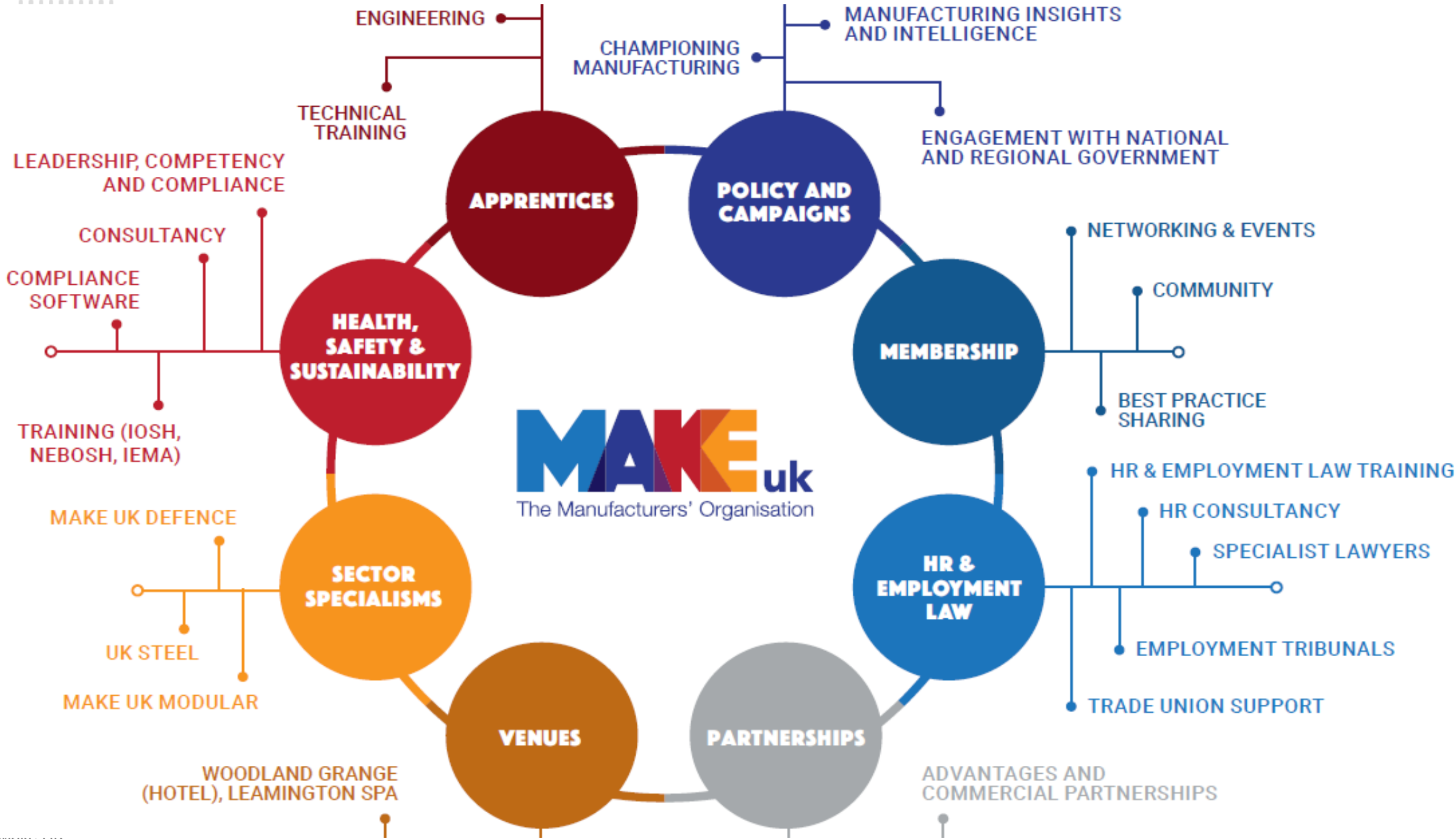


HR & Employment Law

Employment Law Update

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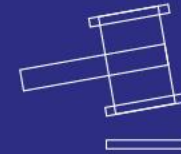


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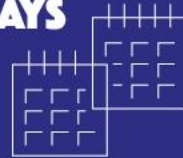


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Agenda

- Case law update
- Holiday
- Where are we with?
- How we can help



Case law update



Omar v Epping Forest District Citizens Advice

The EAT considered whether an employment tribunal had properly directed itself when finding that an employee's "heat of the moment" resignation was really intended.

