

Employment law update for CIPD tutors and students

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This document is primarily intended for tutors and students studying the employment law module of CIPD's Advanced Level Qualifications. Those studying the CIPD's Intermediate Level Qualifications and HR practitioners may also find it useful.

It provides a comprehensive update on the most important employment law developments in the UK and anticipates further changes. It is updated every six months and is divided into four sections:

- Important statutory developments since the last update
- Significant court and tribunal decisions, focusing on judgments that have the most actual or potential consequences for HRM practice. It also gives brief summaries of cases that, while not hugely significant in their impact, are nonetheless interesting or remarkable in some way.
- Key future developments in employment law
- Useful sources of further information.

The law is stated as at 14 January 2019. You can keep up to date with legislative and case law developments since this document was written by going to the Employment Law section of the CIPD website: www.cipd.co.uk/knowledge/fundamentals/emp-law

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Introduction

The past year has been relatively quiet as far as new statutes in the field of employment law is concerned. The introduction of new regulations on data protection is the only major development, although we did, of course, see the first snapshot reports on equal pay in organisations published in April 2018. There have, however, been an unusually large number of important employment-related cases decided in the courts, some of which have very real potential consequences for practical HR management.

When it comes to the future, while there are few definite changes of significance planned for the next year, longer term we are likely to see some major new law coming onto the statute book, in large part implementing recommendations from the 2017 Taylor report (see p24 below).

It remains unclear exactly how Brexit in March 2019 (if it happens then) will affect employment rights, both in the short and the long term. We know that all existing EU employment law will be retained in the short term. We do not know how far future UK parliaments will be able to alter the substance of this law in the longer term, how significant in practice European Court of Justice (ECJ) rulings will continue to be in the UK, or even whether or not the UK will agree to be bound by future changes in EU employment regulation as part of a long-term deal to retain good single market access. Ministers have made it clear that in the event of a so-called 'no deal Brexit' no substantive changes to employment law will be made at all. There may be some changes in terminology but nothing more.

The other point to note by way of introduction is the rise in the number of claims coming to the employment tribunals in the wake of the abolition of tribunal fees in 2017. The number remains well below its previous levels, but this could be due to the persistence of historically low levels of unemployment and tight labour market conditions. The following table demonstrates how the number of claims has fluctuated in recent years thanks to the introduction and subsequent withdrawal of the fee system:

2013	January to March	57,737
	April to June	44,335
	July to September	39,514
	October to December	9,801
2014	January to March	6,054
	April to June	4,245
	July to September	4,653
	October to December	5,008
2015	January to March	4,878
	April to June	4,783
	July to September	4,592
	October to December	4,610
2016	January to March	4,411
	April to June	4,501
	July to September	4,528
	October to December	4,586
2017	January to March	4,506
	April to June	4,459
	July to September	7,471
	October to December	8,721
2018	January to March	9,789
	April to June	11,682
	July to September	9,592

It is also worth noting that almost £16 million has so far been returned to claimants who paid tribunal fees between 2013 and 2017.

Major statutory developments

The law is stated as at 14 January 2019

Increases to redundancy and unfair dismissal compensation limits

For terminations occurring on or after 6 April 2018 the maximum figure that can be used to calculate 'a week's pay' when calculating the appropriate statutory redundancy or basic awards in cases of unfair dismissal is £508. The maximum compensatory award for unfair dismissal is £83,682. The maximum basic award now stands at £15,240.

National Living Wage and National Minimum Wage

As of 1 April 2018 hourly rates increased as follows:

- | | |
|---------------------------------------|-------|
| • National Living Wage (for over 25s) | £7.83 |
| • National Minimum Wage (21–24 years) | £7.38 |
| • Development rate (18–20 years) | £5.90 |
| • Young workers rate (16–17 years) | £4.20 |
| • Apprentice rate | £3.70 |

From April 2019 the rates will rise as follows to:

- | | |
|---------------------------------------|-------|
| • National Living Wage (for over 25s) | £8.21 |
| • National Minimum Wage (21–24 years) | £7.70 |
| • Development rate (18–20 years) | £6.15 |
| • Young workers rate (16–17 years) | £4.35 |
| • Apprentice rate | £3.90 |

Gender pay gap reporting

The Small Business, Enterprise and Employment Act 2015 requires all private sector organisations employing more than 250 people to publish details of any gender pay gap among their workers on a publicly available website in respect of a single 'data capture' or 'snapshot' day.

The requirement is to take a 'data snapshot' on 5th April each year and to publish it during the following 12 months. The first of these 'snapshot' days was 5 April 2017, and the first reports thus had to be published before 5 April 2018.

Similar reporting requirements apply to larger public sector organisations, but their first 'snapshot' date was 31 March 2017, and their first reports had to be published before 31 March 2018.

- All private sector and third sector employers who employ more than 250 people 'ordinarily working in the UK' are covered by the new regulations. Public sector employers are covered by another set of regulations which extend their existing equality duties.
- There is a requirement to calculate and publish the difference between both the mean and median hourly pay rates of pay earned by males and females (overtime, salary sacrifice schemes and benefits-in-kind are not included in the definition of 'pay' used for this purpose).
- Employers need to provide information about the number of men and women they employ by salary quartile.
- They also need to publish any differences between the mean bonus payments for men and women, as well as information on the proportion of men and women who received a bonus payment, in the past 12 months.

- The information gathered has to be published on a publicly-accessible website and remain posted there for at least three years. The report must be signed off by a senior employee of the organisation.

The Government Equalities Office report summarising the 2017/2018 pay gap data stated that 100% of organisations covered by the new regulations complied, 94% before their required deadline.

The House of Commons Business, Energy and Industrial Strategy select committee has published a report recommending that the duty to publish pay gap data should now be extended to all companies which employ more than 50 people.

Vento compensation guidance

In September 2017 the Presidents of Employment Tribunals took the step of issuing updated figures to be used by tribunals when determining compensation for injury to feelings in discrimination cases. They also announced that from now on the figures will be updated on an annual basis. The new figures are considerably higher, representing increases well in excess of inflation.

