Shoosmiths National Employment Team

# On Demand: Employment Law Update

April 2023

SHOOSMITHS

# Overview

Developments since October 2022:

- Legislation Update
- What's on the horizon?
- Case Law Update

EMPLOYMENT LAW UPDATE

# Legislation Update

# Legislation Update

- Increase to statutory rates of pay
  - 1 April 2023: National minimum wage and national living wage will increase

| | |
|---|---|
| Apprentices | £5.28 an hour |
| 16 – 17 year olds | £5.28 an hour |
| 18 – 20 year olds | £7.49 an hour |
| 21 – 22 year olds | £10.18 an hour |
| National living wage (workers aged 23 and over) | £10.42 an hour |
| Accommodation offset | £9.10 per week |

# Legislation Update

- Increase to statutory rates of pay
  - 10 April 2023: Statutory benefit and other payments will increase

| | |
|---|---|
| Statutory sick pay | £109.40 per week |
| Statutory maternity pay, maternity allowance, statutory paternity pay, statutory shared parental leave pay, statutory adoption pay and statutory parental bereavement pay | £172.48 per week |
| A week's pay | £643.00 |
| Maximum compensatory award for ordinary unfair dismissal | £105,707.00 |

Employment Law Update

# On the horizon....

# What's on the horizon?

- A number of Private Member's Bills have received support from the government. These include:
    - Carer's Leave Bill
    - Protection from Redundancy (Pregnancy and Family Leave) Bill
    - Employment Relations (Flexible Working) Bill
    - Worker Protection (Amendment of Equality Act 2010) Bill
    - Neonatal Care (Leave and Pay) Bill
    - Employment (Allocation of Tips) Bill
    - Workers (Predictable Terms and Conditions) Bill

# What's on the horizon?

- Carers Leave
  - Introduces an entitlement to one week's (five working days) unpaid leave per year for employees providing or arranging care
  - Carers leave will be a day one right
  - Eligibility will depend on:
    - Employee's relationship with person being cared for (likely to follow the definition of a dependant)
    - That person needing long-term care
  - Leave can be taken in half days, days or up to a block of one week

- Extending redundancy protection
  - Covers pregnant women and new parents returning from maternity leave, adoption leave and shared parental leave
  - Expands entitlement to be offered suitable alternative employment where a vacancy exists from notification of pregnancy up to 18 months after birth

# What's on the horizon?

- Flexible working
  - Employers required to consult with employee before rejecting any request
  - Ability to make 2 statutory requests in any 12-month period
  - Decision on the request must be made within 2 months
  - Employees no longer need to explain what effect the change will have nor suggest how it might be dealt with
  - NB: In its response to consultation, the government confirmed it would remove the 26 week qualifying period for the right to request flexible working, making it a day one right

- Worker protection
  - Creates liability for employers for harassment of employees by third parties
  - Employers will also have a duty to take all reasonable steps to prevent sexual harassment of employees in the course of their employment
  - Compensation uplift of up to 25% in cases of sexual harassment where the duty is breached

# What's on the horizon?

- Neonatal leave and pay
  - 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

- Tips
  - Requirement for employers to pass on all tips and service charges to workers without deductions
  - 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

# What's on the horizon?

- Predictable terms and conditions
  - 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 could be made in a 12-month period
  - Further details will be set out in regulations, including a potential service requirement
  - Employers, temporary work agencies or hirers able to reject applications based on statutory grounds
  - Workers and agency workers have the right not to suffer a detriment for making an application and it would be automatically unfair to dismissal an employee for making an application

# What's on the horizon?

- Consultation on holiday entitlement for part-year and irregular-hours workers
  - Follows the Supreme Court decision in *Harpur Trust v Brazel*
  - SC held the 5.6 weeks' holiday entitlement for part-year workers on permanent contracts cannot be reduced to take account of periods when no work was done
  - Decision led to difficulty in the calculation of holiday for part-year workers, casual workers, agency workers and others with irregular working patterns
  - Government is now proposing to make holiday entitlement proportionate to hours worked
  - Calculation of holiday entitlement would use hours worked in previous 52 weeks (including those weeks without work) x 12.07%
  - Holiday entitlement would be calculated and fixed at the beginning of the leave year based on hours worked in previous 52 weeks
  - Consultation closed on 9 March 2023

