

**SHOOSMITHS**

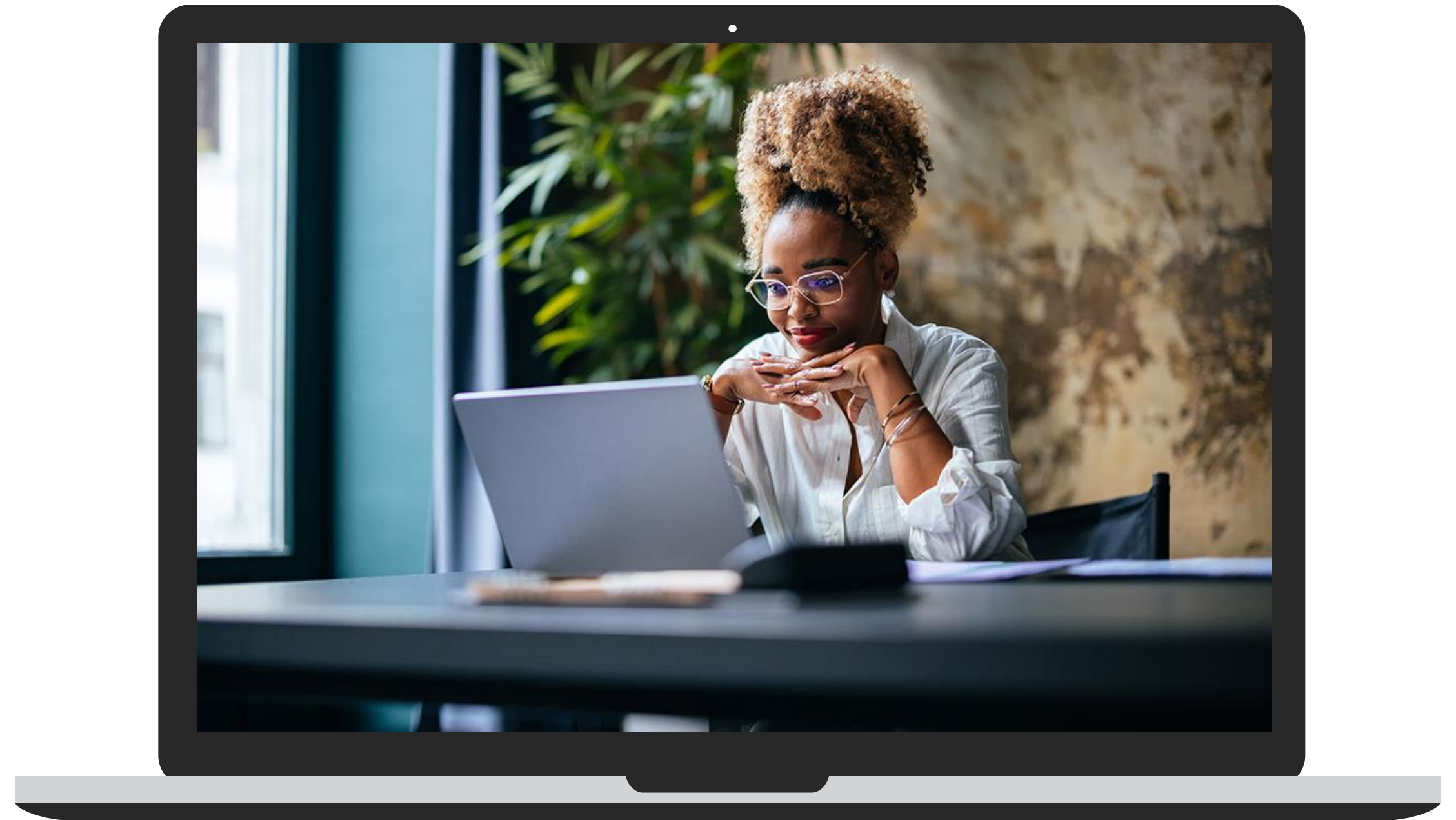
# On Demand: Employment law update

October 2023

# Overview

Developments since April 2023:

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



# Legislation update

# Legislation update

- Private Member's Bills received Royal Assent
  - Carer's Leave Act 2023
  - Employment (Allocation of Tips) Act 2023
  - Neonatal Care (Leave and Pay) Act 2023
  - Protection from Redundancy (Pregnancy and Family Leave) Act 2023
  - Employment Relations (Flexible Working) Act 2023

# Legislation update

- Carer's Leave Act 2023
  - Introduces an entitlement to one week's (five working days) unpaid leave per year for employees providing or arranging care
  - Carer's 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
  - Implementing Regulations needed to bring key provisions into force – unlikely to be before April 2024

# 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
  - Implementing Regulations will be needed to bring the Act fully into force. This is expected to be around May 2024
  - A draft Code of Practice is due to be published by the end of 2023

# Legislation update

- 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

# Legislation update

- Protection from Redundancy (Pregnancy and Family Leave) Act 2023
  - 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
  - Will need Regulations to implement the changes – no date yet announced for these



# Legislation update

- Employment Relations (Flexible Working) Act 2023
  - 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
  - Implementing Regulations needed to bring the changes into force – expected April 2024
  - ACAS has issued a consultation on an updated Statutory Code of Practice on handling flexible working requests incorporating the proposed changes

# Legislation update

- Regulations allowing companies to hire temporary staff to fill in for striking workers illegal
  - The Secretary of State failed to properly consult before introducing the changes last year
  - As a result the Regulations are quashed and should not be applied on or after 10 August 2023
  - It remains to be seen whether the government will now consult to bring in fresh Regulations

# On the horizon

# On the horizon

- Worker Protection (Amendment of Equality Act 2010) Bill
  - Creates liability for employers for harassment of employees by third parties although the House of Lords has voted to remove this provision
  - Employers will also have a duty to take all reasonable steps to prevent sexual harassment of employees in the course of their employment although the House of Lords has voted to remove all and make this just a reasonable steps requirement
  - Compensation uplift of up to 25% in cases of sexual harassment where the duty is breached
  - On 11 April 2023 it was reported that ministers may withdraw their support for the Bill so it remains to be seen if this is progressed

# On the horizon

- Workers (Predictable Terms and Conditions) Bill
  - 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 will be 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 dismiss an employee for making an application

# On the horizon

- **Good work plan: proposals for families consultation**
  - Proposal to allow fathers and partners to split their two weeks of paternity leave into two blocks of one week taken at any time in the 52 weeks after birth or adoption
  - Notice requirements for taking paternity leave to be changed
- **Holiday pay reform**
  - Proposal to allow for rolled-up holiday pay
  - Also for the two different types of leave in the UK to be treated the same way with a single calculation for holiday pay
  - Plan to pro-rate holiday entitlement for part-year workers / those with irregular hours
- **Consultation on reform of TUPE**
  - Proposal to allow businesses with fewer than 50 employees or involved in transfers affecting less than 10 employees to consult directly with affected employees where there are no existing employee reps in place

# On the horizon

- Consultation on reform of WTR
  - Proposal to remove requirement on businesses to keep a record of all workers' daily working hours
- 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
- Response to consultation on draft Code of Practice on Dismissal and Re-engagement still awaited

# Case law update



# Case law update

- Disability discrimination

## McQueen v General Optical Council

- Mr McQueen has various conditions including dyslexia, some symptoms of Asperger's Syndrome and hearing loss, which he believed caused him to have numerous workplace confrontations and meltdowns
- Following two incidents of inappropriate behaviour involving a senior colleague, he was disciplined for a performance issue. Mr McQueen claimed that he had been discriminated against by his employer because his disabilities had caused the confrontations
- Both the Tribunal and EAT held that Mr McQueen's inappropriate conduct when he came into conflict with colleagues was not something arising in consequence of his disabilities. Rather his behaviour was because he had a short temper and resented being told what to do