This is commonly known as 'Vento guidance' as a three-band approach was first introduced in the judgment of the case *Vento v Chief Constable of Yorkshire* (2003).

As of April 2018, the bands and ranges of compensation are as follows:

Band 1:	£900-£8,600 – for one-off occurrences
Band 2:	£8,600-£25,700 – for more serious cases and discrimination occurring on more than one occasion
Band 3:	£25,700-£42,900 – for 'severe' cases involving a lengthy campaign of seriously discriminatory actions.

General Data Protection Regulation (GDPR)

In May 2016, EU institutions approved a new General Data Protection Regulation (GDPR) which came into effect across all EU member states in May 2018. The new rules came into effect in the UK on 25 May.

The GDPR tightens up existing data protection law in a variety of ways. Some changes are quite fundamental. The detailed regulations are complex covering a range of specific duties to which 'data processors' as well as 'data controllers' are obliged to adhere. Much of these concern accurate record keeping when personal data is processed.

Personal data should now only be processed when one of six 'lawful bases' applies:

1. Consent: the individual has given clear consent for you to process their personal data for a specific purpose.
2. Contract: the processing is necessary for a contract you have with the individual, or because they have asked you to take specific steps before entering into a contract.
3. Legal obligation: the processing is necessary for you to comply with the law (not including contractual obligations).
4. Vital interests: the processing is necessary to protect someone's life.
5. Public task: the processing is necessary for you to perform a task in the public interest or for your official functions, and the task or function has a clear basis in law.
6. Legitimate interests: the processing is necessary for your legitimate interests or the legitimate interests of a third party unless there is a good reason to protect the individual's personal data

which overrides those legitimate interests. (This cannot apply if you are a public authority processing data to perform your official tasks)

New privacy notices have had to be drawn up and sent to all employees. These replace any standard clauses in contracts of employment, ensuring that each individual consents to personal data about them being processed by their employer. The need is for people to 'opt-in' and not merely fail to 'opt-out'. They must include details of the intended purposes for processing the personal data and a statement of the lawful basis for the processing (ie one of the six discussed above).

A new 'special category' of data replaces the previous 'sensitive data category'. It includes the same things (health, race, sex, sexual orientation, trade union membership etc) plus biometric and genetic data.

Individual rights relating to data held on them by their employers are expressed concisely as follows:

- the right to be informed
- the right of access
- the right to rectification
- the right to be forgotten
- the right to restrict processing
- the right to data portability
- the right to object
- rights in relation to automated decision making and profiling.

Subject access requests have to be dealt with satisfactorily in a calendar month, and no fee can be charged except where a request is 'manifestly unfounded or excessive'.

Employers are placed under a duty to notify the Information Commissioner when there is a breach of confidentiality.

Much more substantial fines can now be levied when organisations fail to comply with the regulations. For lower level breaches these can go up to €10m or 2% of global annual turnover, whichever is greater. In the case of upper level breaches the figure goes up to €20 million or 4% of global annual turnover for the preceding financial year, whichever is the greater.

Extensive and fairly user-friendly guidance about all aspects of the GDPRs is available on the Information Commission Office website.

Major developments in case law

Constructive dismissal

Brown v Neon Management (2018)

This case has various elements, but the point of law which is significant relates to the timing of a resignation prior to a claim of constructive dismissal being lodged. One of the claimants resigned in response to a change to his terms and conditions which removed access to a 'ring-fenced commission scheme'. He perceived that he would lose from this change, did not accept it and gave notice. The problem was that his contract specified a six-month notice period which he decided to fulfil. The court held that in accepting that element of his contract, he was effectively 'affirming the breach'.

In order to bring a successful case of constructive dismissal it is necessary to resign 'shortly after the breach' and to do so without giving notice.

Disability discrimination

South Warwickshire NHS Foundation Trust v Lee (2018)

Mutombo-Mpania v Angard Staffing Solutions (2018)

Williams v Trustees of Swansea University Pension and Assurance Scheme (2018)

The *South Warwickshire Trust* case concerned the withdrawal of a job offer due to the receipt of unsatisfactory references which included information about the claimant's disability (she suffered from arthritis) and the way that this affected her capacity to carry out her nursing duties. The EAT found that the decision to withdraw the job offer had been 'tainted' by references to absence and disability in one of the references and that this breached disability discrimination law. What should have happened is that the Trust should have sought further information and consulted Lee about what reasonable adjustments could be made to facilitate her employment.

The *Mutombo-Mpania* case concerned a situation in which a man suffering from hypertension claimed disability discrimination when dismissed for refusing to undertake night work over the Christmas period. The employer claimed that he had not only undertaken night work previously, but that he had never informed them that he had any disability. Indeed, when appointed he had completed an occupational health form which made no reference to any health condition. Mutombo-Mpania claimed that he had frequently made references to his condition in conversations and had on several occasions been absent because of it.

Both the ET and subsequently the EAT found in favour of the employer. Key here was the fact that the burden of proof is always on employees to show they have a disability which is covered by the Equality Act 2010. This claimant could not satisfy the court that his medical condition did amount to a disability and, moreover, even if he had, the fact that the employer was unaware of it meant that it had not acted unlawfully.

The *Williams* case concerned a man who suffered from Tourette's syndrome and had to retire on ill health grounds at the age of just 38. At that time he had worked for the university and had made pension contributions for 13 years. During the first 10 of these he worked full-time, moving onto a part-time contract (50%) as a result of his disability for his final three years of service. He had requested this change and it was granted as a 'reasonable adjustment'. As this was a final salary pension scheme, his ill health retirement package was calculated on a part-time basis. It thus had only half of the value it would have had if he had remained on a full-time contract through to retirement. Williams argued that this amounted to a detriment and unlawful discrimination arising from his disability.

The EAT, the Court of Appeal and the Supreme Court all found against Williams. They said that he had not suffered any disadvantage. In fact he had been treated more favourably than colleagues who were not disabled in being able to claim a pension for life at the age of 38. He had indeed been

treated less favourably than he would have liked in an ideal world, but that did not amount to a detriment in law.

