) has increased by 66% to £1035 per year, from 6 February 2024
- Civil penalty fines for employers who employ illegal workers has increased threefold to a maximum of £60,000 per breach, from 13 February 2024
- Sponsor licences will now no longer need to be renewed. Sponsor licences which were due to expire on or after 6 April 2024 will be extended for 10 years
- The Home Office guidance in relation to carrying out right-to-work checks has been updated regarding supplementary employment
- The Ukraine family visa scheme has closed to new applicants

# On the horizon



# On the horizon

- Neonatal Care (Leave and Pay) Act 2023

- New right to up to 12 weeks' paid leave for parents of babies requiring neonatal care
- Available from the first day of work
- Available to parents of babies who are admitted to hospital up to the age of 28 days and who have a continuous stay in hospital of 7 full days or more
- Statutory rate of pay to apply while on neonatal leave where employee has worked at least 26 weeks with their current employer
- Anticipated that 7 sets of Regulations will be needed to deliver the new entitlements, which will be made in due course.
- Currently planned to be in force by April 2025

# On the horizon

- Worker Protection (Amendment of Equality Act 2010) Act 2023
  - Received Royal Assent on 26 October 2023
  - Comes into force one year after the day on which it was passed
  - Introduces new duty on employers to take reasonable steps to prevent sexual harassment of employees
  - Compensation uplift of up to 25% in cases of sexual harassment where the duty is breached
  - The EHRC has confirmed its *Sexual harassment and harassment at work: technical guidance* and the *Employment: Code of Practice* will be updated to reflect this new duty. These updated documents will be subject to consultation to be launched in due course

# On the horizon

- **Workers (Predictable Terms and Conditions) Act 2023**
  - Received Royal Assent on 18 September 2023
  - Further details will be set out in Regulations - expected to come into force around September 2024
  - Provides a new right to allow workers and agency workers to request a predictable work pattern where:
    - There is a lack of predictability in terms of any part of their work pattern
    - The change relates to their work pattern
    - Their purpose in applying for the change is to get a more predictable work pattern
  - Two applications can be made in a 12-month period and applications may be rejected on statutory grounds
  - Workers and agency workers have the right not to suffer a detriment for making an application and it will be automatically unfair to dismiss an employee for making an application
  - Acas has issued consultation on a new statutory Code of Practice on handling requests for a predictable working pattern – consultation closed on 17 January 2024

# On the horizon

- Response to consultation on reform of non-compete clauses
  - Confirmed proposal to cap non-compete clauses in employment and workers contracts at 3 months
  - Other post-termination covenants are unaffected
  - Legislation to be brought in “when Parliamentary time allows”
  - Government will also publish guidance on non-compete clauses

# On the horizon

- Response to consultation on draft Code of Practice on Dismissal and Re-engagement and final version of the Code
  - Published 19 February 2024 and awaiting Parliamentary approval
  - Under the draft Code an employer:
    - must engage in meaningful consultation with trade unions, other employee representatives or individual employees to find an agreed solution
    - should revisit the business plans and take all reasonable steps to explore alternatives before going down the route of dismissal and re-engagement
    - should not use the threat of dismissal to put undue pressure on employees to accept new terms
    - phase in changes as best practice
    - contact Acas before raising the prospect of dismissal and re-engagement
  - An unreasonable failure to follow the Code could increase any award made by up to 25%



# On the horizon

- Immigration changes

- From 11 March 2024, anticipated that care and senior care workers will no longer be able to bring dependants with them to the UK
- From 14 March 2024, expected that the Immigration Salary List will replace the Shortage Occupation List
- From 4 April 2024, the 20% going rate discount for shortage occupations will be removed
- From 6 April 2024, the minimum salary threshold for those arriving via the Skilled Worker route will increase to £38,700
- From 11 April 2024, the minimum salary threshold for family visa applicants will increase to £29,000 with the expectation of another increase to £38,700 by 2025
- Physical Biometric Residence Permit (BRP) cards will expire in December 2024, as the Home Office looks to use digital copies instead

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