## Key learning:

- Whilst a helpful decision, employers should still be mindful of the potential causal connection between an employee's disability and their behaviour when considering disciplinary action

# Case law update

- Disability Discrimination

[Achi v GMB and Morgan](#)

- Mr Achi was employed by a trade union. After discussions over his performance, he was issued with a formal warning for lateness
- He then went on sick leave and filed a grievance against his employer for bullying which was not upheld
- His employer planned to take disciplinary action against him for breaching the bullying and harassment policy, but this was delayed whilst he was on sick leave. He remained on paid sick leave for a year but resigned when his employer made a shortfall in his final sick pay. His resignation coincided with the end of his sick pay entitlement
- Mr Achi claimed discrimination, victimisation and constructive dismissal. The Tribunal and EAT held that Mr Achi had resigned as a result of his sick pay coming to an end, not discrimination

**Key learning:**

- This is a reminder that the reason for resignation must amount to a breach of contract for a constructive dismissal claim to succeed. Employers must have clear evidence to support any actions when implementing disciplinary procedures to ensure there is no breach of contract and that the reason for the action is separate from any protected act the employee has done

# Case law update

- Disability discrimination

[Greasley-Adams v Royal Mail Group Ltd](#)

- Mr Greasley-Adams has Asperger's and is classed as disabled under the Equality Act 2010, which his employer was aware of. He was the subject of two bullying and harassment complaints which were upheld following an investigation. During the investigation, he became aware of disparaging comments made against him by other colleagues and raised a grievance, which was investigated but not upheld
- His claim for harassment failed, on the basis that whilst the conduct he complained of was proven, these incidents could not violate his dignity before the time he became aware of them and it was not reasonable for them to be viewed as a violation of his dignity at the point he did become aware of them, given this was in the context of an investigation process

**Key learning:**

- This case is useful confirmation for employers that harassment under the Equality Act can only take place when the claimant is aware of the unwanted conduct

# Case law update

- Disability discrimination

## [AECOM Ltd v Mallon](#)

- Mr Mallon has dyspraxia. He was employed by AECOM Ltd in 2017 but was dismissed for unsatisfactory performance.
- In 2018 he wanted to apply for another role at AECOM. The process involved a short online application form. Instead of completing this Mr Mallon sent an email, attaching his CV which stated that he had dyspraxia, to HR requesting that he be allowed to make an oral application. HR responded by email confirming that he needed to complete the online form but that if he had problems with it to let them know
- Mr Mallon brought a disability discrimination claim for failure to make reasonable adjustments which the Tribunal upheld on the basis AECOM knew he had difficulty completing the online form as a result of his dyspraxia and should have made reasonable enquiries by telephoning him to understand what adjustments were needed

## Key learning:

- This case is a reminder of the importance of adjusting recruitment processes, including speaking to candidates about the level of adjustment needed

# Case law update

- Harassment

- [Fahmy v Arts Council England](#)

- Following suspension of a grant due to the alleged transphobia of the recipient charity, a virtual drop-in session for all staff was hosted by the Deputy Chief Executive. At the meeting Ms Fahmy challenged the view that the charity was anti-trans and asked how gender critical views were protected at her employer. This led to conflicting comments from other attendees. The Deputy Chief Executive then emailed all staff indicating his solidarity with trans and non-binary colleagues. An email and petition were then circulated by another colleague with further hostile and intimidating comments contained in it which were aimed at all gender critical people
    - Ms Fahmy brought a claim of harassment related to religion or belief. The Tribunal upheld the claim in relation to the email and petition which amount to unwanted conduct that had violated Ms Fahmy's dignity and created a hostile environment for her

- [Key learning:](#)

- This case reiterates that gender critical beliefs are a protected philosophical belief under s10 Equality Act 2010 and that employers need to carry out a careful balancing act to ensure all employees are protected from harassment



# Case law update

- Pregnancy discrimination

  - [Alcedo Orange Ltd v Ferridge-Gunn](#)

