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HR Solutions

Monthly Newsletter | Sept 2022

Hot Topics

Where is the Employment Bill?

Back in December 2019, the Employment Bill was announced which would implement recommendations set out in the "Good Work Plan" the previous year. Since then, the only statute enacted as a result has been amendments to the contents of Contracts of Employment; the right of workers to a written contract (rather than just employees); the abolition of the "Swedish derogation" in the Agency Worker Regulations; and the right to Parental Bereavement Leave and Pay. The other provisions are therefore firmly on the back burner and, indeed, the Bill was not even mentioned in the Queen's speech this year.

One legislative reform which does look likely to come into effect is the **Neonatal Care (Leave and Pay) Bill**. This passed its second reading in Parliament. If enacted, it would allow parents to take up to 12 weeks' shared leave if their baby is admitted into hospital within 28 days of being born and for continuous period of at least 7 days.

Currently, in this situation a proportion of maternity leave is spent in hospital with the baby whilst 6% of partners have had to take sick leave to enable them to spend time in hospital after using their paternity leave. Neonatal leave would be available to mothers in addition to maternity leave and to partners once they have taken paternity leave.

This would be a "day one" right; however, neonatal care pay would only apply to parents who have at least 26 weeks' service and whose weekly pay is at least the Lower Earnings Limit (as with Statutory Maternity Pay and Statutory Paternity Pay). The Bill is expected to be passed in 2023 meaning that these new rights will probably not be implemented until sometime in 2024.

Another provision in the Bill was making the **Right to request Flexible Working** a "day one" entitlement rather than after 26 weeks' service as at present. There is no sign of this being enacted; however, it has been rather overtaken by events i.e. lockdown. Most employers do now operate agile or hybrid working where possible, and there are strong recruitment / retention reasons for doing so. In addition, an unreasonable failure to grant a request is likely to be indirect sex discrimination, as more women than men still need to amend their working pattern to fit their caring responsibilities. Discrimination cases require no qualifying length of service and there is also no cap on the amount the Tribunal can award (remember the case last year where an employer paid an award of **£185,000** to a female employee whose flexible work application they refused). Employers are therefore advised to carefully consider such requests for business reasons and also to avoid costly Tribunal claims.

HR Solutions can provide you with "family friendly" and agile working policies, and also advise you on employees taking family-friendly leave or submitting flexible working requests.

Employment Tribunals

***Employers still have a tendency to not see age discrimination as not being unlawful, despite it being incorporated into the Equality Act in 2010. Here, we consider three Employment Tribunal cases with costly consequences*:**

In **Cowie v Vesuvius plc**, the Tribunal held that the dismissal of a senior employee without a fair procedure being followed was direct age discrimination and the employer could not justify this by reference to "succession planning".

Mr Cowie had worked for Vesuvius plc since 1981 and had progressed through the business to become global business unit president of the foundry division, reporting directly to the CEO. He was aged 58 at the time of his dismissal.

The company identified a succession planning issue, as a number of managers would retire at the same time without suitable successors. This led to a focus being placed on recruiting "young high potential" managers to develop as candidates for senior roles with a preference for those aged under 45.