Parental leave

Tribunalul Botosani and Ministrul Justitiei v Dicus (2018)

In its ruling in this Romanian case, the ECJ decided that paid holiday does not accrue when someone takes a period of parental leave (ie that provided for under EU law rather than 'shared parental leave' in the UK system). The court made a distinction between parental leave which is planned, foreseeable and not associated with incapacity, and both sick leave and maternity leave during which paid holiday does accrue.

A note of caution needs to be sounded in respect of UK law here, as a factor in the decision was that in Romania the contract of employment is suspended during periods of parental leave. That is not the case in the UK. So it is possible that this judgment does not constitute good law in the UK.

Vicarious liability

Barclays Bank v various claimants (2018)

Wm Morrison Supermarkets v various claimants (2018)

Bellman v Northampton Recruitment (2018)

We have had three significant judgments this year relating to situations in which vicarious liability applies. The first two extend the law in important ways. The third reminds us of an important established principle.

The *Barclays Bank* case concerns a class action from 126 employees and former employees who were sexually assaulted by a doctor when undergoing pre-employment medicals on various dates between 1968 and 1984. The doctor concerned had died in 2009, so there was no possibility of bringing any legal action against him, so the claimants sued Barclays Bank instead, alleging that it was vicariously liable as it had sent them to see the doctor ahead of their start dates. The bank tried to defend itself by arguing that it could only be vicariously liable in law for the actions of its employees. As the doctor who carried out the assaults was an independent contractor, it was not liable.

The High Court and subsequently the Court of Appeal both found against the bank. It was vicariously liable, because the doctor's work was 'sufficiently connected with the employment' and 'inextricably interwoven' with the activities he was carrying out on behalf of the bank. This case is one of a number that have come to court in recent years which have broadened vicarious liability beyond employment.

The *Morrison's* case is a major ruling of the Court of Appeal that will be appealed to the Supreme Court. So the outcome is yet to be finalised. To date though *Morrison's* has lost in every court. The case concerns the actions of a disgruntled employee who worked in IT for the company and who was given a formal warning for using the company's postal facilities for his own private purposes. His response was to copy the personal data of almost 100,000 *Morrison's* employees and to post them on an internet site. He also sent them anonymously to three newspapers. He was subsequently, arrested, tried and sent to prison. The question that is now before the courts concerns whether or not *Morrison's* is vicariously liable for his actions.

Both the High Court and the Court of Appeal have concluded that the company is vicariously liable even though the employee's actions clearly fell outside his work duties. In deciding this, the courts are applying new principles to the 'at work' principle established by coincidence in a previous case defended by *Morrison's* a few years ago (*Mohamud v Wm Morrison Supermarkets, 2016*). This held that an employer is vicariously liable when an employee acts unlawfully 'within the field of his work duties'.

The *Bellman* case concerns an assault by a company director on an employee that took place at a drinking session following on from a formal Christmas party. The High Court decided that as the people present had not been 'on duty' at the time that the assault occurred, the company could not be

vicariously liable. This decision was subsequently overturned by the Court of Appeal. This impromptu drinking session had a sufficiently close connection to work and company affairs for vicarious liability to apply.

Holiday Pay

Max-Planck-Gesellschaft zur Forderung der Wissenschaften ev v Shimizu (2018) *Sebastian W Kreuziger v Land Berlin (2018)*

These two German cases, heard in the European Court of Justice, like so many on holiday pay in recent years, have important practical HR implications across Europe. These concern the common situation in which accrued holiday is 'lost' and no payment made in lieu when an employee fails to take his or her full accrued holiday entitlement before leaving an organisation.

The finding here was that it is unlawful to refuse to pay holiday pay in lieu automatically if a worker simply fails to ask for any holiday prior to leaving. It is only lawful when an employee is given an opportunity to take the leave and is clearly warned that they will lose their leave and not be paid in lieu if they fail to take it.

This case leaves unanswered the more important question of what should happen when employees are not leaving and lose their holiday entitlement because a holiday year comes to an end before they have a chance to take it all. This will no doubt be considered at some stage by the ECJ, but probably after Brexit, so it may not have any impact in the UK.

Harassment

Evans v Xactly Corporation (2018)

This is an unpleasant case, but one which has some potential wider legal significance. It seems to go very much against the recent run of cases on harassment which have tended to be employee-friendly.

Evans was a poorly performing salesman who was dismissed on grounds of his performance after a year's service. He could not, therefore, bring an unfair dismissal claim. Instead he brought discrimination claims, alleging that he had been both harassed and victimised on account of his race (he had some family links to the traveller community) and a disability (he was a type 1 diabetic). The main evidence related to harassment and concerned remarks made to him about his weight and his red hair. It was agreed that at some stage he had been called 'fat ginger pikey'. He claimed that he was overweight due to his diabetes and had red hair due to his traveller ancestry.

He lost his case in the tribunal, but not on the grounds that the insults were not discriminatory. The ET said that they potentially were. Instead it was held that the main reason for the dismissal was poor performance and that his claim to have been insulted by the remarks made by his fellow employees was untrue. He had happily worked in an office environment in which banter of this kind was the norm and had himself joined in, giving as good as he got. Evidence was produced that he had himself insulted a fellow worker by calling him a 'fat paddy'.

The EAT agreed with the ET. In harassment claims it ruled, context needs to be taken into account. And on this occasion it had been right to rule that calling Evans a 'fat ginger pikey' did not amount to racial or disability-related harassment.

The case has important implications for sexual harassment cases that concern environments in which a 'bantering culture' is well-established and which subsequent claimants join in with. Here the courts accepted that the banter could be discriminatory, but on this occasion they were not unlawful because no genuine offence had been taken by the claimant at the time.

Duty of care

James-Bowen v Commissioner of Police of the Metropolis (2018)

This case concerned a public apology made by the Chief of the Metropolitan Police as part of a settlement made with a suspected terrorist who claimed to have been assaulted by the police officers who arrested him. The officers subsequently claimed in court that in making the apology, the chief constable had breached the implied duty of care by causing them reputational harm and possible future economic loss.

The Supreme Court found in favour of the chief constable. There is no implied duty to protect employees from reputational or economic harm. The duty of care relates to physical and mental health and the court was not prepared to take the opportunity to create any further implied duties.