# What's on the horizon?

- Consultation on draft Statutory Code of Practice on "fire and re-hire" practices
  - Employers must undertake meaningful consultation to find agreed solution and not use threats of dismissal to get employees to accept new terms
  - Employers to take all reasonable steps to explore alternatives and should share as much information regarding the proposed changes as possible
  - Dismissal and re-engagement should be used as a last resort
  - Employers should consider a phased introduction of changes over a longer period of time
  - Tribunals will be able to take the code into account when considering relevant cases
  - Tribunals will also have the power to apply an uplift of up to 25% of an employee's compensation where the code applies and an employer has unreasonably failed to follow it
  - NB: Code won't apply where there is a genuine redundancy situation
  - Consultation closes on 18 April 2023

Employment Law Update

# Case Law Update

# Stop Press!

*Chief Constable of the Police Service of Northern Ireland (PSNI) and another v Agnew and others*

- Supreme Court decision awaited in this important holiday pay case
- CA of Northern Ireland decided:
  - Paying holiday pay correctly for 3 months does not break the chain in a series of unlawful deductions
  - All holiday should be treated the same in terms of how pay is calculated
- Outcome could have serious implications for employers across the UK and NI

# Case Law Update

- Reasonable adjustments

  *Hilaire v Luton Borough Council*

  - Mr Hilaire suffered from depression and arthritis
  - His employer went through a restructure as part of which he was required to apply and interview for a role
  - Mr Hilaire refused to attend the interview and was dismissed by reason of redundancy
  - He argued that the requirement for him to participate in an interview was a PCP that put him at a substantial disadvantage due to his disability
  - He also claimed that a reasonable adjustment would have been to give him the job without having to interview
  - The EAT held that the real reason for his non-attendance at interview was because he had lost faith in his employer not because of his disability. They also found that slotting him into the role without an interview would not have been a reasonable step to take as it would have impacted detrimentally on others

Key Learning:

The duty to make reasonable adjustments if a duty to remove a particular disadvantage, not to give an advantage

# Case Law Update

- Disability discrimination

  *Jandu v Marks & Spencer Plc*

  - Ms Jandu, who is dyslexic, had worked for Marks & Spencer for 22 years at the time she was dismissed on grounds of redundancy
  - The redundancy selection criteria assessed her leadership skills, technical skills and behaviours
  - She argued she had been unfairly marked down on areas that linked to her dyslexia. Her lower scores reflected perceptions that her emails were rushed as they tended to be brief, set out in bullet points and often contained spelling errors. There were also issues with time management and failure to adapt the tone of written communications to different audiences
  - Marks & Spencer were unable to demonstrate that the dismissal was a proportionate means of achieving a legitimate aim and had failed to make reasonable adjustments when applying its selection criteria to Ms Jandu

Key Learning:

Where performance issues arise, they should be raised promptly and if they are a consequence of a disability, then reasonable adjustments should be made. It is important to take the impact of any disability into account and objectively justify any decisions made

# Case Law Update

- Disability discrimination

  *McAllister v Revenue and Customs Commissioners*

  - Mr McAllister suffered from anxiety and depression
  - He had long periods of absence from work, although not all related to his mental health issues
  - His employer decided that his absence was impacting on productivity and staff morale and that all reasonable adjustments had been exhausted
  - As a result, Mr McAllister was dismissed on grounds of capability
  - He brought a claim for discrimination arising from disability in relation to his dismissal
  - His claim failed on the basis his employer was able to objectively justify the decision – it was a proportionate means of achieving its aim of ensuring staff were capable to demonstrating satisfactory attendance and a good standard of attendance
  - The evidence presented showed that Mr McAllister's absence had a read adverse impact on his employers use of resources, in particular time management and staff morale

Key Learning:

Capability dismissals can be justified provided there is clear evidence of the impact that an employee's absence is having and there is no other way to achieve a legitimate aim in a more proportionate way

# Case Law Update

- Disciplinary proceedings

  *Marangakis v Iceland Foods Ltd*

  - Ms Marangakis was dismissed for alleged gross misconduct in January 2019
  - She appealed, indicating that she wished to be reinstated. However, subsequently she changed her mind due to her belief that mutual trust had broken down
  - Her appeal was successful, and she was reinstated but did not in fact return to work
  - She was then dismissed in July 2019 for failure to attend work
  - She brought an unfair dismissal claim in relation to the January 2019 dismissal
  - The EAT held that her successful appeal meant she had been reinstated, even though by that time she did not want to return to work

Key Learning:

If an appeal is successful, the dismissal should be treated as if it never took place, with the employee being reimbursed for wages due in the interim period and with their continuity of service preserved