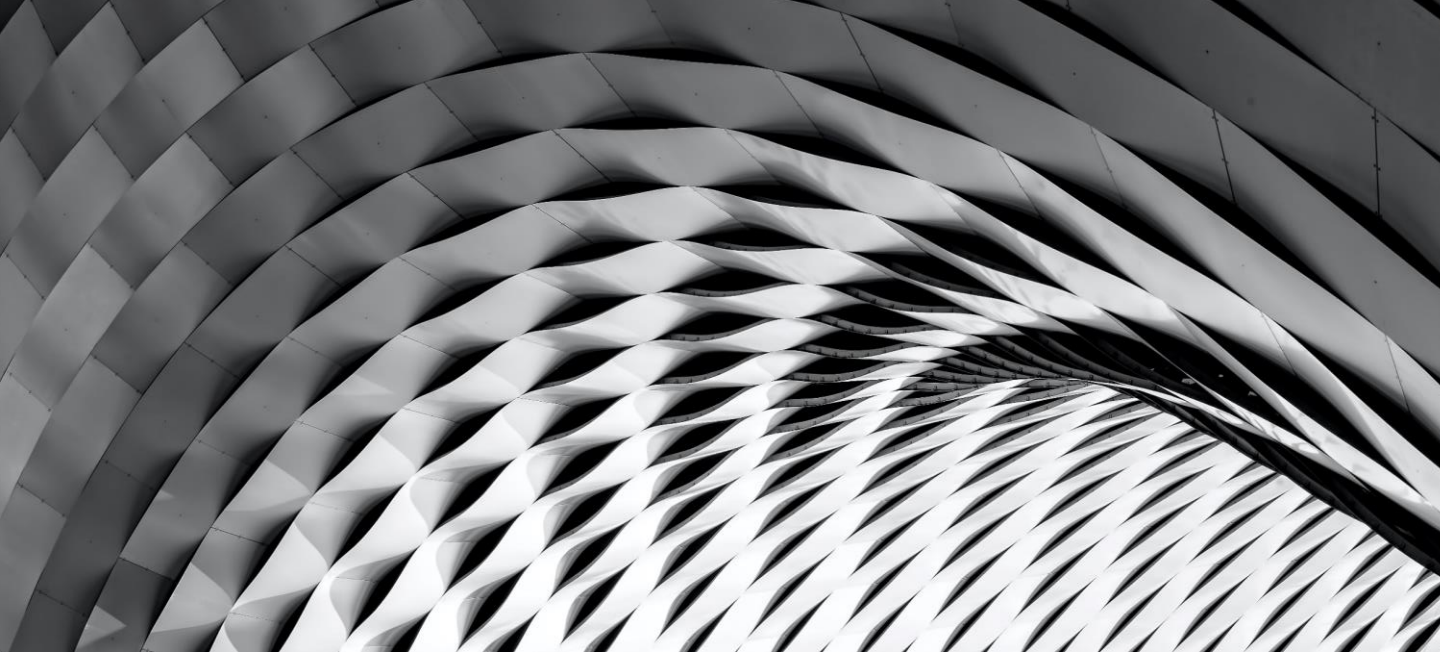
At a meeting of the executive committee in February 2018, the CEO made a comment that, "these millennials will never stop until they have my job and you guys had better get used to it." He also told Mr Cowie that he was "an old fossil and did not know how to deal with millennials".

In October 2018, without Mr Cowie's knowledge, an executive search agency was engaged to find a replacement for him. In August 2019, he was told that his employment was to be terminated and he was placed on garden leave.

Mr Cowie requested written reasons for dismissal and was given a letter stating that that the company had lost confidence in his inability to manage the business effectively, citing that the foundry division was going to miss its profit target, key strategic objectives and key working capital objectives. Mr Cowie had never been told that there were concerns about his performance.

The Tribunal upheld Mr Cowie's claims for direct age discrimination and unfair dismissal, finding that the CEO's comments showed that questions about Mr Cowie's competence and his age group were clearly linked in the CEO's mind. In addition, the policy to recruit people aged under 45 went beyond succession planning and suggested a mindset where assumptions were made about people and their abilities because of their age. A significant number of other senior managers in their 50s and 60s had also been dismissed across the organisation.

Mr Cowie's dismissal was also found to be procedurally and substantively unfair. He had been given no advance notice of the dismissal or reasons for it. He had no opportunity to improve performance before the decision to dismiss was taken and no opportunity to put his case as to why he should not be dismissed.



In **Sunderland v Superdry plc**, the Tribunal held that a failure to promote a fashion designer who was seen as a "low flight risk" was discrimination because of her age.

Ms Sunderland was a fashion designer with over thirty years' experience and was employed by Superdry plc from 2015 until 2020. In 2017, two other designers in the department were promoted to senior designer. Ms Sunderland queried why she had not been promoted and was told that she needed to undertake other responsibilities in order to progress to this position. A number of other designers, younger than Ms Sunderland, were subsequently promoted or recruited to more senior roles.

In June 2019, Ms Sunderland was told to cover for another designer who was on maternity leave. This led to her effectively doing two full-time jobs at the busiest design period resulting in a very demanding workload. Despite this, a reorganisation at the end of 2019 resulted in four other designers being given the job title of lead designer with Ms Sunderland being overlooked again. In July 2020, she resigned stating that she found her situation at Superdry humiliating.

The Tribunal upheld Ms Sunderland's claims for direct age discrimination and unfair constructive dismissal, finding that the failure to promote Ms Sunderland and the considerable increase in her workload constituted less favourable treatment on the grounds of age.

The Tribunal noted appraisal documents in which Ms Sunderland's "flight risk" was assessed to be low and concluded that this was based on a perception relating to her age. The reasons given by Superdry for not promoting Ms Sunderland were not accepted and the Tribunal concluded that "a similarly valuable designer who was significantly younger" than Ms Sunderland probably would have been promoted.

The Tribunal accepted that Ms Sunderland had resigned in response to the lack of recognition and the unreasonable workload, and that Superdry's treatment of Ms Sunderland was a breach of the implied duty of mutual trust and confidence.

Ms Sunderland was awarded total compensation of **£96,208.70**

In **Bandura v Fernandez**, the Tribunal held that the dismissal of a butcher was age discrimination after the employer prevented him returning to work after a brief illness and then told him he was being retired.

Mr Bandura was employed as a butcher in a shop from January 2000 until his dismissal in 2019.

