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Employment Law

Disability discrimination & Family rights

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Agenda

PART 1 – Disability Discrimination

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Disability

A person (P) has a disability if P has a **physical or mental impairment**, that has a **substantial** and **long-term adverse effect** on their ability to carry out **normal day-to-day** activities.

Disability – meaning of “impairment”

McNicol v Balfour Beatty [2002] IRLR 711, impairment in this context bears "its ordinary and natural meaning... It is left to the good sense of the tribunal to make a decision in each case on whether the evidence available establishes that the applicant has a physical or mental impairment with the stated effects"

Disability – meaning of “substantial”

Substantial = more than minor or trivial

Disability – meaning of “long term”

Long-term effect = lasted at least 12 months; likely to last 12 months; or likely to last for the rest of the life of the person affected.

Likely = could well happen (*SCA Packing Ltd v Boyle*)

Note: past disabilities and reoccurring conditions

Disability – meaning of “normal day-to-day”

Examples include: shopping, reading and writing, having a conversation or using the telephone, watching television, getting washed and dressed, preparing and eating food, carrying out household tasks, walking and travelling by various forms of transport, and taking part in social activities

Case Study

Khorochilova v Euro Rep Ltd

- Tribunal should not apply a rigid sequential approach. In cases where a mental impairment is disputed, the focus of the tribunal's enquiry should be on the effect the impairment has on an employee's day-to-day activities.
 - If the tribunal finds a long-term substantial adverse effect, it will, in most cases, follow "as a matter of common sense inference" that the claimant is suffering from an impairment which has produced that effect.
 - However: *"there can be no error of law in seeking to identify whether or not a person has an impairment as that is what the statute expressly requires"*
 - In Khorochilova, claimant said she had "mixed personality disorder". Tribunal considered impairment first, decided that she didn't have one. Claimant argued that they didn't then properly consider the effect of the disorder.
 - EAT said approach was fine.
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Deemed disabilities vs excluded conditions

Deemed disabilities (automatic protection):

- Blindness, severe sight impairment, sight impairment and partial sightedness (not colour blindness)
- Severe disfigurements, with the exception of unremoved tattoos and piercings
- Cancer, HIV infection and multiple sclerosis

Excluded conditions (but careful to consider disabilities arising out of these conditions - *Power v Panasonic [2003] IRLR 151*)

- Addiction to alcohol, nicotine or any other substance (although this does not apply where the addiction was originally the result of the administration of medically prescribed drugs or other medical treatment)
Tendency to set fires, steal or to commit physical or sexual abuse
 - Exhibitionism
 - Voyeurism
 - Tattoos and body piercings
 - Seasonal allergic rhinitis (i.e. hayfever)
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Case Study

Lofty v Hamis

- Employee has “lentigo maligna”. Described variously by her doctors as “pre-cancerous” or “in-situ cancer”.

What is your approach?

“Invisible” disabilities

You cannot be liable for disability discrimination unless you knew or ought to have known about the existence of the disability.

Be particularly alert to the possibility that the employee themselves is not fully aware of their disability: *Fotheringham v Perth & Kinross Council/ET/114087/11*

Examples of so-called "hidden" or "invisible" disabilities include:

Asperger's syndrome
Autism spectrum disorder (ASD)
Attention deficit hyperactivity disorder (ADHD)
Dyslexia
Dyspraxia
Obsessive compulsive disorder (OCD)
Post-traumatic stress disorder (PTSD)
Diabetes
Epilepsy
Depression and other mental health conditions

Case Study Sherbourne v N Power Ltd

- Autistic employee worked in an open plan setting.
- There was a busy walkway behind him; he said this caused him to feel “overwhelmed and distracted”.
- He became distressed and had a breakdown at work.

Thoughts?

Who is protected?

- Protects job applicants and those “in employment”.
- If an employee discriminates against or harasses another, the employer will be liable for any discrimination or harassment unless it has taken **reasonable steps** to prevent such conduct. The offending employee may also be liable.

