

HR & Employment Law



Employment Law Update

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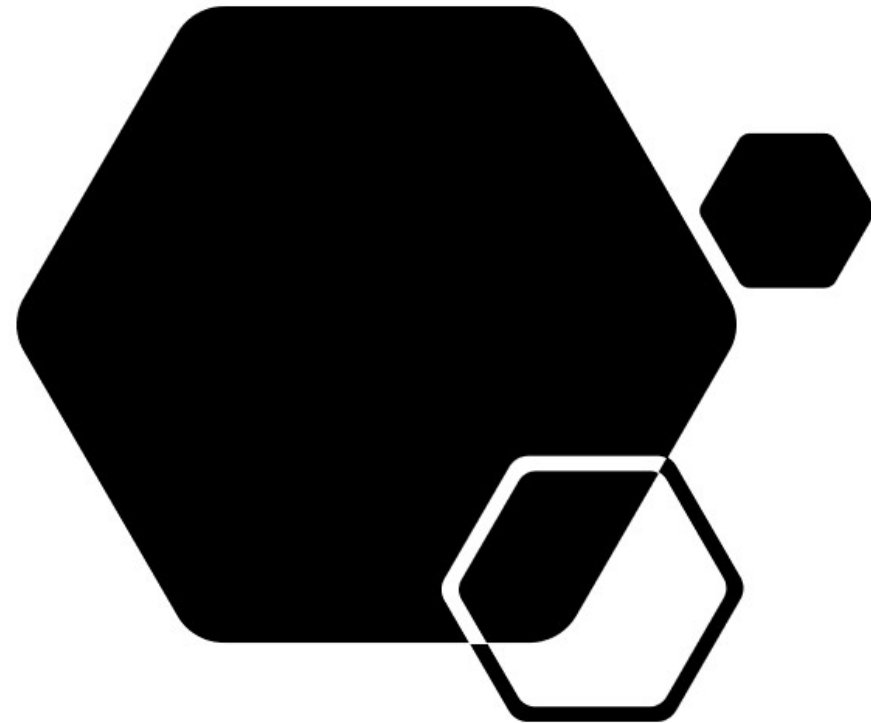
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Agenda

- Case law update
- Investigating and understanding stress at work
- Where are we with?
- How we can help

Case law update





AECOM Ltd v Mallon

The EAT considered the application of an employer's duty to make reasonable adjustments to their recruitment process for a disabled job applicant

Facts

- Standard AECOM recruitment process involved online form
- M has dyspraxia and emailed CV to AECOM, requesting oral application due to his disability
- AECOM offered help with the online form by email, but M didn't respond
- M's application was unsuccessful
- He brought an ET claim for failure to make reasonable adjustments

Tribunal decision

- Not allowing M to make oral application by phone = failure to make reasonable adjustments
 - PCP: requiring applicants to create account and complete online form
 - This put M at substantial disadvantage
 - No actual knowledge of particular disadvantage
 - But should have phoned M when he didn't respond to email
 - AECOM therefore had constructive knowledge
 - Not reasonable to expect M to explain difficulties by email

EAT decision

- Dismissed AECOM's appeal
- Reasonable adjustments duty applies if employer has (actual or constructive) knowledge of the **particular** disadvantage
- When applicant with dyspraxia who had asked for adjustment did not respond to email question, a reasonable employer would have phoned them
- If AECOM had phoned M, he would have explained his particular difficulties with the form
- AECOM therefore had constructive knowledge and had failed to comply with duty to make reasonable adjustments

Lessons

- Where applicant has a disability that may put them at a disadvantage, onus is on you to seek further details
- Seek as much info as possible so you can evaluate
 - whether adjustments are needed
 - what adjustments would be reasonable
- Good practice to make your recruitment process neurodiversity-friendly in any event

Greasley-Adams v Royal Mail Group Ltd

The EAT considered whether a person can be harassed under the Equality Act 2010 if they are not aware of the unwanted conduct.