On 10 July 2019, Mr Bandura had to leave work to go to A&E. He was diagnosed with an episode of ulcerative colitis and discharged from hospital after three nights with a clean bill of health and no recommendation for him to see his GP.

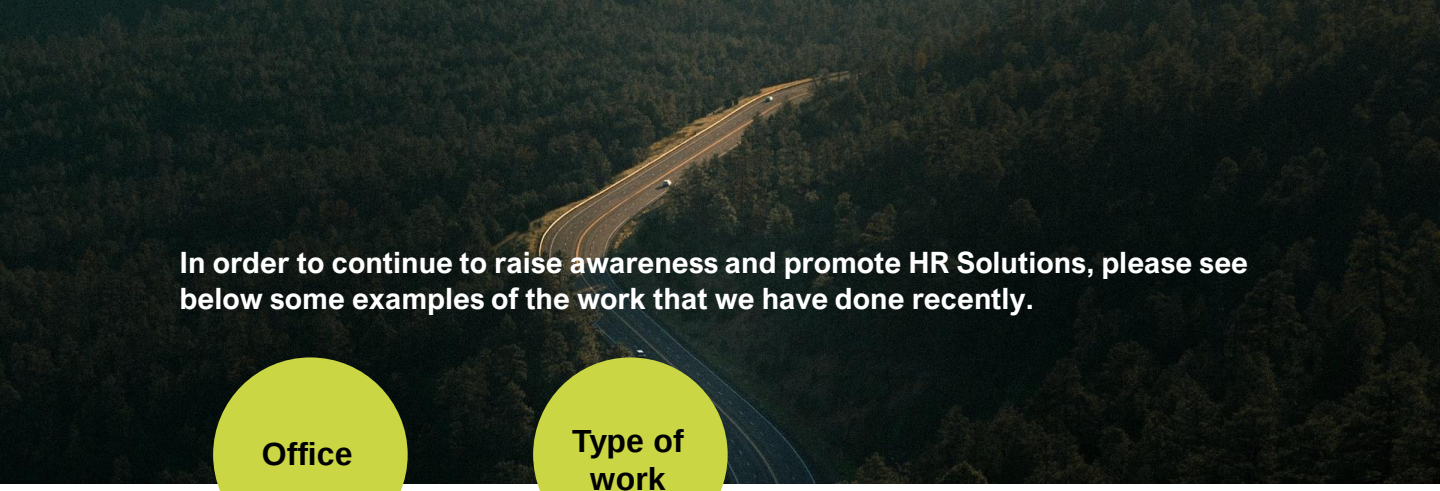
Mr Bandura told the owner of the shop that he was fully fit and ready to return to work; however, the owner told him to remain at home and recover. On 1 August, the owner put Mr Bandura on SSP even though he was not ill and did not have a fit note, and also employed another butcher who was much younger than Mr Bandura. The owner continued to refuse to allow Mr Bandura to return to work, eventually dismissing him on 4 October 2019 by posting his P45 to him and telling him he had been retired.

The Tribunal upheld Mr Bandura's claims for age discrimination and unfair dismissal, rejecting the employer's claims that his dismissal was due to health and safety concerns, Mr Bandura's failure to provide evidence that he was well (which he had not been asked for) and some conduct issues (which had never been raised with him). the owner. It found that the reason for dismissal was retirement and therefore inextricably linked with Mr Bandura's age.

Mr Bandura was awarded total compensation of **£121,462**.

Employers should ensure that an employee's age is not a factor in a decision to dismiss. Succession planning should incorporate flexibility around expectations of when employees will retire, and factors related to an employee's age, such as their presumed likelihood of leaving the organisation, should not be used as the basis for decisions about career development. Employers should also be careful not to make age-related assumptions about an employee's health; decisions about health-related capability should be based on medical evidence relating to the individual.

HR Solutions can advise you on how to avoid discrimination, We can also assist you with effective succession planning and advise on genuine absence / capability management.



In order to continue to raise awareness and promote HR Solutions, please see below some examples of the work that we have done recently.

Office	Type of work
London	Conducting a redundancy consultation process, including: attending all individual consultation meetings in an HR advisory capacity and facilitating the redundancy discussions; advising on the process and statutory payments; and provision of all relevant letters to the individual employees at risk of redundancy.
Thames Valley	Assigning Certificate of Sponsorship to migrant worker for Skilled Worker Visa extension, and advising on the Visa application
Maidstone	Preparation of Consultancy Agreement
London	Advice regarding employee on long-term sickness absence and potential Unlawful Deduction from Wages claims

We can provide support on an hourly, fixed-fee or retainer basis so there are a number of options available for clients according to their needs; as you can see from the above examples, we can assist with a large project or a one-off piece of advice.

Caz and Stephanie

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Now, for tomorrow