Types of discrimination

Normal direct and indirect discrimination, harassment and victimisation, plus:

- Treating applicants/employees unfavourably **because of something arising out of** disability without objective justification
 - Failing to comply with the duty to make reasonable adjustments
 - Asking applicants pre-employment health questions other than for a prescribed reason
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Direct discrimination

Direct Discrimination

- Direct disability discrimination occurs where, because of disability, a person (A) treats another (B) less favourably than A treats or would treat others
 - It is not direct discrimination for an employer to treat a disabled person more favourably than it treats or would treat a non-disabled person.
 - Direct disability discrimination cannot be objectively justified.
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Comparator

- Employees must show that they have been treated less favourably than a real/hypothetical comparator whose circumstances are not materially different to theirs.
- The reason must be the disability itself, not merely something related to the disability
- The disability must be the conscious/subconscious reason for the treatment, therefore there must be evidence that the employer knew of the disability.

An employer withdraws a job offer made to a disabled applicant. The costs of the support necessary to enable her to do her job are too high.

Is this direct discrimination?

Indissociability

Employee with multiple health issues is denied the opportunity to be posted overseas following medical concerns raised in an occupational health assessment. The employee argues that the reason the employer did not allow him to be posted overseas was **indissociable** from his disabilities.

This argument, and his direct discrimination claim, failed.

Discrimination arising from disability

- A treats B **unfavourably** because of **something arising** in consequence of B's disability and A cannot show that the treatment is a proportionate means of achieving a **legitimate aim**.
 - An employer cannot be liable unless it knew (**or should have known**) about the claimant's disability.
 - Employers must take reasonable steps to find out if a worker is disabled.
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Unfavourably, not less favourably

- No comparator required.
 - No statutory definition.
 - It is enough that the worker can reasonably say that they would have preferred to be treated differently.
 - Employees cannot make claims for associative discrimination arising from disability.
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Treatment "because of something arising in consequence of B's disability"

- The unfavourable treatment must be because of something that arises in consequence of the employee's disability.
 - The consequences of a disability include anything which is the result, effect or outcome of a disabled person's disability, e.g.
 - An inability to work unaided or a need for regular rest breaks or toilet breaks
 - Restricted diet
 - Slower typing speeds
 - Regular hospital appointments
 - Difficulties in using public transport
 - A need for specialist computer equipment
 - A need for private and/or quiet working environment
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Objective Justification

Is the unfavourable treatment
objectively justifiable?

- The unfavourable treatment must be a proportionate means of achieving a legitimate aim.
 - To be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so.
 - Tribunals will consider whether a lesser measure could have achieved the employers legitimate aim.
 - The Tribunal will consider whether the measure taken was proportionate at the time the unfavourable treatment was applied.
 - It is good practice to weigh up the options available and be ready to explain your reasoning for implementing a particular measure.
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Harassment

- A engages in unwanted conduct related to disability.
- The conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
- Deciding whether conduct has the effect referred to above, each of the following must be considered:
 - B's perception.
 - The other circumstances of the case.
 - Whether it is reasonable for the conduct to have that effect.

Victimisation

- Victimisation occurs where a person (A) subjects another person (B) to a detriment because B has done, intends to do, or is suspected of doing or intending to do, any of the following protected acts:
 - Bringing proceedings under the EqA 2010.
 - Giving evidence or information in connection with proceedings under the EqA 2010, regardless of who brought those proceedings.
 - Doing any other thing for the purposes of or in connection with the EqA 2010.
 - Alleging that the discriminator or any other person has contravened the EqA 2010.
 - There is no protection if a person makes allegations or gives evidence which they know to be false, however a person who complains mistakenly but in good faith is protected.
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Association and perception

- An employer treats an employee less favourably because of the disability of another person.
 - An employer treats an employee less favourably because they perceive that the employee is disabled.
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Case study

- Richard Danson runs a airport. One of his employees has a son with a disability. As a result Richard treats the employee less favourably.
 - This would be an example of disability discrimination based on association.
 - Caesar Julius runs a costume shop. He wrongly believes that his employee Cameron Davidson is suffering from some form of anxiety that meets the definition of a disability. As a result he moves Cameron from the shop floor to the back room.
 - This would be an example of disability discrimination based on a perceived characteristic.
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Pre employment questions practical guidance