Facts

- GA, who has Aspergers' Syndrome, worked as a driver for RMG Ltd
- Two colleagues, K and E, complained GA was bullying and harassing them
- Their complaints were upheld
- GA's grievance, re harassment by K and E, was dismissed
- GA brought tribunal claim of harassment related to disability
 - gossip and disparaging remarks
 - spreading of rumours
 - incident linked to his autism used to discredit him

Tribunal decision

- Incidents of unwanted conduct did happen
- However, they could not have violated GA's dignity before he became aware of them
- GA became aware of them during investigation into his alleged bullying
- Inevitable that things would emerge from investigation that GA would not like
- In context, it was not reasonable for them to be considered as violating his dignity

EAT decision

- The EAT dismissed the appeal
- Test for harassment in s26 is cumulative and must consider all factors:
 - perception of claimant
 - other circumstances
 - whether reasonable for conduct to have effect of violating dignity
- Perception of claimant “a key and mandatory component”
- If there is no awareness, there can be no perception
- Nature and context of unwanted conduct relevant to reasonableness test

Lessons

- Employers should be able to investigate complaints thoroughly
- Witnesses should not be deterred from providing their truthful account of events
- But case does **not** mean that revelations during an investigation can **never** constitute harassment
- Still important to act reasonably when conducting investigations

Chief Constable of the Police Service of Northern Ireland v Agnew

The Supreme Court considered two key issues in relation to holidays:

- Whether claims for underpayment of holiday pay can be brought where there are gaps of three months or more between a “series” of underpayments.
- Whether annual leave entitlement can be divided into Working Time Directive (“WTD”) days, Working Time Regulations (“WTR”) days and additional contractual leave days, or whether all days of leave must be treated as fractions of a composite whole.

Legal background

- Annual leave comprises
 - 4 weeks under Working Time Directive (WTD)
 - 1.6 weeks under Working Time Regulations (WTR)
 - Additional contractual leave if granted
- Pay for WTD leave must be based on “normal remuneration”
- Unlawful deductions claims for underpaid holiday pay can be based on “series of deductions”
- Gap of 3 months between deductions breaks the series
- Since 2015, 2 year statutory backstop applies in GB (but not NI)

Case history

- Police officers and civilian staff holiday pay was calculated on basic pay only
- Claims for unlawful deductions and underpaid holiday pay under Northern Irish legislation
- Tribunal upheld claims (back to 1998!) and Northern Ireland Court of Appeal dismissed employer's appeal
- Supreme Court decision now binding across the UK

Issue 1: Series of deductions

- “Series” = number of things of a kind which follow each other in time
- Here, series “in relation to holiday pay”, connected by common fault of payment by reference to basic pay
- 3 month gap **does not** break a series
- Lawful payments between deductions did not break *this* series

Issue 2: Order of leave

- Previous view as to correct order of leave (WTD, WTR, then contractual) rejected
- Employer had not distinguished between different types of leave
- Default = each day of leave is a fraction of a composite pot
- “if and in so far as it is not practicable to distinguish”?

Lessons and next steps

- Decision does **not** mean all holiday pay must be based on “normal remuneration” – that still only applies to WTD leave
- Carry out holiday pay risk assessment and documentation review
- If you pay normal remuneration for **all** holiday, no need to act
- If you don't pay normal remuneration for **any** holiday, liable for underpayments for past two years (longer in NI), take urgent action to change approach to holiday pay going forwards
- If you **distinguish** between WTD leave (normal remuneration) and other leave (lower rate), you may face claims. There is a possible defence (“practicable to distinguish”)
- Make UK can help!

Other cases to note

- ***R (ASLEF and others) v Secretary of State for Business and Trade*** – agencies once again prohibited from supplying staff to cover a strike
- ***Connor v Chief Constable of South Yorkshire Police*** – payment in lieu of untaken holiday on termination can't be less than worker would have been paid for working
- ***Mercer v Alternative Future Group Ltd and another*** – Supreme Court to consider questions on protection from detriment for taking industrial action

Investigating and understanding stress at work

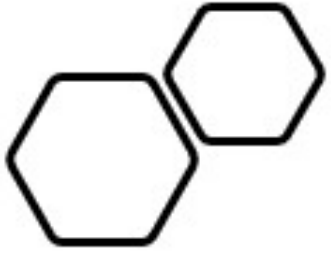


Mental health and stress at work

- Stress-related absence reported by 79% of all employers (and 90% of large employers) – CIPD 2022 report
- Common work-related causes of that absence
 - workloads (60%)
 - management style (26%)
 - pressure to meet targets (20%)
- 17 million working days lost to work-related stress, depression or anxiety in 2021/22 – HSE statistics
- Concern that managers aren't equipped to support employees' mental health

Risks of failing to look after employees' mental health and wellbeing

- Legal risks include:
 - Unfair dismissal
 - Constructive dismissal
 - Disability discrimination
 - Personal injury
- Other risks include:
 - High absence levels
 - Demands on management time
 - Impact on productivity
 - Impact on working environment
 - Recruitment and retention challenges



Case study



Sam – employee off sick with work- related stress

- Production Supervisor at Automobots Ltd
- Good performer and well-liked
- Recently given responsibility for new site in addition to regular duties
- Gone off sick with fit note covering the next 4 weeks and citing “work-related stress”

What should the company do next?