Employee surveillance

Barbulescu v Romania (2017)

Barbulescu v Romania (2016) was a landmark ruling by the European Court of Human Rights that appeared to confirm the legality of the UK's Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 which had often been considered by commentators potentially to breach the European Convention on Human Rights.

This case concerned an employer's right under existing law in Romania to snoop on employees' web-based activities while they are at work to establish whether or not they were 'personal'. Here an employee had used his employer's messenger account for personal purposes and was dismissed for that reason.

The Romanian government won the case on the following grounds:

- The prohibition on personal use had been widely and clearly communicated. It was known by employees in the organisation that personal use was absolutely prohibited
- The surveillance was proportionate as it was done in order to ascertain whether or not workplace rules had been broken
- The employee had dishonestly denied having used the messenger service for personal purposes.

The court thus clarified that provided the surveillance is proportionate and can be justified with a good business reason, it does not amount to a breach of privacy.

Barbulescu then took the unusual step of appealing the case to the Grand Chamber of the European Court of Human Rights whose rulings are final. On this occasion a panel of judges overturned the original 2016 ruling, holding that the Romanian court which first heard the case had failed to give sufficient weight to Article 8 of the European Convention on Human Rights when reaching its decision. This gives people a right to respect for their private lives and correspondence.

Most legal opinion appears to concur that this ruling does not mean that the established UK law contravenes the Convention because, while it permits snooping on employees' web-based activities while at work, it also requires employers to make every effort to inform employees that their online activity at work, or the use of work-based accounts, may be monitored. Provided this is done, it would seem that checking in order to ascertain compliance with established rules on personal usage remains lawful.

Varying contracts unilaterally

Abrahall v Nottingham City Council (2018)

When an employer imposes a contractual change (in this case, a two-year pay freeze which altered a contractual entitlement to annual increments) it has generally been understood by employers that if employees continue to work normally without protesting (ie 'working under protest'), they have accepted the breach and cannot subsequently sue for damages.

Not so, according to the Court of Appeal in this case. Here while the employees themselves had made no statement to the effect that they did not accept the breach and were working under protest, their trade union had objected strongly at the time. The Court held that the employees had not therefore shown 'unequivocal acceptance'. They could not be said to have accepted the breach by continuing to work and had not waived their right to sue for damages resulting from the breach.

Agency workers

Kocur v Angard Staffing Solutions (2018)

This is the first case of significance concerning the Agency Workers' Regulations 2010 to be appealed to the EAT on a point of law. Kocur was an agency worker who worked alongside directly recruited and employed colleagues doing similar work. While his hourly rate of pay was higher than that of the directly employed staff, he had a lower holiday entitlement and fewer rest breaks. His working time rights were thus inferior.

The employer argued that the value of Kocur's overall package was equivalent, and the employment tribunal accepted this point. There was no evidence of unequal treatment 'in the round'. The case was then appealed to the EAT where the tribunal judgment was overturned. The holiday and rest entitlements of agency workers should be the same as those of employed staff in equivalent roles once they have been working for more than 12 weeks.

It is entirely lawful to pay agency staff a higher hourly rate, not least to compensate them for their lack of job security, but this should not be used as a reason for offering less extensive working time rights.

TUPE

London Care and Carewatch Care Services v Henry (2018)

In this case the EAT gave important guidance on a common situation which occurs when the contract to provide a service is lost by one provider and then split across a number of new contractors.

The question is whether or not this constitutes a 'relevant transfer' when the employees concerned are working for more than one employer on separate contracts after the transfer. The employment tribunal concluded that it was and that full TUPE rights should, therefore, be preserved. The EAT disagreed. Putting greater weight on the requirement in the statute that activities post-transfer should be 'fundamentally the same', the EAT judged that the differences when there are multiple employers are too great. TUPE did not, therefore, apply.

Constructive dismissal

Mwanahamisi Mruke v Saeeda Kamal Khan (2018)

This is a fascinating and disturbing case involving a woman from Tanzania who was very poorly educated and worked for four years for her employer for around 30 pence an hour – making her effectively a victim of 'modern slavery'.

After resigning she was told about the National Minimum Wage and advised that she would have a case for breach of those regulations, as well as constructive dismissal, because there had clearly been a breach of duty on the part of her employer.

The question that the courts had to resolve was whether or not an employee could be said to have resigned in response to a breach of contract even though she was entirely unaware at the time that she had a right to be paid the National Minimum Wage. Both the Employment Tribunal and the EAT found against the claimant, but this was subsequently overturned by the Court of Appeal. A lack of awareness of legal rights should not mean that she could not nonetheless have resigned in response to a breach of contract.

Some lawyers have argued that this case breaks with one of the long-standing tests established in the leading case of *Western Excavating v Sharp* (1978), namely that in order for a constructive dismissal to occur, an employee must resign 'in response to a repudiatory breach' on the part of the employer. Further cases in which a breach is less blatant will be needed before such a conclusion can be reached.

Joint and several liability

Timis and Sage v Osipov (2018)

This is a fascinating case which could potentially have really significant long-term implications.

Osipov worked as CEO of a company called International Petroleum. Sage was the chairman of the company while Timis was a non-executive director, as well as being the majority shareholder. In 2014 Osipov was dismissed. The e-mail dismissing him was sent by Sage on the instruction of Timis.

It was subsequently established in court that the dismissal had been due to Osipov making a protected disclosure under the Public Interest Disclosure Act 1998. He was awarded nearly £2 million by way of compensation. This case concerns whether or not this money should all be paid by the company or whether the two men who decided to dismiss him should also – personally – be held to be jointly and severally liable. The ET, EAT and Court of Appeal have now all found in his favour on this point of principle. There is nothing in law to prevent an employee from bringing a case naming decision-makers, as well as the employer, as respondents when a detriment has been suffered.

Where senior directors with a good deal of personal wealth take decisions that are unlawful, particularly dismissals, we can thus now expect more to be named as joint respondents when claims subsequently come before the tribunals.