- Disabled people can be put off applying for jobs because of pre-employment health questions. Section 60 of the EqA 2010 was introduced to address this problem. It:
 - prohibits employers from asking potential recruits questions about health, other than for prescribed reasons.
 - shifts the burden of proof automatically to the employer where a job applicant who has been asked a prohibited health question brings a direct disability discrimination claim.
 - applies whether the employer asks the question of the applicant or asks the applicant's former employer by way of a reference request.
 - applies where an agent or employee of the employer, rather than the employer itself, asks the questions.
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Burden of Proof

- Asking an applicant a prohibited pre-employment health question will not, in itself, amount to discrimination.
 - However, asking a pre-employment health question for a non-prescribed reason might lead to the shifting of the burden of proof in a direct disability discrimination claim.
 - The burden of proof will only shift in direct disability discrimination claims if a job applicant argues that the employer's conduct complained of was "in reliance on information given in response to" a prohibited health question. Employer will have to show that no direct discrimination took place.
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Burden of Proof

- If the burden of proof shifts, the employer could avoid liability by showing that the specific disability was not its reason for rejecting the applicant .
 - The employer could avoid direct discrimination by showing that it rejected the applicant because of the consequences of the disability, rather than simply the existence of the disability.
 - The employer will then has to show **objective justification** to avoid liability for indirect discrimination.
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Circumstances when you can ask health questions

- The following questions will not be prohibited where the questions are necessary for the purpose of any of the following:
 - Establishing if the applicant will be able to undergo an assessment, or establishing if a duty to make reasonable adjustments is (or will be) imposed on the employer in relation to the applicant undergoing an assessment.
 - Establishing if the applicant will be able to carry out a function that is intrinsic to the work concerned.
 - Monitoring diversity.
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Circumstances when you can ask health questions

- Taking action under section 158 (permitted positive action).
 - If there is a genuine occupational requirement to have a particular disability, establishing whether the applicant has that disability.
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Responding to a job applicant who voluntarily discloses health issues

- The employer must ensure that in responding to this disclosure it only asks questions that are permitted. The employer may respond by asking further questions about reasonable adjustments that would be required to enable the person to carry out an intrinsic function of the job.
 - However, the employer must not respond by asking questions about the applicant's disability or health that are irrelevant to the ability to carry out the intrinsic function.
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Reasonable Adjustments

Who is protected?

- Employees, workers and some self employed.
- For the duty to arise in respect of a potential job applicant, that individual must be an "interested" disabled person. An employer will not be obliged to make reasonable adjustments on the off chance that a disabled person might apply for a job.

When does the duty arise?

- The employer must take reasonable steps to avoid the disadvantage
 - Where a provision, criterion or practice puts a disabled person at a substantial disadvantage in comparison with those who are not disabled
 - Where a physical feature of the employer's premises puts a disabled person at a substantial disadvantage in comparison with those who are not disabled
 - Where a disabled person would, but for the employer's provision of an auxiliary aid, be put at a substantial disadvantage in comparison with those who are not disabled
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Provision, criterion or practice (PCP)

- Includes formal/informal practices, policies and arrangements and may in certain cases include one-off decisions.
 - A claimant might be put at a substantial disadvantage by a PCP even where they are not themselves required to comply with it.
 - Arguably a PCP will only give rise to a duty to make reasonable adjustments if it is related in some way to the job, rather than simply to the personal needs of the disabled person.
 - The ECHR code states: “There is no requirement to provide or modify equipment for personal purposes unconnected with a worker's job, such as providing a wheelchair if a person needs one in any event but does not have one. The disadvantages in such a case do not flow from the employer's arrangements or premises.”
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Case study

Kenny v Hampshire Constabulary

- A applicant with cerebral palsy needed assistance going to the toilet. He was given a conditional offer of employment subject to the employer being able to make appropriate arrangements for his needs.
 - The employer withdrew the offer when it realised it could not find any employees to provide the necessary assistance.
 - The applicant claimed that the employer had failed to make reasonable adjustments. The EAT held that the employer's decision was not discriminatory because it was going too far to suggest that employers were under a statutory duty to provide carers to attend to an employee's personal needs.
 - This decision should be treated with caution...
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Physical Features