Contact with Sam

- Before contacting Sam, seek input from manager
- Don't let the 'stress' reason for absence stop you from making contact
- BUT be sensitive – avoid appearing overbearing or intrusive
- Consider who is the most appropriate person to contact Sam
- Early contact can help show that you're supportive
- Lack of contact could cause Sam to stew, make him less likely to return
- Speak to Sam to investigate cause of stress – you won't know if you don't ask
- Keep channels of communication open
- Helpful to have a policy setting out your approach to keeping in touch during sickness absence

Conversation with Sam

- Had brief contact with Sam on first day off
- Heavy workload and difficulties at new site
- Unwilling to talk in detail about causes of his stress

What should the company do next?

Medical report

- A medical report can help you assess:
 - whether work may have contributed to a medical condition;
 - how long an employee is likely to be off work; and
 - what you can do to assist/make adjustments for the employee.
- Get medical report early, particularly for work-related conditions
- Options:
 - Report from employee's GP
 - Referral to a specialist; or
 - Occupational Health (OH) report (which may be preferable)
- Note process requirements (AMRA, consent and data protection)

Getting an effective medical report

- Provide background on role and duties, and ask the right questions, for example:
 - How is Sam affected by his condition?
 - Does OHP have a view on what has caused/triggered Sam's condition?
 - Ask for a range of dates for return
 - Identify adjustments you could accommodate, ask if they would help
 - Are there any other adjustments the OHP would recommend?
 - Is Sam getting the right treatment and could any other treatment / support help?
- Seek clarification/further detail if initial report is unhelpful or further report
- Don't ask for medical opinion on disability too early on

Looking at the bigger picture

- OH report confirms Sam's work-related stress and recommends various adjustments to assist him back to work
- Automobots Ltd is concerned by OH report and some of Sam's comments about workplace culture
- It wants to investigate whether it has a broader problem with stress in the organisation

What can the company do to investigate stress within the organisation more broadly?

Stress / wellbeing surveys

- Questions designed to get employees' views on work-related stress
- Based on six areas identified by the HSE
- Face-to-face or telephone interviews or online questionnaire (answers anonymised)
- Good response rate is vital – communicate clearly and reassure employees to encourage participation
- Results can prompt employer to review job design and working practices (risk assessments may be helpful here)
- CAUTION – only undertake a survey if you're willing to act on results

Sam -

What if...

- Sam didn't go off sick but was showing signs of stress at work
 - appeared to be working out of hours in secret
 - quiet and withdrawn
 - tired and forgetful
 - occasionally tearful or snappy

What should the company do in this scenario?