Facts

- O resigned “in the heat of the moment” during an altercation with his line manager
- Same day: O claimed CEO recognised he wished to continue and offered him alternative role
- Two days later: CEO told O that his resignation would stand
- O sought to formally retract resignation, but his employment was treated as terminated
- O claimed unfair and wrongful dismissal

Tribunal decision

- General rule: employer is normally entitled to rely on unambiguous words of resignation in accordance with their plain and natural meaning
- O sought to rely on “special circumstances exception”
- O’s words clearly amounted to resignation
- O had not immediately attempted to retract them – unlike after at least one previous resignation
- O hadn’t accepted offer of new role
- Tribunal’s conclusion: O had resigned, so no dismissal

EAT decision

- Case remitted to fresh Tribunal given flaws in legal analysis
- No such thing as the “special circumstances” exception – once given, a resignation cannot be unilaterally retracted
- Judge words from perspective of reasonable bystander in position of recipient of words, at time words are uttered:
 - Did words constitute immediate resignation or notice of resignation?
 - Was resignation seriously meant, really intended, or conscious and rational?
- Genuinely meant resignation is not cancelled out if employee change their mind afterwards
- Evidence of what happened after resignation may cast light on what was “really intended” at the time

Lessons

- High threshold to establish that heat of moment resignation is not really intended
- Fine line between not really intending and changing mind, so may be difficult to predict how a tribunal would view it
- Good practice to give the employee the chance to withdraw the resignation
- If you want to accept the resignation
 - first consider how an objective bystander might have interpreted the words; and
 - bear in mind unfair dismissal risk

De Bank Haycocks v ADP RPO UK

The EAT considered whether an employee's dismissal for redundancy was unfair where the employer had not carried out 'workforce consultation' in a small scale redundancy process with selection from a pool.

Facts

- D was a recruitment consultant for ADP
- Before any consultation, UK manager used selection matrix to assess 16 employees in D's team
- D came last in ranking
- After the scoring, the company held individual consultation meetings with D, following which he was dismissed
- D appealed (was given his score, but appeal was unsuccessful)
- D claimed unfair dismissal

Tribunal decision

- Tribunal rejected D's claim (concluded fair process)
- D appealed to the EAT (arguing that lack of consultation at a formative stage of the redundancy process meant his dismissal was unfair)

EAT decision

- D's appeal was successful
- Generally, a fair dismissal requires “workforce consultation”, even where statutory collective consultation thresholds are not met
- Generally, a fair redundancy consultation requires a two-stage process:
 - “Workforce consultation” on ways to minimise impact of the redundancy situation when proposals are at a formative stage
 - “Individual stage of consultation” that is more personally directed
- There is no prescriptive form of “workforce consultation”
- An appeal cannot rectify lack of consultation at a formative stage

Recommended approach: non-statutory consultation with a pool

- Begin consultation when redundancy proposals at formative stage when employees can still affect the outcome
- First, consult the whole pool on a group basis (with or without reps) on proposals for redundancies/alternatives and selection/scoring
- Next, consult one-to-one
 - Once you have provisionally selected an employee
 - On matters personal to an individual

Bathgate v Technip Singapore PTE Ltd

The Court of Session considered whether a settlement agreement could be used to settle unknown future employment claims under the Equality Act 2010.