Suspensions

Agoreyo v London Borough of Lambeth (2017)

This case has considerable potential significance from a practical HR perspective. It concerns the decision of an executive head to suspend an experienced primary school teacher following a complaint that she had used unreasonable force when seeking to control the behaviour of two 'highly challenging' pupils.

Agoreyo alleged that this decision amounted to a repudiatory breach of trust and confidence because her own head teacher had already carried out a full investigation and decided that she had in fact used reasonable force. Moreover, she argued that the suspension was unnecessary in order that a full and fair investigation could be carried out.

She had completed less than two years' service and was thus unable to bring a claim of constructive dismissal in the employment tribunal, but in any event was keen to establish that a breach of contract had occurred. So she initially took her claim to the County Court. At this stage she lost her case, the court finding that the education authority had had no choice but to suspend her, given the nature of the allegations against her. She then appealed to the High Court and won her case. The decision to suspend amounted to a 'knee-jerk reaction', according to the court, and had become a default response when allegations against teachers were made, whatever their seriousness. Moreover, no attempt had been made to enquire about her point of view before the suspension occurred.

This case does not create a new situation in which employers should hesitate to suspend an employee, pending a full investigation, when an allegation of serious misconduct is made against that

individual. But it does strongly suggest that greater care must be taken than is commonly the case and that an employer ought to be able to justify the decision. Suspending simply because it is policy to do so is not a good enough reason.

This case is also interesting because it has effectively pioneered an innovative (if risky) alternative route for employees to pursue proxy constructive dismissal claims, even if they have not completed two years' service at the point at which a breach of contract occurs.

Religion or belief harassment

Bakkali v Greater Manchester Buses (South) (2018)

This is an interesting case which demonstrates that the context in which a remark is made in the workplace should help determine whether or not someone has been harassed by a colleague for their beliefs.

Here a colleague had said to Bakkali, a Muslim, 'are you still promoting IS?' Bakkali claimed to have taken offence and alleged that he had been unlawfully discriminated against for a reason related to his religion. He lost his case both at the ET and subsequently at the EAT because the incident occurred soon after the two men had had another conversation in which Bakkali had quoted an article about IS in an approving manner.

This is a potentially significant ruling because several cases in recent years have concerned harassment in respect of beliefs – including non-religious beliefs. This case suggests that context can and should be taken into account when deciding if offence was genuinely taken during an argument about beliefs that takes place at work.

Shared parental leave and pay

Capita Customer Management v Ali (2018)

Under the statutory shared parental leave scheme introduced in 2015, the parents of a new child are permitted to share the leave and pay that the mother is entitled to under the long-established maternity leave and statutory maternity pay (SMP) regimes. Mothers and fathers thus receive the same pay and leave entitlements once the two-week compulsory maternity pay period has finished. They can, for example, choose to take almost six months of concurrent leave after the baby has been born. Alternatively the mother can return to work, leaving the father to look after the baby for an extended period.

There has, however, always been a question mark over the extent to which fathers taking leave as part of the shared parental leave scheme are, or are not, entitled to claim enhanced payments over and above the statutory minimum in situations where an employer would pay such sums to mothers taking maternity leave (ie pays the mothers more than SMP). Does a failure to give fathers taking shared parental leave the same privilege as mothers taking maternity leave amount to unlawful sex discrimination?

In this case the ET said that it did. As the purpose of parental leave is to care for the child, and because mothers and fathers both take leave for that purpose, the proper comparator should be a woman taking paid maternity leave. If fathers are treated less favourably in an equivalent situation it amounts to sex discrimination. The EAT overturned this ruling. In its view the purpose of maternity leave is to aid recovery and wellbeing of a new mother. This distinguishes it from parental leave. As a result, provided an employer treats men and women equally in respect of shared parental leave, it is entitled to pay women taking maternity leave higher rates of pay than men taking shared parental leave.

Injury to feelings

South Yorkshire Fire and Rescue Service v Mansell (2018)* *Gomes v Higher Level Care (2018)

In the first of these cases, the EAT held that injury to feelings awards could potentially be payable as part of the compensation awarded to claimants who are found to have suffered a detriment under any of the headings included in Section 5 of the Employment Rights Act 1996.

The list is long and includes the following:

- undertaking jury service/working as a pension fund trustee
- enforcing health and safety rights
- refusing to work on a Sunday (in the retailing and betting industries)
- working time rights
- whistleblowing rights
- taking family and domestic leave
- exercising the right to request flexible working.

However, in the *Gomes* case, the Court of Appeal ruled that injury to feelings awards could not form part of the compensation that could be awarded by tribunals when someone has been denied their full rest break entitlement under the Working Time Regulations 1998.

While these two rulings appear to conflict, they actually do not. The EAT ruling was that injury to feelings awards could be paid, not will be paid. It will be interesting to see how the law develops in this area as more cases come before the tribunals in the future.

Pregnancy redundancies

Porras Guiado v Bankia SA (2018)

This Spanish case, recently decided by the ECJ, is of considerable significance. It concerns the right of employers to select for redundancy women who are pregnant or are on maternity leave.

Until this judgment the position across Europe was that it was unlawful to dismiss women in these categories when collective redundancies were being carried out. This position derives from the EU's pregnant workers directive which states that except in 'exceptional cases' it is unlawful to dismiss a woman during the period encompassing her pregnancy and maternity leave. When making redundancies, employers have thus been well advised simply to exclude such employees from consideration when selecting employees for redundancy.

This no longer appears to be good law. In this case the ECJ said that collective redundancy situations do amount to 'exceptional circumstances'. No special treatment is, therefore, required. In this case an employer had made the claimant redundant after her being selected using a fair system which had scored her contribution/performance in her role relatively poorly. The fact of her pregnancy was irrelevant.

It is important to note, however, that while EU law has changed in an important way, separate UK law still requires that women on maternity leave should be given the opportunity to be redeployed to other roles when their jobs are redundant, and that they should not be required to go through a competitive interview process in these situations.

Summary dismissals

Mbubaegbu v Homerton University Hospital NHS Foundation Trust (2018)
Quintiles Commercial v Barongo (2018)
Reilly v Sandwell Metropolitan Borough Council (2018)

The *Mbubaegbu* and *Quintiles* cases are the latest in a long line whereby, since about 2010, the EAT has been steadily broadening the number of situations in which employers can lawfully dismiss staff without notice.