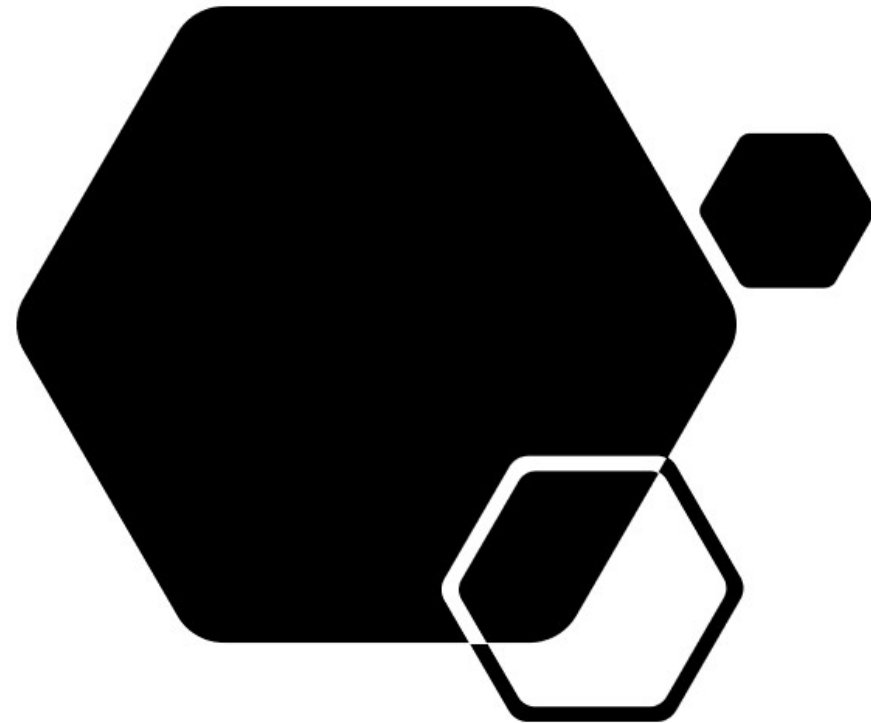
Addressing signs of stress at work

- Tackle the issue early (don't ignore presenteeism/leaveism because work is still largely getting done)
- Start a conversation in a sensitive way, to get Sam's perspective
- If Sam won't engage, don't force the issue, but do follow up if you still see signs of stress
- Offer for Sam to speak to someone else (HR, or a Mental Health First Aider)
- Discuss possible adjustments that could help
- Consider OH referral if appropriate
- Signpost to any other support, e.g. employee assistance programme

Wellbeing initiatives for mental health

Health promotion and early intervention	Support services	Internal management initiatives and training	Insurances
<ul style="list-style-type: none"> • Health risk assessments • Subsidised gym membership • Cycle to work scheme • Smoking support • Health and wellbeing days or workshops (e.g. pet therapy/sleep workshops) 	<ul style="list-style-type: none"> • Occupational health services • Employee assistance programmes • Counselling services • Therapeutic services (e.g. massage /yoga /complementary therapy/ mindfulness) • Financial education (e.g. advice on debt and referrals for welfare loans) 	<ul style="list-style-type: none"> • Manager training on handling sensitive conversations • Senior leader role-modelling (e.g. switching off emails while on holiday, talking openly about mental health) • Mental Health First Aider training • Flexible working and leave purchasing programmes • Mental resilience training • Rehabilitation and return to work services • Conflict resolution workshops 	<ul style="list-style-type: none"> • Private medical insurance • Long term disability or permanent health insurance • Personal accident insurance • Group income protection • Self-funded health plans • Health cash plans

Where are we with?



Flexible Working

- Employment Relations (Flexible Working) Act 2023:
 - Requires consultation before rejecting flexible working request
 - Allows two statutory requests in any 12-month period
 - Reduces decision period to two months
 - Removes need for employee to explain effect of requested change
- Regulations to provide detail AND make flexible working a “day one” right
- Expected to take effect in April 2024
- ACAS to produce updated Code of Practice
- Call for evidence on non-statutory flexible working

Extended redundancy protection during pregnancy and following family related leave

- Protection from Redundancy (Pregnancy and Family Leave) Act 2023:
 - Extends redundancy protections that apply to employees on maternity, adoption and shared parental leave to employees who are pregnant or have recently returned from such leave
 - Expected to take effect April 2024

Unpaid leave for carers

- Carer's Leave Act 2023:
 - One week's unpaid leave per year for employees who look after a dependant with "long-term care need"
 - "Day one" right
 - No need to provide evidence of entitlement
 - Employer may not refuse a request (but may postpone)
 - Protection from detriment or dismissal as a result of having taken carer's leave
- Expected to take effect April 2024

Neonatal Care Leave and Pay

- Neonatal Care (Leave and Pay) Act 2023:
 - Up to 12 weeks of statutory leave and pay for employees whose babies are admitted to neonatal care for at least 7 days
 - Neonatal care leave will be in addition to other entitlements (e.g. maternity and paternity leave)
 - “Day one” right
 - 26 weeks’ service and minimum earnings requirement for right to pay
 - Protection from detriment or dismissal as a result of having taken neonatal care leave
- Only likely to take effect from April 2025

Retained EU Law (Revocation and Reform) Act 2023

- Controversial “sunset” clause removed
- Gives Government new powers to reform EU-based laws
- Ends principle of supremacy of EU law and directly effective EU rights on 31 December 2023
- Enables ETs to refer questions of EU law to Court of Appeal or Supreme Court

