

Employment law in 2022

As we move into 2022, we take a look at what employment law developments may be on the cards for the coming year.

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For much of 2020 and 2021, employers across the country from all sectors have had to adjust quickly to restrictions, new safety procedures, and different working environments - without significant time for planning or deliberation. As we move into 2022, we take a look below at what employment law developments may be on the cards for the coming year.

Legislative changes

There are a number of significant employment changes proposed by the Government but with no specific timeline attached to these – instead, they are to be introduced “when parliamentary time allows” - which doesn’t give us much of a steer. Areas to keep an eye on include:

- the new proposed duty to prevent sexual harassment, the reintroduction of provisions to prevent third-party harassment (this used to be law in this country before it was revoked) and legislation relating to the use of non-disclosure agreements to silence complainants in such discrimination cases;
- expansions to the right to request flexible working – although the Government’s response to the flexible working consultation is still awaited, changes in this area seem likely;
- the proposed introduction of a right to take one (working) week’s unpaid leave per year for the purpose of caring for a dependant with long-term care needs;
- reform of the law relating to whistleblowing – the Government has indicated that a review will be considered; and changes may be required to “maintain the level playing field” with Europe to keep pace with the new EU Whistleblowing Directive;
- the long-promised Employment Bill – this appeared in the 2019 Queen’s Speech but was dropped from the 2021 Queen’s Speech. Following this, the Government confirmed it was still their intention to introduce the Employment Bill. This has previously been stated to include matters such as a single enforcement body to better protect vulnerable workers, the right to request a more predictable contract, leave for neonatal care and extending redundancy protection in connection with pregnancy/maternity leave;
- whether disability reporting obligations will be introduced – a consultation in respect of the same remains open until 25 March 2022; and
- whether non-compete restrictions will be banned or otherwise reformed – a consultation in respect of this important issue closed in February 2021, but the Government’s response is still awaited.

Case law

Decisions in the appeal courts are awaited in respect of a number of significant holiday pay cases which may affect how holiday pay is calculated, and what historical pay can be claimed including:

- The Harpur Trust v Brazel (Unison Intervening) – this was heard by the Supreme Court in November 2021 and judgment is awaited. The case concerns the calculation of holiday pay for term-time employees but may provide further guidance for part-time workers more generally, especially those who only work for part of the year;

- Smith v Pimlico Plumbers Limited – this was heard by the Court of Appeal in December 2021 and judgment is awaited. This case concerns carry forward and timing provisions in respect of unpaid leave, but also considers whether the Bear Scotland case law on breaking a series of deductions remains valid or whether the approach taken in Agnew should be preferred (see next case);
- Chief Constable of the Police Service of Northern Ireland and another v Agnew and others – this is a Northern Irish case which was due to be heard by the Supreme Court in June 2021. It was pulled from the hearing list, but it remains unclear whether it will be relisted. The Northern Irish Court of Appeal had held (contrary to the approach taken in Bear Scotland – see above) that a three-month gap did not break a series of deductions for holiday pay purposes. The issues of breaking a series is important because it has significant implications on how far back people can claim backdated holiday pay.

Trends

Even without changes to the statutory flexible working regime, there may well be conflicts which arise between an employee's increased desire for flexibility (such as homeworking) and an employer's desire to return to pre-pandemic norms. This could potentially lead to disputes and claims under the statutory flexible working regime, under discrimination legislation or as a constructive unfair dismissal claim. It will therefore be important to ensure that those involved in these processes are familiar with the procedural steps required and have been appropriately trained to identify and correctly deal with equality and diversity issues.

Disparity between employee desires and employer provision may also affect retention and recruitment. The pandemic has changed the way many employers and employees work – and this has resulted in many employees feeling that their needs, or what they value most highly, are no longer being met. The "Great Resignation", as it has been termed, creates significant challenges in terms of loss of experience, recruitment time and costs and effects on team morale and cohesiveness, as well as placing increasing pressure on those "left behind" to meet workloads and maintain standards. Greater thought may therefore be required to ensure that benefit packages and working arrangements remain fit for purpose.

A recent [Health and Safety Executive survey](#) indicates half of work-related illnesses are now stress, depression or anxiety, with the pandemic found to be a major contributory factor. There is therefore likely to be an increased need to focus on wellbeing initiatives and support, absence management procedures, and reasonable adjustments.

Lastly, CVP (Cloud Video Platform – i.e. virtual) hearings look set to remain in place, with the Presidents of the Employment Tribunals in England and Wales and Scotland indicating in March 2021 that video hearings were not simply a pandemic response but provided a mechanism for reducing the Tribunal's outstanding caseloads and so were likely to be in place for at least two years.

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