A string of cases has steadily diluted the requirement that employees must generally know that their conduct might lead to summary dismissal, has broadened the ability of employers to define 'gross misconduct' as they please, and has permitted employers to treat misjudgments as examples of 'gross misconduct' rather than as examples of poor performance that properly lead to the issuing of a warning rather than summary dismissal. A position has evolved whereby, as long as procedures are followed correctly, it is not for tribunals to judge whether or not the reason for a dismissal was overly harsh. As a result employers are able to dismiss people for all manner of reasons – a far wider range than used to be the case – provided they are able to satisfy a tribunal that they followed the correct procedure.

In the *Mbubaegbu* case the EAT decided that there is no requirement for an act of gross misconduct to have taken place at all in order for a summary dismissal to be lawful. Here a hospital consultant with a hitherto clean disciplinary record, extending over 15 years, was summarily dismissed without notice after an investigation found that he had failed to comply on 17 occasions with some newly introduced departmental rules. Many of the instances were trivial and he had begun to comply at the time of his dismissal.

A General Medical Council investigation concluded that *Mbubaegbu* was fit to practice. However, the series of minor breaches were cumulatively held to have amounted to a repudiatory breach of trust and confidence. The employer was thus entitled to accept this breach and terminate the contract with immediate effect and no notice.

This case appears to render lawful a situation in which an employer looking to dismiss someone undertakes an investigation into their past activities and puts together a case based on minor acts of misconduct or misjudgment that took place over time. No complaint needs to have been made. Even if each incident is trivial, this will be sufficient now to justify summary dismissal without notice. It is a manager's perception of the overall impact of an employee's conduct on trust and confidence that now appears to matter – not the seriousness of any one incident.

The *Barongo* case is further confirmation of the EAT's adoption of a much harsher approach to dismissals on grounds of misconduct. The employee in this case had a clean disciplinary record until he was found to have failed to attend two scheduled training sessions by a required deadline. He said that he was under considerable pressure and that he had felt it necessary to prioritise other work commitments. At his disciplinary hearing managers decided that trust and confidence had been destroyed and that the mitigating circumstances put forward by him were insufficient to justify his misconduct. When he appealed, a more senior manager said that while he was guilty of 'serious misconduct' and not 'gross misconduct', the dismissal should still stand as trust and confidence had been breached.

The Employment Tribunal found in favour of *Barongo*, holding that if misconduct is not 'gross' a warning should be given. Summary dismissal without notice is too harsh a sanction, falling outside the band of reasonable responses. The EAT then overturned this ruling, stating that there was nothing in the relevant statute that said misconduct had to be gross in order that a summary dismissal was lawful.

This ruling is important for two reasons. First it means that a key part of the Acas Code of Practice on Discipline and Grievance, which tribunals are supposed to take account of when judging reasonableness, effectively no longer appears to carry any weight whatsoever. The code clearly links summary dismissal to 'gross misconduct' and this has been the approach taken by tribunals for many

years. It is now apparently the case that summary dismissal without notice can be reasonable even when the employer itself has stated that no act of gross misconduct has taken place.

Secondly, notwithstanding the above point, this case effectively allows employers to create a new class of misconduct that falls between 'gross' and 'ordinary', namely 'serious' and to summarily dismiss people for such offences even when they fall short of 'gross misconduct' as defined in the Acas code.

The *Reilly* case is interesting for another reason. This is a Supreme Court judgement concerning the summary dismissal of a head teacher of a primary school on the grounds that she had failed to disclose to the governing body the fact that a close friend of hers had been convicted of downloading indecent images of children from the internet. She was not in a relationship with the man concerned and did not live with him. When he was convicted she asked a variety of people, including probation officers, police officers and local authority officers, whether or not she was under a duty to disclose her friendship to her governing body. She received equivocal advice and chose not to do so. When the governors were told of her friendship by another party they suspended her and subsequently dismissed her on grounds of gross misconduct.

Reilly lost her case at the ET, the EAT and the Court of Appeal. First it was held that the school governors had met the requirements of the well-established 'Burchell test' when handling the matter. This was established by the EAT in *British Home Stores v Burchell* (1980) and involves the tribunal asking three questions:

1. Did the employer genuinely believe that the claimant was guilty of misconduct?
2. Were there reasonable grounds in the employer's mind on which to sustain this belief?
3. At the point at which the belief was formed, had the employer carried out as much investigation into the matter as was reasonable in the circumstances?

Secondly, the courts all agreed that the school safeguarding risks posed by Reilly's friendship with a convicted sex offender were such as to require her to have disclosed it to the governors. The failure to disclose amounted to a breach of trust and confidence, giving them the right to summarily dismiss her.

The Supreme Court agreed with the other courts and dismissed Reilly's appeal. Importantly, however, two of the judges suggested in their comments that the *Burchell* test may not be entirely appropriate to apply in all cases, potentially including this one. They did not take the opportunity here to amend or replace it, because they had not been asked to, but the implication of the remarks is that they would have liked the opportunity to consider its ongoing usefulness. While they accepted that it works reasonably well when deciding whether or not an act of misconduct has taken place which merits dismissal, it is potentially much less helpful when examining another requirement in the relevant statute, namely the tribunal should determine the matter "in accordance with equity and the substantial merits of the case".

The *Reilly* case is unusual in that there was no disagreement about whether or not an act of misconduct had taken place, nor about the procedure used. The point contested was whether or not it was fair to have dismissed Reilly for this offence.

In her judgment Lady Hale, President of the Supreme Court, stated that she would have liked to have been given the opportunity to consider two points of law:

1. Whether a dismissal based on an employee's 'conduct' can ever be fair if that conduct is not in breach of the employee's contract of employment.
2. Whether the *Burchell* approach can lead to dismissals which were fair being treated as unfair, and dismissals which were unfair being treated as fair.

On both matters she said that it was possible to think of legal arguments for and against the proposition that a change to the way the law is applied would be appropriate.