Facts

- B was employed by T for 20 years
- Jan 2017: B took voluntary redundancy and signed SA expecting redundancy and notice pay, plus later “additional payment” under collective agreement
- March 2017: T decided no additional pay due to employees aged 61+ under collective agreement terms
- June 2017: T communicated decision to B, who claimed age discrimination
- T said B’s claim had been validly compromised by SA

Tribunal decision

- Waiver in SA:
 - Stated full and final settlement of claims B *'intimates and asserts'* against T
 - Listed various types of claim, including age discrimination
 - Included general waiver of 'all claims...of whatever nature (whether past, present or future)'
- Tribunal concluded age discrimination claim was precluded by SA
- B appealed to the EAT

EAT decision

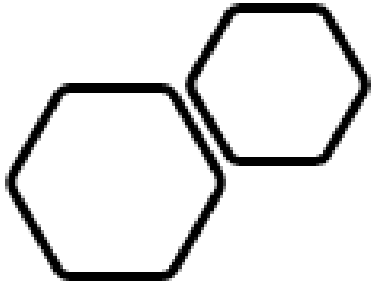
- Valid settlement must 'relate to the particular complaint'
- Future unknown complaints could not easily be considered 'particular complaints'
- Legislative purpose: intended to be available only in the context of a particular complaint that has already arisen
- T appealed to the Court of Session

Court of Session decision

- B's age discrimination claim had been validly settled by SA
- S.147 EqA does not exclude the settlement of future claims, so long as the:
 - types of claim are clearly identified; and
 - objective meaning of the words used is such as to encompass settlement of the relevant claim
- *“a future claim of which an employee does not and could not have knowledge, may be covered by a waiver where it is plain and unequivocal that this was intended”*

Lessons

- Unknown future claims can be settled by SA, provided the potential claim is clearly identified within the agreement
- General waivers are ineffective
- Identify claims by generic description or reference to section of statute giving rise to the claim
- Unlikely to allow settlement of future claims where employment is ongoing



Holidays: all change, please!

(for irregular hours and part-year
workers)

Holiday headlines

What's the new holiday law?

New legislation amending the Working Time Regulations 1998 (WTR)

What's it for?

Creates new holiday regime for 'irregular hours' and 'part-year' workers

When does it apply from?

Only applies to holiday years starting on or after 1 April 2024 (i.e. from 1 Jan 2025 if holiday year follows the calendar year)

Will it affect you?

Yes, if you have any part-year workers (e.g. term time) or irregular hours workers (e.g. zero hours)

Does it do anything else?

For workers generally, aims to codify case law on 'normal remuneration' and carry over of holiday, with effect from 1 Jan 2024

Which of these workers is covered?

Ajay: finance manager, works 9am – 5.30pm, Mon to Thurs, all year round

Brenda: production operative, works a 2-week rotating shift pattern, with 35 hours in week 1 and 42 hours in week 2, plus frequent overtime

Charles: assistant tutor for apprentices, works 8.30am – 3.30pm, Mon to Wed, on a permanent contract, working during college term times only, paid salary in equal instalments

Davina: catering assistant, on a zero-hours contract, working hours assigned on a weekly basis

“A worker is an **irregular hours worker**, in relation to a leave year, if the **number of paid hours** that they will work **in each pay period** during the term of their contract in that year is, **under the terms of their contract, wholly or mostly variable**”

“A worker is a **part-year worker**, in relation to a leave year, if, under the terms of their contract, they are **required to work only part of that year** and there are **periods** within that year (during the term of the contract) of **at least a week** which they are **not required to work and for which they are not paid**”

Who is covered?

Ajay (finance manager, works 9am – 5.30pm, Mon to Thurs, all year round)

- Paid hours are fixed, so Ajay **is not an irregular hours worker**
- Works all year round, so Ajay **is not a part-year worker**

Davina (catering assistant, on a zero-hours contract, working hours assigned on a weekly basis)

- Number of paid hours in each pay period is variable under terms of contract, so Davina **is an irregular hours worker**
- If there are weeks when Davina is not required to work and is not paid, she **could also be a part-year worker**

Who is covered?