- A feature arising from the design/construction of a building.
 - A feature of an approach to, exit from or access to a building.
 - A fixture or fitting, furniture, furnishings, materials, equipment or other chattels, in or on premises.
 - Any other physical element or quality.
 - The ECHR Code provides a non-exhaustive list:
 - steps, stairways, kerbs, exterior surfaces and paving, parking areas, building entrances and exits (including emergency escape routes), internal and external doors, gates, toilet and washing facilities, lighting and ventilation, lifts and escalators, floor coverings, signs, furniture and temporary or movable items
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Case study

- Pat Murdoch is a visually impaired lawyer working at Nielsen's law. Clear glass doors at the end of a corridor have been fitted in his workplace. Due to Pat's visual impairment, the glass doors present a hazard.
 - This is a substantial disadvantage caused by the physical features of the workplace.
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Auxiliary aids and services

- An auxiliary aid is something which provides support or assistance to a disabled person.
 - It can include provision of a specialist piece of equipment e.g. an adapted keyboard.
 - Auxiliary aids include auxiliary services; e.g. provision of a sign language interpreter.
 - Where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in comparison with those who are not disabled, the employer must take such steps as it is reasonable to have to take to provide the auxiliary aid.
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Substantial disadvantage

- The employer does not have an automatic duty to make adjustments once a job applicant or employee is found to be disabled. The duty only arises where a ‘substantial disadvantage’
 - Substantial = more than minor or trivial
 - An employer is not under a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know about the disability
 - It is necessary to establish the comparator group; the group of non-disabled people who are not disadvantaged (or who are substantially less disadvantaged than the disabled person) by the PCP in question.
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Potential adjustments

- Making adjustments to premises e.g. widening a doorway.
 - Providing information in accessible formats, e.g. manuals in braille.
 - Allocating some of a disabled person's duties to another worker.
 - Transferring a disabled worker to fill an existing vacancy.
 - Altering a disabled worker's hours of working or training
 - Assigning a disabled worker to a different place of work or training, or arranging home working.
 - Allowing a disabled worker to be absent during working or training hours for rehabilitation, assessment or treatment.
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Potential adjustments

- Giving, or arranging for, training or mentoring
 - Acquiring or modifying equipment
 - Modifying procedures for testing or assessment
 - Providing a reader or interpreter
 - Providing supervision or other support
 - Allowing a disabled worker to take a period of disability leave
 - Participating in supported employment schemes
 - Employing a support worker to assist a disabled worker
 - Modifying disciplinary or grievance procedures
 - Modifying performance-related pay arrangements
 - Adjusting redundancy selection criteria
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Reasonableness

- Employers will not breach the duty to make adjustments unless it fails to make an adjustment which is **reasonable**. Factors which will be considered:
 - Will the adjustment work?
 - Is the adjustment practicable?
 - The financial and other costs of the adjustment, and the extent to which the step would disrupt the employer's activities.
 - The resources available to the employer.
 - The availability of external financial or other assistance.
 - Employer's activities and the size of the undertaking.
 - Where the adjustment would be taken in a private household, the extent to which the step would disrupt the household and residents.
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Making the adjustment

- There is no onus on a disabled person to suggest adjustments.
 - The duty to consider making reasonable adjustments falls on the employer.
 - It is good practice for the employer to ask the disabled employee about possible adjustments
 - It is not reasonable for an employer to pass on the costs of complying with the duty to make reasonable adjustments to the disabled person.
 - An employer should ensure that a disabled employee's immediate manager is fully aware of the adjustments made. This information should be passed on to any new manager when either the employee changes roles or their line management changes.
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Agenda

PART 2 – Family rights

- 1 Maternity and adoption
- 2 Paternity
- 3 Shared parental leave
- 4 Parental leave
- 5 Time off for antenatal care
- 6 Time off for dependents

Maternity rights – the basics

NOTE: primary adopters (male or female) get the same rights.