Arguably this constitutes a strong steer from the Supreme Court that it would like to be given an opportunity in the future to re-consider the whole way that the law is applied in the area of misconduct dismissals. There is even a hint in Lord Wilson's remarks that he is not entirely comfortable with the 'band of reasonable responses' test itself which has formed the basis of unfair dismissal law since 1981. It will be interesting to see if change in this area of law does ultimately come about as a result of a future Supreme Court judgment.

Employment status

Aslam v Uber (2018)

Dewhurst v Citysprint UK (2017)

Pimlico Plumbers v Smith (2018)

King v Sash Window Workshop (2017)

Deliveroo v IWGB Union (2018)

Addison Lee v Gascoigne (2018)

In the last year a number of cases have been brought by people working in the so-called 'gig economy' alleging that they are not genuinely self-employed and that they should be considered either to be workers or employed persons. A number of further cases are in the pipeline, but it is already pretty clear the way that most of these are likely to go. When people are contracted to carry out work personally on behalf of another organisation under a degree of direction they are not a self-employed persons working for a client or customer on their own account. In most cases they are not working under a contract of service (ie; a contract of employment), but they are nonetheless worker and have a range of rights such as the right to be paid the National Living or Minimum Wage (NMW) and the right to paid holiday under Working Time rules.

The ruling of an Employment Tribunal in the *Aslam* case gained considerable publicity last year when it was found that Uber taxi drivers should be considered to be workers for employment law purposes. They are not running businesses on their own account, are required to undertake work personally and are thus not genuinely self-employed. This case was appealed by Uber, and both the EAT and Court of Appeal (CA) upheld the tribunal judgment. Uber has now announced that it intends to appeal directly to the Supreme Court.

Another tribunal reached the same decision in the case of a cycle courier who was labelled as self-employed by CitySprint. She was contracted to work under the direction of the company, had to wear a logo, meet set standards and was paid at a fixed rate determined by the company using a weekly payroll. She was unable to work for other companies and was not, in practice, able to turn work down without arranging a substitute who had to be another CitySprint person. The right to substitution was thus theoretical only.

Some cases have now reached the higher courts, creating binding precedents. The most widely reported judgment was that of the Supreme Court in the *Pimlico Plumbers* case. Here too the case hinged on the degree of control exercised by the company. Smith's contract labelled him as a 'self-employed operative', yet the company required him to wear its uniform, to rent its branded vans, but to refrain from working for a competitor or competing himself for at least three months after his contract was terminated. The company argued that the fact that he was also entitled to hire assistants independently, was taxed as self-employed and purchased his own materials, for which he charged a 'mark-up', meant that he was, in practice, self-employed. The court ruled that because Smith was still obliged to perform services personally, he was a worker for the purposes of employment law.

The *Sash Window* judgment is more important still in terms of its potential financial consequences for organisations that employ people on a self-employed basis when they are in fact workers. Here the ECJ ruled that King was owed £27,000 in unpaid holiday pay going back over a period of 13 years. Throughout this time he had been engaged on a self-employed basis and paid commission only – a situation he appeared to prefer to employment with paid holiday. Later, following his dismissal, he successfully argued that he had in fact been a worker for the purposes of employment law.

The *Sash Window* case reminds employers that there are considerable financial risks associated with labelling people who work for them as 'self-employed' when they are in fact employed to work under

the direction of the organisation's management. There are now significant incentives present for such workers to pursue legal claims, particularly if they are dismissed.

From a 'gig employer' perspective the only good news came in the form of the ruling of the Central Arbitration Committee (CAC) in its ruling on whether or not a Deliveroo riders' trade union should be granted a compulsory recognition order. The CAC decided that they should not on the grounds that the riders were self-employed and not workers. The reasoning given was that the riders were permitted under their contracts to swap deliveries, hence providing them with a 'genuine right of substitution'. In other words they were not required in all situations to provide their services personally. This meant they could be classed as 'self-employed' and the company is not required to pay them the NMW or holiday pay.

The fact that the company appears to have altered contracts to introduce the substitution clause for the purposes of ensuring that its riders remain self-employed does not appear to have had any relevance to the final decision. The IWGB union was granted permission to seek judicial review of this CAC ruling but lost in the High Court. The *Deliveroo* case thus remains the only outlier among all these cases.

Other significant cases

The following are brief summaries of cases that are notable or interesting, confirming points or developing less significant new precedents. Some have significance for specific types of employment situation, others are simply curiosities.

In ***University of Sunderland v Drossou (2017)*** the EAT determined that employer pension contributions should be included when calculating 'a weeks' pay' for the purposes of establishing redundancy payments and relevant Employment Tribunal awards. The decision does not affect the cap on the figure of 'a week's pay' (£508 from 6 April 2018), but it will nonetheless increase pay-outs quite considerably in situations where employers are making substantial contributions to a pension scheme.

British Airways v Pinaud (2017) concerned a situation in which a group of part-time employees were paid a sum equivalent to 50% of the full-time wage, but were actually required to work 53.5% of the equivalent full-time hours. According to the EAT this constituted less favourable treatment which the employer was unable to objectively justify. This case serves to remind us that the part-time worker's regulations, while rarely a source of litigation, exist and should be adhered to.

Royal Mail v Jhuti (2017) is another very employer-friendly ruling by the higher courts in a case involving an unfair dismissal. Here Jhuti was dismissed for poor performance after having raised concerns about breaches of company policy which amounted to protected disclosures. When an employee is dismissed for making a protected disclosure (in other words, lawful whistleblowing) it falls into the 'automatically unfair category' which does not require two years' service on the part of claimants. In this case, however, because the dismissing manager was unaware of the whistleblowing and its relevance to the case, the Court of Appeal decided that this was not an automatically unfair dismissal, but a potentially fair one based on performance. Two years' service were thus required before a claim could be made.

In ***Ramos v Servicio Galego de Saude (2017)***, a Spanish case that came before the ECJ, it was decided that an employer's failure to carry out a specific risk assessment relating to the health and safety risks accruing to a worker who was breastfeeding amounted not only to a breach of health and safety law, but to unlawful sex discrimination too.