Brenda (production operative, 2-week rotating shift pattern, with 35 hours in week 1 and 42 hours in week 2, plus frequent overtime)

- Works all year round, so Brenda **is not a part-year worker**
- Rotating shift pattern does not mean number of paid hours in each pay period is variable
- Does working overtime make Brenda an irregular hours worker?
 - Government guidance creates uncertainty
 - Nature and frequency of overtime would be relevant
 - Make UK current view – if overtime is the *only* factor pointing to irregular hours, worker is **unlikely to be an irregular hours worker**

Who is covered?

Charles (assistant tutor for apprentices, works 8.30am – 3.30pm, Mon to Wed, on a permanent contract, working during college term times only but paid in equal instalments across the year)

- Number of paid hours in each pay period is not “wholly or mostly variable” so Charles **is not an irregular hours worker**
- Charles only works during term times, so is he a part-year worker?
- Government guidance currently suggests he **would not be a part-year worker** since he:
 - is paid an annualised salary across the year
 - receives pay during periods when he is not working

Statutory holiday entitlement accrues at 12.07% of hours worked in a pay period

Example:

Davina - paid monthly, works 118 hours in April

- $118 \times 12.07\% = 14.2426$
- round to nearest whole hour = 14

Note:

- different percentage if provide extra contractual holiday
- different calculation where worker is on sick/family leave

Statutory holiday entitlement - issues with accrual

- Unclear how to apply 28 day cap
- Issues at start and end of leave year
- Change to terms
- No distinction between WTD and WTR derived holiday – same rights attach to all statutory holiday

Holiday pay –
employer choice
between:
- 52 week average
calculation; or
- rolled-up holiday
pay

- If paying **rolled-up** holiday pay, employer must:
 - calculate as **12.07% of total pay** in each pay period
 - pay **in each pay period** at same time worker is paid for work done
 - **itemise** separately on payslip
- If using 52 week average, ‘normal remuneration’ calculation applies for all statutory holiday
- Moving to rolled-up holiday pay = changing terms

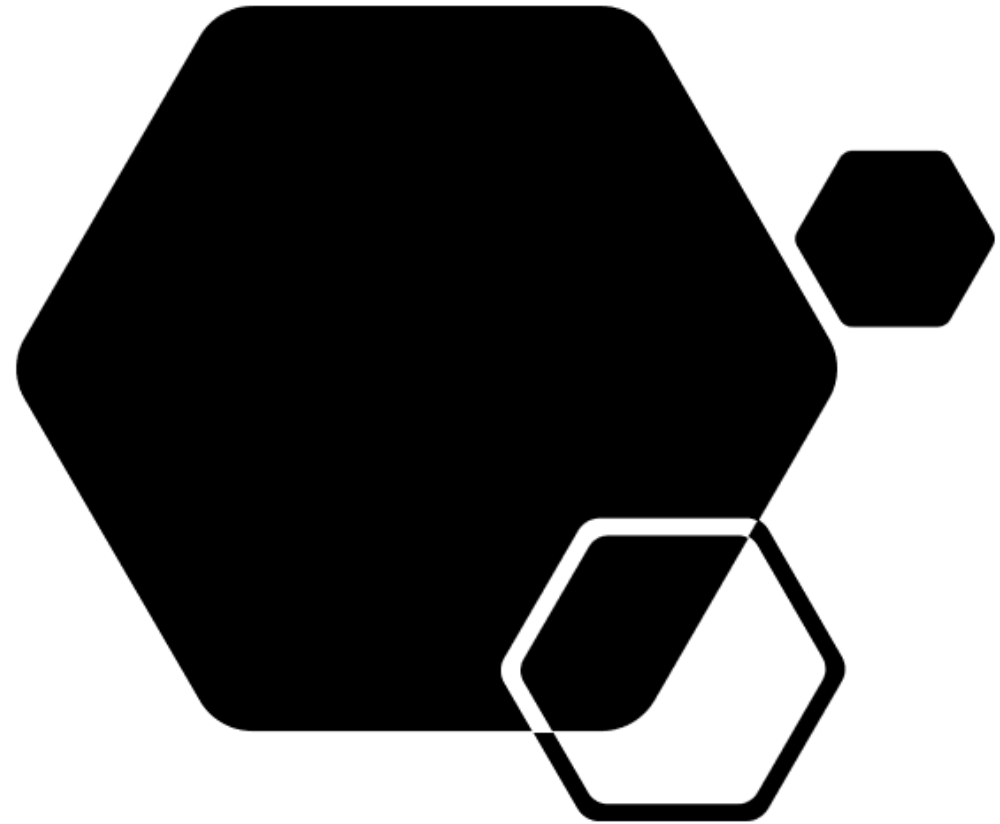
Changes to terms and holiday policies/rules

