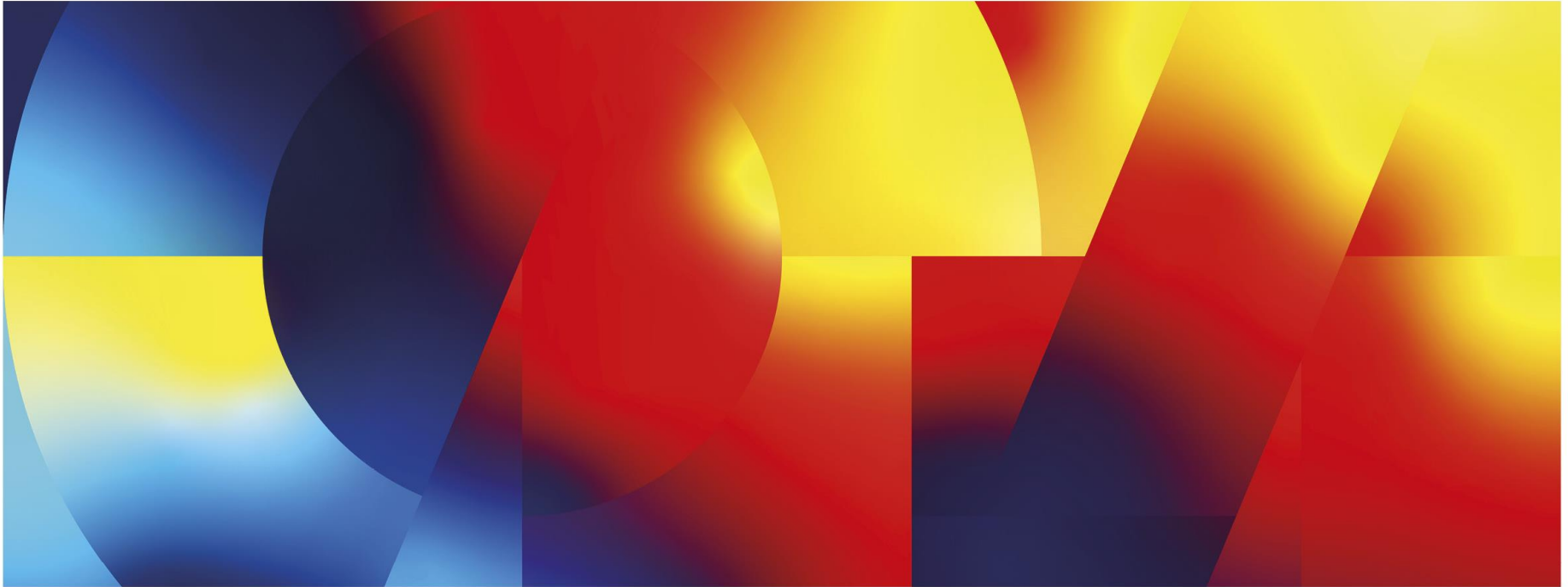


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# Employment Law Update



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# Trends

# Trends we are seeing

- Sickness absence rates higher than last decade! (7.8 days per employee)
  - Stress significant factor - heavy workloads and management style
  - Minor illnesses, musculoskeletal issues, strokes and cancer
  - Covid19 still a significant cause for short term absence
  
- Health and wellbeing initiatives
  - 53% wellness strategy
  - 43% taking measures to support employee health and wellbeing
  - Mental health most commonly targeted
  - Financial wellbeing receiving increased attention (57%)
  - 46% now have some provision for menopause transition
  - 78% of organisation proactively seeking to reduce stress



# New Guidance

# ACAS Guidance on Sickness Absence

- Acas have released new and updated guidance on sickness absence which covers:
  - checking holiday entitlement and sick pay;
  - fit notes and proof of sickness;
  - time off for dependants/parents;
  - returning to work after absence;
  - creating absence policies;
  - recording and reducing sickness absence; and
  - absence trigger points.