Other Government backed Bills

- Worker Protection (Amendment of Equality Act 2010) Bill:
 - Duty to take “reasonable steps” to prevent sexual harassment (not “all” reasonable steps)
 - Protection from third-party harassment now removed
- Workers (Predictable Terms and Conditions) Act:
 - Giving workers and agency workers the right to request a predictable work pattern

Immigration / right to work

- Maximum civil penalties for employing illegal workers to triple in 2024
- New restrictions on switching from student to skilled worker visas
- Individuals with EUSS pre-settled status not required to make further application
- Increases to immigration fees
 - Work visa +15%
 - Certificate of sponsorship +20%
 - Immigration Health Surcharge +66%

New ICO guidance

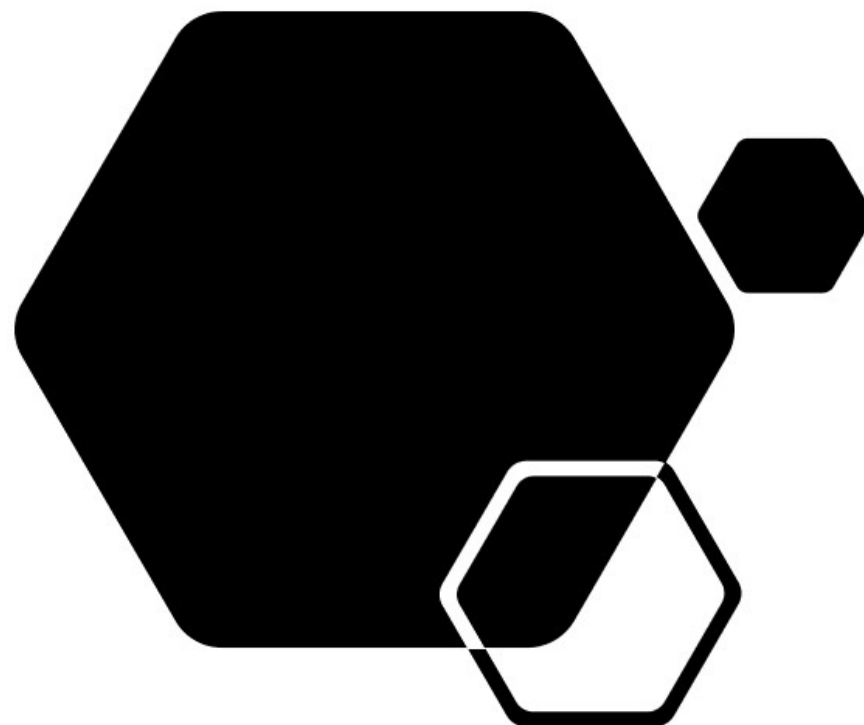
- FAQs on SARs for employers
 - tackle common misconceptions, e.g. form of a SAR, how exceptions apply, etc.
 - right of access **can't** be waived by settlement agreement
- Information about workers' health
 - examples of specific workplace scenarios, e.g. managing absence records, drugs and alcohol testing, data sharing, etc.
 - what you '**must**' do, what you '**should**' do and what you '**could**' do
- Monitoring at work
 - explains mandatory steps before monitoring, e.g. DPIA, privacy notices, etc.
 - compliance requirements for specific types of monitoring, e.g. remote working, emails, vehicles, covert monitoring, etc.

Horizon scanning

- If Labour win the General Election in 2024:
 - Employment Rights Bill within 100 days of entering office
 - introducing sectoral collective bargaining and increasing union rights
 - broadening access to and increasing rate of SSP
 - reforming employment status and ending qualifying period for employment rights
 - banning zero-hours contracts
 - prohibiting 'fire and rehire' practices
- Before that, other possible developments may include:
 - minor changes to TUPE consultation requirements
 - amendments to rules on holiday entitlement and pay
 - reform of non-compete clauses in employment contracts

How we can help

(Contact us:
enquiries@makeuk.org)



Wellbeing

- Wellbeing surveys
- Mental health training courses
- **Wellbeing: beyond compliance into culture** webinar on 21 November at 10am – email smcgregor@makeuk.org to register your interest
- Westfield Health workplace wellbeing solutions

Preventing sexual harassment at work

- Policy review: communicate a zero-tolerance approach
- Pulse survey
- Anti-harassment training
 - micro-awareness video
 - half-day workshop