- 52 weeks off. 2 weeks are compulsory (4 weeks for factory workers).
 - First 26 weeks = “ordinary maternity leave”
 - Second 26 weeks = “additional maternity leave”
 - If mother is eligible, statutory maternity pay is payable for 39 weeks
 - First 6 weeks = 90% pay
 - Remaining 33 weeks = statutory rate (currently £156.66) or 90% pay, whichever is lower.
 - Can take up to 10 paid KIT days without ending maternity leave.
 - All terms and conditions relating to employment continue to apply except those relating to pay – so holiday continues to accrue, continuous service continues etc.
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Notification requirements

- Expectant mother should notify employer as soon as possible of EWC (expected week of confinement). They will normally use form MATB1 for this (completed by medical professional).
 - Earliest leave can start is 11 weeks before EWC. Mother needs to give 8 weeks' notice of when she wants it to start/if she wants to change her start date.
 - Leave will start automatically:
 - If baby is born early (starts the day after)
 - If mother is sick for a pregnancy-related reason in the 4 weeks before birth.
 - Employer will assume that mother wants to take 52 weeks unless mother advises otherwise. Mother has to give 8 weeks' notice to return to work early.
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Eligibility

- All new mothers are entitled to maternity leave, irrespective of length of service.
 - New mothers that have been employed for at least 26 weeks as at the qualifying date (which is 15 weeks before the EWC) are entitled to statutory maternity pay.
 - If mother is not eligible for SMP, she may be able to claim maternity allowance (employer will need to provide form SMP1)
 - New mothers whose babies die after the qualifying date (i.e. after 24 weeks) are still entitled to maternity leave.
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Adoption leave and pay

- Primary adopters are eligible to receive statutory adoption pay in the same way that new mothers are
 - provided they have 26 weeks' service in the week in which they are notified of having been matched with a child .
 - It is paid at the same rate as SMP.
 - Similar notification requirements.
 - Terms and conditions of employment continue apart from those relating to pay.
 - Can work 10 KIT days without bringing their leave to an end.
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Returning to work from maternity or adoption leave (primary adopter)

- Employees that return after taking only ordinary maternity leave or ordinary adoption leave are entitled to return to the same job.
- Employees that return after taking additional maternity leave or additional adoption leave are entitled to return to the same job, unless it is not reasonably practicable for them to return to that job, in which case they are entitled to return to a suitable alternative job on no less favourable terms.

Returning to work – case examples

- *Raithatha v Addleshaw Goddard ET/2406019/05*
- *Stelfox v Westco Building Components Ltd ET/15083/95*

Paternity rights – the basics

NOTE – secondary adopters (male or female) get the same rights

- 2 weeks off – has to be taken within the first 56 days of the birth, has to be taken in one “block”.
 - If the employee is eligible (same eligibility requirements as women taking maternity leave), they can get statutory paternity pay which is the lower of:
 - £156.66; or
 - 90% of the employee's normal weekly earnings
 - No such thing as additional paternity leave anymore (replaced by shared parental leave) but you will still see the 2 week entitlement referred to as “ordinary paternity leave”.
 - All terms and conditions (except those relating to pay) continue to apply during paternity leave.
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Discrimination issues relating to paternity pay

- Since paternity leave can be taken by members of either sex, **the appropriate comparator for a man taking paternity leave** is not a woman taking maternity leave but **a woman taking paternity leave**.
 - It is not discriminatory to offer enhanced maternity pay, and not offer enhanced paternity pay.
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Shared parental leave and pay

- New (ish) concept introduced in 2015
 - Allows new parents to share 50 weeks of leave between them (remembering mother must take the first 2 weeks off after child birth)
 - Mother has to formally curtail her maternity leave and both parents have to opt-in to shared parental leave.
 - Eligible parents can receive 39 weeks' worth of shared parental leave pay, *minus* whatever maternity/paternity leave pay has already been paid (i.e. they will only ever actually be able to share 37 weeks' pay because of compulsory maternity leave)
 - Parents can take time off together, or separately, or a mixture of the two. Minimum period of SPL is 1 week.
 - Parents can take up to 20 SPLIT days whilst on SPL without bringing SPL to an end.
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Shared parental leave - example

- Heterosexual couple having a baby.
 - Mum has to take the first 2 weeks as maternity leave
 - Thereafter the couple have chosen to take shared parental leave.
 - Mum and Dad both take the next 10 weeks off together (so in total, the couple have used 20 weeks of their 50 week entitlement).
 - Dad stays off work whilst Mum goes back, taking 1 week in every 4 weeks as shared parental leave (roughly, they use 5 weeks' SPL each month between them).
 - They can therefore continue with this pattern for approximately 6 months (meaning they will have exhausted SPL 9 months after the birth)
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Parental leave