<https://www.acas.org.uk/holiday-sickness-leave>

# Presidential Guidance on Alternative Dispute Resolution

- Guidance dated 7 July 2023.
- Four types of ADR available to Employment Tribunals.
  1. ACAS
  2. Judicial Mediation
  3. Judicial Assessment
  4. Dispute Resolution Appointment
    - Cases listed for 6 days or more
    - Tribunal can arrange without agreement
    - No mandatory outcome
    - 2-3 hours
    - After witness statement exchange



# Upcoming changes



# Workers - Predictable Terms and Conditions

- Casual, zero hours and agency workers who work ‘unpredictable hours’
- New right to request changes to their terms and conditions (modelled on flexible working)
- A lack of predictability in a worker’s work pattern
- The change relates to their work pattern
- The purpose of the application is to get a more predictable work pattern
- ‘Work pattern’ - the number of hours, the days of the week or times of the day worked by a worker, and/or the period a worker is contracted to work
- Grounds to refuse the request
- One application every 12 months
- Passed on 18 September 2023 but not taking effect until September 2024
- Further Regulations and ACAS Guidance to follow – who is eligible?

# Protection from Third Party Harassment

- Previous Equality Act 2010 provisions (repealed in October 2013): failure to take such steps as would have been reasonably practicable to prevent harassment, and knew of at least two other occasions.
- Worker Protection (Amendment of Equality Act 2010) Bill proposed:
  - To reintroduce this duty.
  - To protect employers from claims of harassment relating to the expression of opinions in the workplace (under certain conditions).
  - To introduce a mandatory duty to take 'all reasonable steps' to prevent sexual harassment in the workplace.
- However, these proposals have been amended.
  - The first 2 proposals have been removed entirely.
  - The second has been amended to 'reasonable steps'.
- These changes will not take effect for at least a year (and may change again).

# Strikes - Minimum Service Levels

- Received Royal Assent on 20 July 2023.
- Secretary of State has power to set Minimum Service Levels by statutory instrument.
- Intended to amend the legal framework governing industrial action so that minimum levels of service can be maintained during strikes in certain sectors. Those sectors include: Passenger Rail Services, Ambulance Services, Fire and Rescue Services.

*“to ensure that striking workers don’t put the public’s lives at risk and prevent people getting to work, accessing healthcare, and safely going about their daily lives”*

- Minimum Service Levels will not come into force until secondary legislation has been passed by Parliament.
- The Bill would also amend unfair dismissal rights, so that any worker identified as being required to work during a strike, will lose their automatic unfair dismissal protection.
- The Bill has proved controversial and has faced significant opposition, especially from trade unions who argue it is undemocratic. Labour had promised to repeal when the bill if it were to come into power.

# Case Law Update

# Agnew v Police Service of Northern Ireland

- Bear Scotland/Flowers litigation on the correct calculation of holiday pay
- All forms of overtime must now be included
- How far back can the claims go?
- Northern Ireland case – NI equivalent of the WTR and the ERA 1996
- ... but no specific limitation period (not even 6 years)
- 3 month primary limitation period, from date of deduction to date of claim
- ... and 3 months between a series of deductions: now overturned
- Increased the value of the claims from £300,000 to £3m
- NB. Claims in England & Wales are limited to 2 years from the date of claim

# Borg-Neal v Lloyds Banking Group

- During a training session on discrimination (and race), the Claimant asked how a line manager should handle a situation in which they hear someone from an ethnic minority use a word that might be considered offensive by others (the 'N' word).
- Following an investigation and disciplinary process, he was dismissed for gross misconduct.
- The Claimant claimed unfair dismissal, discrimination arising from disability (dyslexia) and direct race discrimination.
- The Employment Tribunal upheld the disability discrimination claim. The Claimant's dyslexia led him to reformulate questions and 'burst out' things before losing his train of thought, contributing to the way he expressed himself in the session.
- The unfair dismissal was also upheld - a reasonable investigation had not taken place.
- The race discrimination claim was rejected.