# Case Law Update

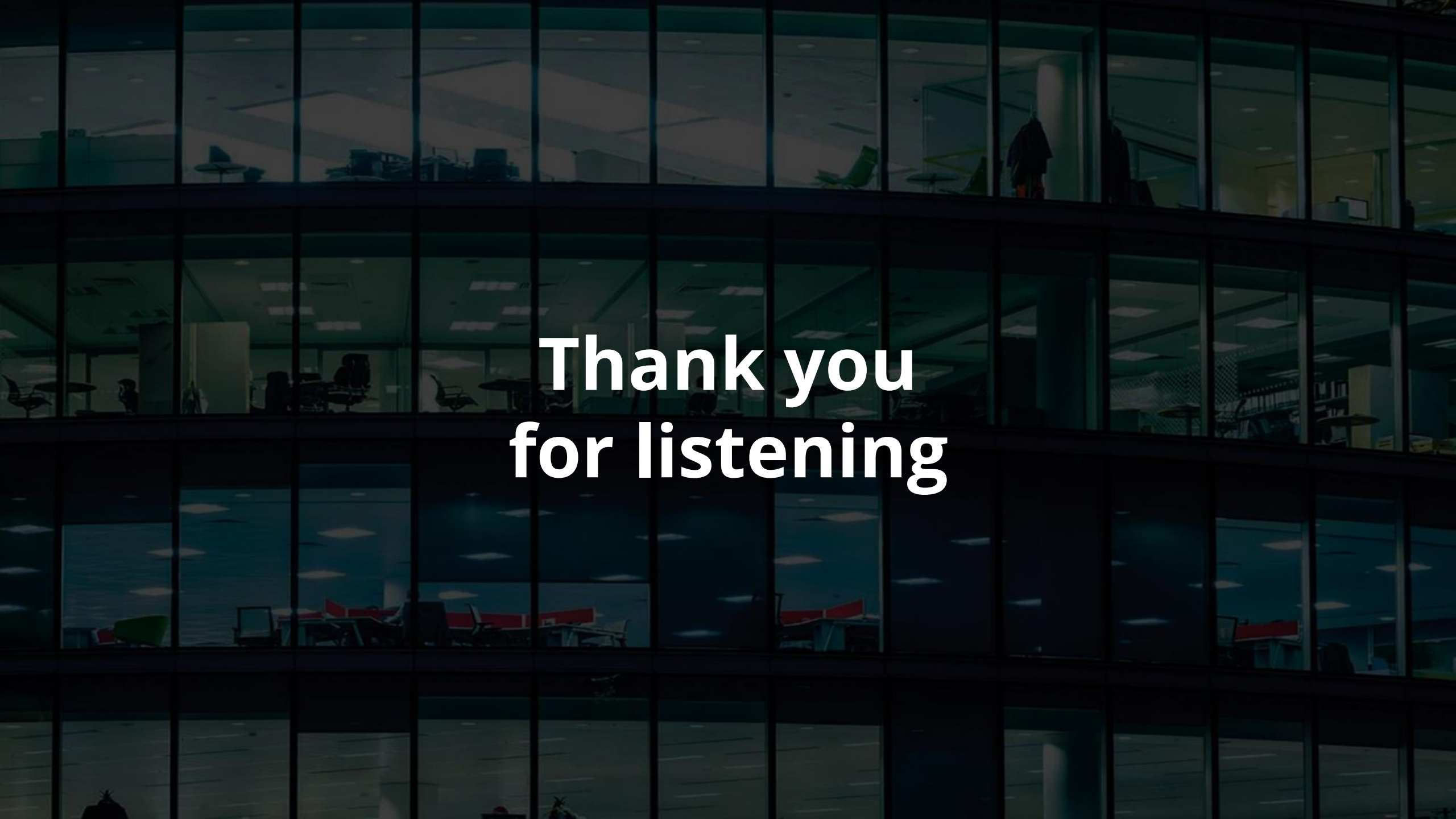
- Disciplinary procedure

  *Lyfar-Cissé v Western Sussex University Hospitals NHS Foundation Trust and others*