Contact us for further details: enquiries@makeuk.org

EDI+ micro-videos

- EDI+ and creating an inclusive workforce:
 - Banter
 - Bullying, harassment & victimisation
 - Unconscious bias
 - Protected characteristics
 - Types of discrimination
 - Working in an inclusive way
 - Menopause
 - Allyship
 - Neurodiversity (including dyslexia, dyspraxia, dyscalculia, ADHD and autism)
 - Trans and gender diverse awareness (terminology, etiquette, for managers and employees)

Recruitment and retention

- Employee engagement surveys
- Visioning workshops
- **STR Group** – Make UK Advantages Partner
- **Boutros Bear** – Make UK Advantages Partner

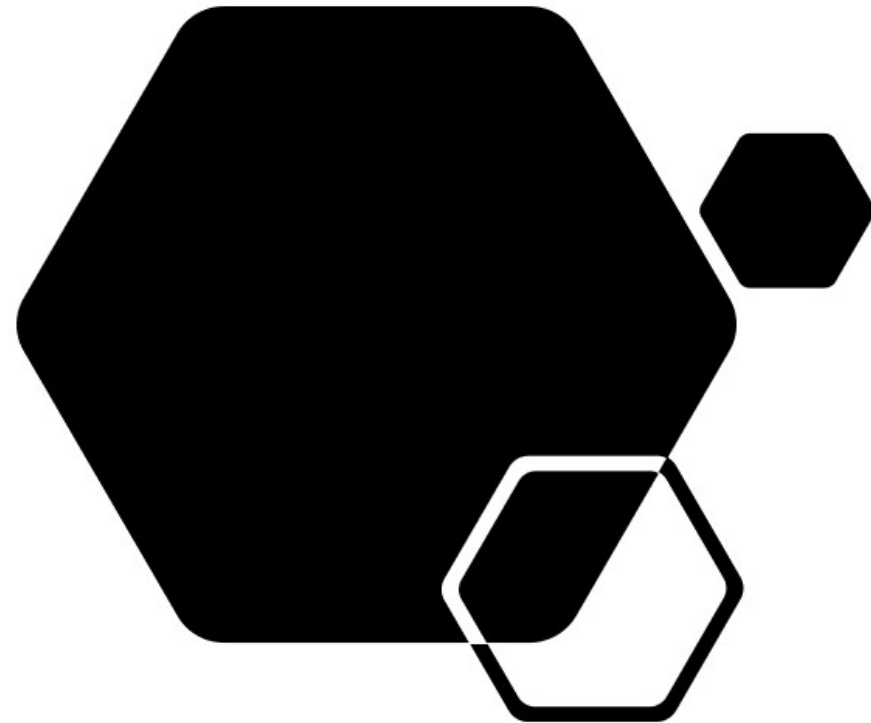
Upcoming events

Title	Date, Time, Location	Content	Join
Make UK HSS Culture Event: Protecting Your Most Valuable Asset	Thursday 19th October 2023 (9.00am to 3.00pm) In person at the Radisson Blu, Durham	Speakers from Make UK, IOSH, and the HSE are coming together to highlight the importance of safety culture, and how it links to sustainability. Exhibition and networking opportunities also available.	Make UK HSS Culture Event: Protecting your most valuable asset Tickets, Thu 19 Oct 2023 at 09:00 Eventbrite
Leadership development open training	Various dates over the next 18 months	Our 90 minute or 3-hour modular leadership development programmes let you create the perfect programme to suit your organisation, your line managers and your operational availability.	Leadership and Management Training Courses Make UK Management Basics Make UK

Upcoming events

Title	Date, Time, Location	Content	Join
Transgender & gender diverse awareness virtual training	Tuesday 14 th November 2023 (10.00am to 12.00pm) Online	Guidance on best practice in management of trans and non-binary employees and an in-depth analysis of trans and gender diverse people's lives and issues.	https://www.makeuk.org/training/all-training-courses/transgender-and-gender-diverse-tgd-awareness-training
Wellbeing, Beyond Compliance Into Culture webinar	Tuesday 21 st November 2023 (10.00am to 11.15am) Online	Understand how a wellbeing strategy can benefit your business, including supporting recruitment and retention.	Coming soon! Register your interest by emailing smcgregor@makeuk.org

Questions





Your feedback would be appreciated



<https://www.surveymonkey.co.uk/r/ELUAutumn2023>