# Lynskey v Direct Line Insurance Services Ltd

- Claimant (a sales consultant) started to suffer from mood swings, poor concentration and memory issues
- Retraining programme began, the Claimant was moved to a team facing less pressure
- She missed out on a sales-related bonus, a pay rise, and was issued with a written warning
- Then absent from work due to work-related stress
- OH confirmed she was suffering from the menopause and likely a disabled person
- Claimant's claim of disability discrimination upheld (claims of age or sex discrimination were not)
- Failure to make reasonable adjustments & discrimination arising from a disability
- Incidents: Written warning, assessment of performance and decision to cease sick pay

# Riley v Direct Line Insurance Group

- Can termination of employment on ill-health grounds be regarded as termination by mutual consent, rather than dismissal?
- The employee, an individual on long-term sick and with no prospect of returning, was told that salary would be paid up until retirement. Following this information, a formal termination meeting was held with him, and the letter sent following this meeting referred to him having been 'dismissed'.
- Claimant brought claims for unfair and discriminatory dismissal and failure to make reasonable adjustments.
- The Tribunal found that the Claimant had not been dismissed.
- The termination of the employee had been mutual, and it was emphasised that the claimant was not tricked, nor coerced into the decision.





- Previously dismissed by Aecom in Dec 17 – brought a claim – settled
- Aug 18 – applied for another role
  - Short online form required – needed to create online profile
  - Contacted HR attaching his CV (including info on dyspraxia) and asking whether he could make a verbal application instead
  - Email correspondence – HR told him he could get assistance filling in the form and asked for details of what he was struggling with.
  - Failure to make reasonable adjustments claim succeeded - the employer knew, or ought to have known that, as a result of the disability, the claimant would have had difficulty in completing the application.
    - Employer should have phoned the applicant given his difficulties communicating in writing
- Employer was under a duty to make reasonable adjustments when requiring job applicants to create an online profile.
- The prospective employee had dyspraxia and was therefore at a “substantial disadvantage”.
- Employer DOES NOT need to know the specifics of a disabled person’s substantial disadvantage before being required to make reasonable adjustments.

- Claimant was diagnosed with chronic kidney disease (CKD) - "clinically vulnerable"
- In March 2020 all driving tests (except critical tests) were cancelled due to the Covid lockdown
- In July 2020, examiners were required to return to work unless "clinically extremely vulnerable"
- He refused and his pay was stopped. The Claimant resigned on 10 August 2020. He brought several Employment Tribunal claims
- Health & safety dismissal claim rejected – he had 'lost objectivity' insisting on 2m social distance (no medical evidence to support his view)
- Disability discrimination claim also rejected – Tribunal held he was not a disabled person, and it was his views rather than his health that led to his dismissal.
- Employment Appeal Tribunal – finding on disability successfully appealed (to be reconsidered) but findings on health and safety detriment and dismissal were upheld.

# Owen v Willow Tower Opco 1 Ltd

- Claimant was a bank staff worker in a care home.
- In June 2021, the care home decided that all staff should be vaccinated against COVID-19.
- In August 2021, the claimant, who had not been vaccinated, raised a grievance. The basis being that she adhered to a vegan diet and believed she should be exempt from the vaccine requirement.
- The claimant was referred to Occupational Health, which confirmed she had no health conditions. Her grievance was not upheld.
- As she did not have a valid exemption, she was dismissed on 12 November 2021, after the legal requirement for staff in CQC registered care homes to be vaccinated had come into force.
- She claimed unfair dismissal and religion or belief discrimination.
- The Tribunal held that she did not have a genuinely held belief in ethical veganism. Her diet and use of some products alone was not enough to establish a philosophical belief.
- The claim was dismissed.

**Thank you**

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