  - Dr Lyfar-Cissé, previously Associate Director of Transformation in an NHS Trust (R2) with responsibility for improving race equality, was disciplined by R2 and issued with a final written warning for bullying, victimisation and discrimination
  - The Care Quality Commission (CQC) concluded that bullying was "rife" at R2 and as such another NHS Trust (R1) took over management of R2
  - R1's Managing Director felt there was an issue regarding whether Dr Lyfar-Cissé was the fit and proper person to perform her role, and following a disciplinary hearing held by R2's new CEO she was dismissed
  - She brought a claim of unfair dismissal and argued that disciplinary proceedings should not have been reopened
  - The EAT upheld the ET's decision, confirming that it was not unfair to dismiss Dr Lyfar-Cissé after reopening a previously concluded disciplinary process

Key Learning:

Although it will not always be fair to do so, there may be some situations, even if limited, where it is appropriate for an employer to reopen disciplinary proceedings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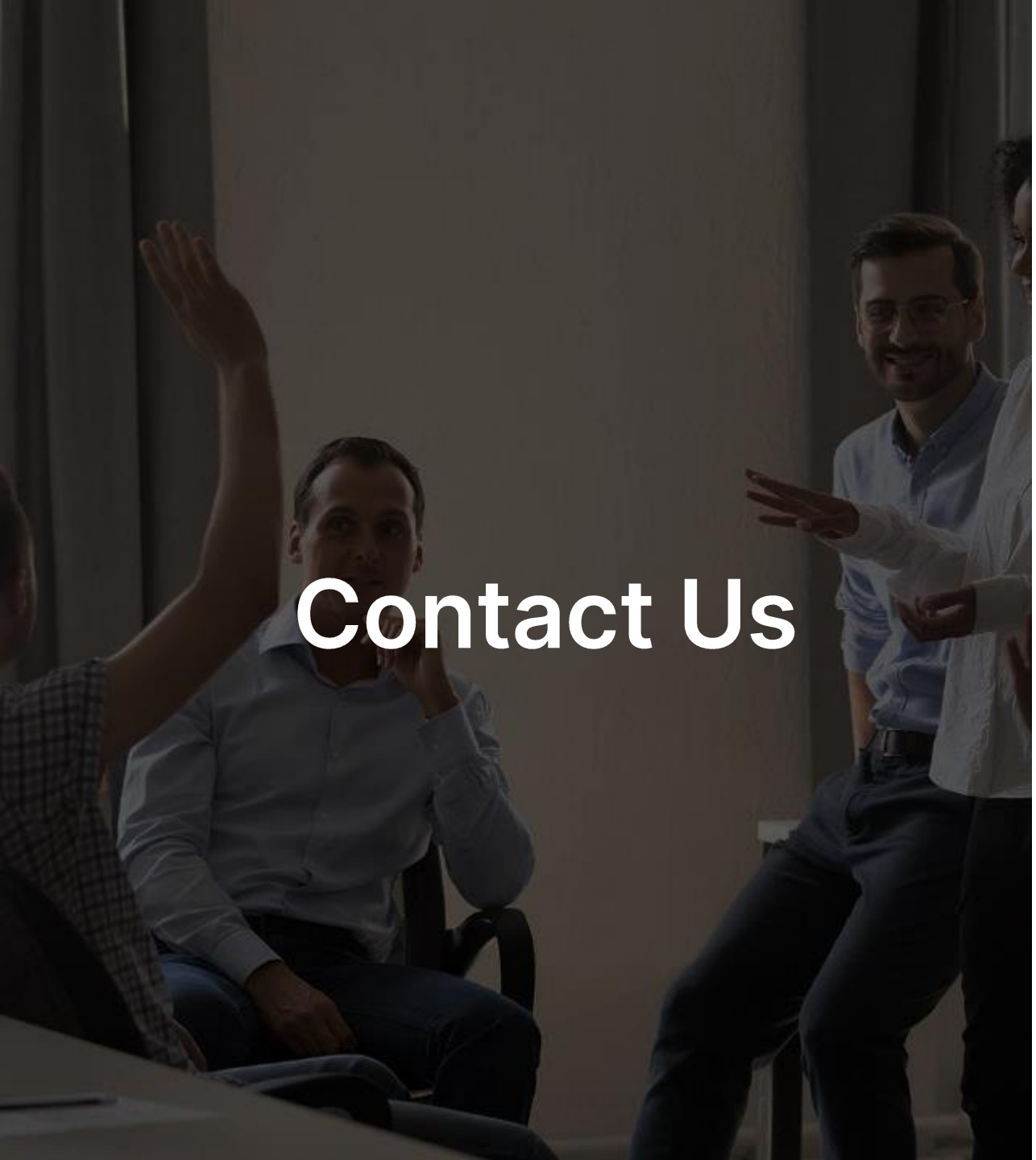

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