- Implementing new regime will require contractual changes
 - Method of accrual – statutory requirement
 - Rolled-up holiday pay – choice (ER considerations)
- How will you implement changes?
 - Depends on your business circumstances
 - Follow a process involving communication and consultation and give sufficient warning/notice of implementation
 - Applicable to first holiday year that begins on or after 1 April 2024 – allow sufficient time
- Also consider holiday policies/rules

Moving forwards...

- Assess workforce – do you have any irregular hours or part-year workers?
- Where it is unclear whether employees will be caught by the definition, hold fire
 - Changes to terms and ER issues
 - Possible change to guidance (lobbying is ongoing!)
- For those who are *definitely* within the definition
 - Contractual changes needed and changes to policies and procedures
 - If already using rolled-up holiday pay, check it meets new requirements
- Time for a broader audit and review of your holiday compliance?

Where are we with?



Flexible working

- Right to request from **day one** of employment
- **Two** statutory requests (not one) in any 12-month period
- Employee no longer required to explain **effect** of proposed change and how that effect might be dealt with
- Employer decision period reduced to **two months** (not three)
- Employer may not reject a request without first **consulting** with an employee
- Updated ACAS Code of Practice
- **Key steps:** train your managers and update your policies

Unpaid leave for carers

- In force from 6 April 2024
- One week's unpaid leave per year to look after a dependant with "long-term care need"
- "Day one" right
- Half or whole days, up to one week
- No need to provide evidence of entitlement but must provide notice
- Employer may not refuse a request (but may postpone)
- Protection from detriment or dismissal

Changes to paternity leave

- In force from 6 April 2024
- Employees can take their two-week paternity leave entitlement as a single block of one or two weeks, or as two separate one-week blocks
- Timeframe to take leave extended from 56 days to within 52 weeks after birth or placement for adoption
- Reduction in amount of notice required from 15 weeks before the EWC to 28 days before the leave will be taken
- Notice to vary leave dates reduced to 28 days' notice

Extended redundancy protection during pregnancy and following family related leave

- Employees who are pregnant or who are returning from maternity, adoption or shared parental leave will have priority over suitable vacancies in a redundancy situation
- 18-month window
- From 6 April 2024

Workers (Predictable Terms and Conditions) Act

- Giving workers and agency workers the right to request a predictable work pattern
- Expected to come into force during Autumn 2024
- ACAS Code of Practice on handling request for a predictable working pattern

TUPE

- Requirement to elect employee representatives removed
 - for employers with fewer than 50 employees; or
 - where a transfer involves fewer than ten employees
- In either case, employer to inform and consult directly with employees
- Applies to transfers taking place on or after 1 July 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
- Likely to take effect from April 2025

Fire and re-hire

- Code of Practice on Dismissal and Re-engagement
- Employers encouraged to consult and explore all options
- Threat of dismissal should not be ‘a tactic’
- Code not limited to only collective bargaining scenarios
- Tribunal required to take the Code into account
- 25% uplift to compensation where employer unreasonably fails to follow the Code
- Expected to be in force by Summer 2024

Immigration / right to work

- Maximum penalties for employing illegal workers increased to £60,000
- Increase in general salary threshold for the skilled worker visa route from £26,200 to £38,700

Worker Protection (Amendment of Equality Act 2010) Act

- Duty on employers to take “reasonable steps” to prevent sexual harassment (not “all” reasonable steps)
- Enforceable by Equality and Human Rights Commission
- Tribunals have the power to uplift sexual harassment compensation by up to 25% where an employer is found to have breached the new duty