- Each parent can take up to 18 week off (unpaid) for each child.
 - It's 18 weeks in total – irrespective of your employer i.e. if you took 6 weeks in a previous job, you only have 12 weeks left.
 - Leave must be taken before the child's 18th birthday. You can't take more than 4 weeks per year and each period has to be at least 1 week (except in cases where the child is disabled)
 - Leave must be taken “for the purposes of caring for a child” – examples include:
 - Spending more time with children.
 - Looking at new schools.
 - Settling a child into new childcare arrangements.
 - Spending more time with family (for example, visiting grandparents)
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Parental bereavement leave and pay

- Introduced from 2020
 - Leave available to employees (no minimum service)
 - Pay only available to employees with 6 months' service
 - Statutory pay = £156.66 per week
 - Applies on death of child under 18, including a stillbirth after 24 weeks of pregnancy
 - Right available for parents including adoptive parents, prospective adopters, intended parents under surrogacy arrangements or parents 'in fact', or the partner, but not paid carers
 - 2 weeks paid leave (which can be taken as 2 separate or continuous weeks) to be used within 56 weeks of death or stillbirth
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Time off for antenatal care

- Pregnant women are entitled to paid time off for attending antenatal care appointments – regardless of length of service.
 - Antenatal care is not defined by legislation. It is not restricted to medical examinations and can include relaxation classes and parentcraft classes, provided that these are recommended by a registered medical practitioner, registered midwife or registered health visitor.
 - The mother's partner is entitled to accompany the mother to up to 2 antenatal appointments, lasting no longer than 6 hours. The partner's leave is unpaid (unless the employer provides an enhanced entitlement).
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Time off for adoption appointments

- Employees seeking to adopt on their own can take paid time off for up to 5 appointments
 - Employees seeking to adopt with someone have the same right and the other party can take unpaid time off for up to 2 appointments
 - Time off for each appointment capped at 6.5 hours
 - Time off can be refused if reasonable
 - Pay = usual rate of pay (note normal working hours vs working hours that vary week to week)
 - Rights available to agency workers as well
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Time off for dependants

A "dependant" is defined as a spouse, civil partner, child or parent (but not grandparent) of the employee, or a person who lives in the same household as the employee (excluding tenants, lodgers, boarders and employees)

- Employees have the right to take a "reasonable" amount of unpaid time off to take "necessary" action to deal with particular situations affecting their dependants (s57A and 57B, ERA 1996)
 - “Necessary” circumstances include:
 - To provide assistance if a dependant falls ill, gives birth, is injured or assaulted.
 - To make care arrangements for the provision of care for a dependant who is ill or injured.
 - In consequence of the death of a dependant.
 - To deal with the unexpected disruption, termination or breakdown of arrangements for the care of a dependant.
 - To deal with an unexpected incident which involves the employee's child during school hours.
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**Thank you for
listening
any questions?**

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— Resources:

Lofty v Hamis (t/a First Café) UKEAT/0177/17
Khorochilova v Euro Rep Ltd UKEAT/0266/19
Power v Panasonic [2003] IRLR 151)

Ladele v London Borough of Islington [2010]
IRLR 211

McFarlane v Relate Avon Ltd [2010] IRLR 196

SCA Packaging Ltd v Boyle [2009] UKHL 37

McNicol v Balfour Beatty [2002] IRLR 711

Sherbourne v N Power Ltd ET1811601/2018

Fotheringham v Perth & Kinross

Council/ET/114087/11

Kenny v Hampshire Constabulary [1999] ICR 27

Raithatha v Addleshaw Goddard ET/2406019/05

Stelfox v Westco Building Components Ltd

ET/15083/95

Equality Act 2010 Guidance:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/570382/Equality_Act_2010-disability_definition.pdf

ACAS Guidance:

<https://archive.acas.org.uk/disability>

EHRC Statutory Code of Practice:

<https://www.equalityhumanrights.com/en/publication-download/employment-statutory-code-practice>

ACAS Guidance on family rights;

<https://www.acas.org.uk/maternity-paternity-and-adoption-leave-and-pay>

<https://www.capital-law.co.uk/news/2021/04/30/maternity-adoption-and-shared-parental-leave/>