  - Performance concerns were raised by Ms Ferridge-Gunn's line manager and the managing director shortly after she started
  - The following week, she informed her line manager of her pregnancy. A few days later, the performance concerns were discussed again following which Ms Ferridge-Gunn went off sick. Her line manager discovered that she had failed to process certain documents and told the managing director that Ms Ferridge-Gunn has misled him about her performance. This was unfounded as the failure to process the documents was due to her absence. Ms Ferridge-Gunn was dismissed by the managing director
  - The tribunal upheld the claim of pregnancy discrimination finding that the line manager was influenced by her pregnancy when updating the manager director, and the line manager's report was a significant factor in the decision to dismiss. However the EAT remitted the case to identify who the correct decision-maker was and whether they had been so influenced

## Key learning:

  - It is important to clearly identify who is a decision maker and ensure that any decisions they make are not motivated by discrimination

# Case law update

- Privilege

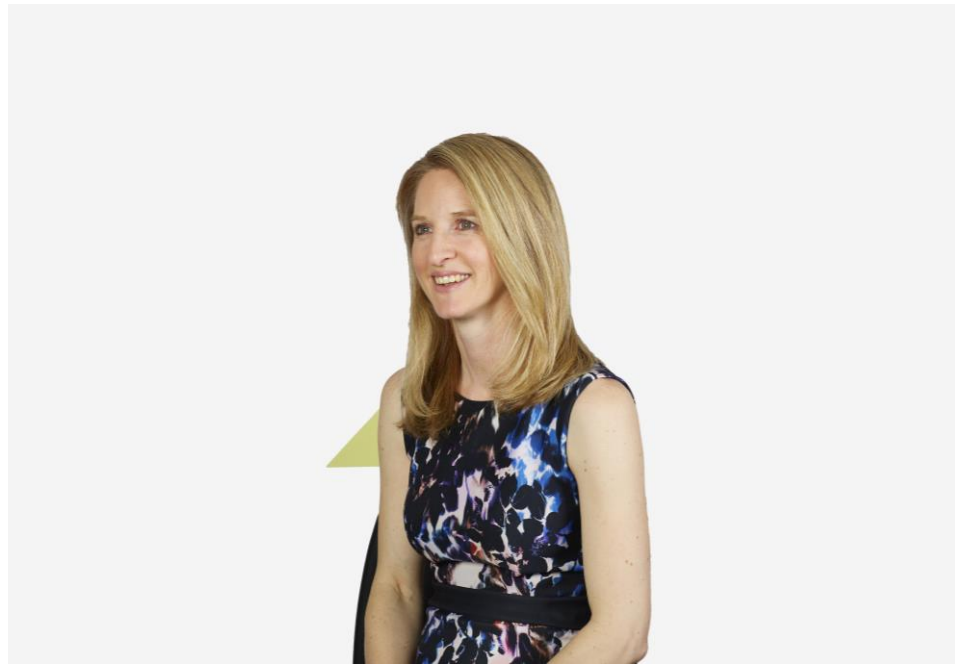
- [University of Dundee v Chakraborty](#)

- Mr Chakraborty raised a grievance under the Dignity at Work policy. The employer appointed an investigator who submitted a report which was then passed to external legal advisers
    - The investigator accepted a number of suggested amendments and the final version of the report was sent to Mr Chakraborty. The report had a note to say it had been amended and reissued following independent legal advice. Mr Chakraborty asked for a copy of the original report but the employer refused on the basis that the report had acquired legal advice privilege when it was amended and a comparison of the two versions would allow conclusions to be made about the legal advice received
    - Mr Chakraborty brought a claim for disclosure and the Scottish Court of Session held that privilege did not apply in this case – disclosure would only allow speculation as to the legal advice received, and privilege had been waived when the advice was revealed to the investigator

- **Key learning:**

- Employers need to be mindful when seeking legal advice on investigation reports that any amended reports could be disclosable

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