Tribunal fees

- Ministry of Justice has launched a consultation on introducing a fee of £55 for all employment tribunal claims and EAT appeals
- If implemented, fees would be payable from November 2024

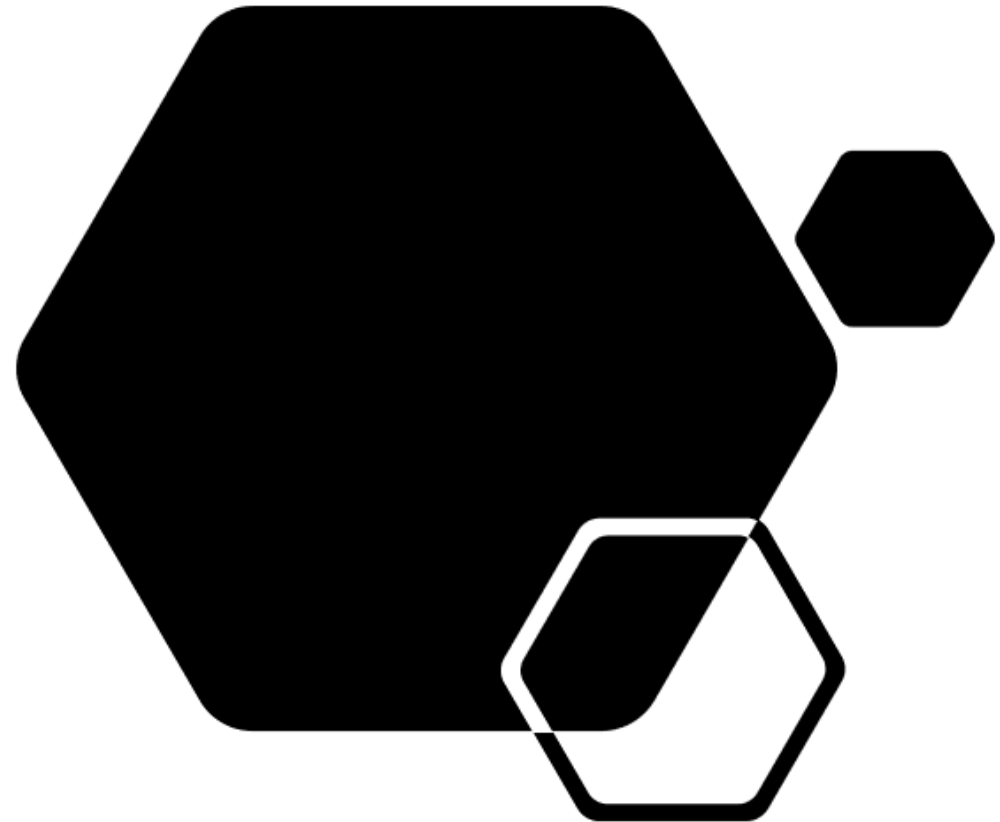
Horizon scanning

- 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

How we can help

Contact us:

enquiries@makeuk.org



Redundancy support

- Managing a redundancy procedure (including handling the new protections for pregnant employees and those returning from family leave)
- Training for line managers
- Outplacement support
- enquiries@makeuk.org

Handling discipline and grievances

- Investigations
- Handling difficult conversations
- Settlement negotiations
- Training for line managers
- <https://www.makeuk.org/training>

Upcoming events

<https://www.makeuk.org/training>

Title	Date, Time, Location	Content
Health & Safety Member Briefing	8 May 2024 (10.00 - 12.00) Online	Our Spring Member Briefing will ensure you're up to date with the latest trends and key issues across health and safety
Environment Member Briefing	9 May 2024 (10.00 - 12.00) Online	Our Spring Member Briefing will ensure you're up to date with the latest trends and key issues across environmental management and sustainability
Leadership and development open training	Various dates over the next 12 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

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Thank you

(Contact us:
enquiries@makeuk.org)





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