The case of ***Trayhorn v Secretary of State for Justice (2017)*** concerned a prison chapel volunteer who was disciplined for quoting passages from the bible that some of the congregation viewed as being homophobic. He had also voiced criticisms of same-sex marriage which had led to complaints. The EAT rejected his appeal against an earlier tribunal ruling that he had not suffered indirect discrimination on grounds of his religion. He claimed that Christians in general, and Pentecostal Christians in particular, are less able to comply with the prison's expectations than other groups. He had not been able to demonstrate compelling evidence of group disadvantage which is necessary when indirect discrimination is alleged.

For some time now it has been accepted that payments for involuntary overtime must be taken into account when calculating the amount of pay that someone should be paid while on holiday. In ***Flowers v East of England Ambulance Trust (2018)*** the EAT clarified that this also applies to voluntary overtime that is undertaken at an employee's discretion, provided this occurs sufficiently regularly so as to fall into the required definition of 'normal remuneration'.

The Belgian case ***Ville de Nivelles v Matzak (2018)*** concerned whether or not hours spent by a firefighter at home when he was required to be on call, and able to respond to an emergency within eight minutes, should count as working time and hence be paid. The ECJ said that it should in this case, but stopped short of establishing a general principle that on-call time should always be paid.

In ***Mencap v Tomlinson Blake (2018)*** the Court of Appeal held that on-call hours spent sleeping do not carry any entitlement to the NMW/NLW. Employers are only required to pay workers the minimum wage when they are awake and working.

In ***Hincks v Sense Network (2018)*** the High Court ruled that it was lawful, as far as the law of negligent misstatement is concerned, when an employer seeking a reference failed to make inquiries about procedural fairness when gathering information about a job applicant's previous disciplinary record. It is lawful simply to rely on the referee's opinion about the individual's conduct.

In ***Lofty v Hamis (First Cafe) (2018)*** the EAT held that an employee who had been diagnosed with a pre-cancerous variety of melanoma was covered by disability discrimination law. It has long been established that people with progressive illnesses are covered from the point of diagnosis. This case includes pre-cancerous conditions within that definition.

Chief Constable of Norfolk v Coffey (2018) is also a case about a long term progressive condition, but here the claimant's condition (hearing loss) was not sufficiently serious to qualify for protection under disability discrimination law. When she applied for a transfer to the Norfolk police she was turned down on grounds of her poor hearing. The EAT held she had nonetheless been unlawfully discriminated against. The Norfolk force perceived that she had a disability even though she did not and had caused her a detriment for that reason, fearing that her hearing would deteriorate further in the future.

In ***United First Partners Research v Carerras (2018)*** the Court of Appeal decided that a rule requiring employees to work long hours could cause substantial disadvantage to people with certain types of disability. Reasonable adjustments might therefore have to be made to the policy in order to make it possible for such a disabled person to work in that employment.

The case ***de Souza v Primark Stores (2018)*** is one of the first to be reported concerning the provisions of the Equality Act 2010 that relate to the rights of transgender employees. This case concerned a failure on the part of a fellow employee to preserve de Souza's confidentiality in this regard. This was held to amount to a detriment and the employer was vicariously liable.

City of York Council v Grosset (2018) concerned a teacher with cystic fibrosis who was summarily dismissed for showing an 18-rated horror film to underage students. No permission had been sought. He claimed that the decision was due to stress brought on by a combination of increased workload and his disability. When dismissing him, the panel had decided to reject this defence. The Court of Appeal ruled that in failing to take full account of the possible link to the disability, an act of unlawful discrimination had taken place.

Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood (2018) related to the right to claim an enhanced pension after the age of 50. A redundant employee claimed that her employment had terminated 12 weeks after she received and read the letter giving her notice of redundancy. This was after her 50th birthday. The employer argued that the notice should run from when an attempt to deliver the letter had first been made. It had been sent by registered post and was not delivered until after the claimant had returned from a short holiday. The Supreme Court agreed with Haywood. The effective date was the date on which she received and read the letter.

In ***Kaur v Leeds Teaching Hospitals NHS Trust (2018)*** the Court of Appeal decided to retain and in some ways to strengthen the 'last straw doctrine' in constructive dismissal established in *Lewis v Motorworld Garages (1985)*. This allows an employee to resign and claim constructive dismissal following a series of minor breaches of contract, treating the final one as 'the last straw'. In Kaur's case the ET and the EAT had decided that she had affirmed earlier repudiatory breaches, relating to a decision to discipline her, by taking up her right to appeal and working normally. The Court of Appeal said that affirmation of this kind should not subsequently prevent a claimant from taking advantage of the 'last straw doctrine'.

In ***Mostyn v S&P Casuals (2018)*** the EAT took the opportunity to remind us that a unilateral pay cut amounts to a breach of contract – both an express term and the implied duty to maintain a relationship of mutual trust and confidence. Whether the employer has reasonable grounds for seeking a pay cut (in this case, poor performance) is irrelevant. A breach is a breach.

In ***Dynasystems for Trade and General Consulting v Moseley (2018)*** the EAT took the opportunity to clarify that the identity of a person's employer is determined with reference to the lived reality of the relationship and not simply to what is written in the contract of employment.

In ***Roddis v Sheffield Hallam University (2018)*** the EAT ruled that a group of lecturers who were employed under zero hours contracts could bring claims under the part-time worker's regulations using full-time colleagues as their comparators.

Afzal v East London Pizza (2018) concerned a man of Pakistani origin who applied for indefinite leave to remain in the UK after five years of residence. He was successful, but before that his employer dismissed him, thinking honestly but erroneously that it was unlawful to continue employing him. However, in denying him a right to appeal the dismissal, the employer had breached his unfair dismissal rights.

In ***James-Brown v Commissioner of Police of the Metropolis (2018)*** the Supreme Court declined the opportunity to introduce a new implied duty into contracts of employment in the form of a duty to protect employees from economic or reputational harm. Here the Metropolitan Police had issued a formal apology to a terrorist suspect who had claimed he had been assaulted while under arrest. The police officers concerned considered that their reputations had been thrown into doubt.

In ***Donelien v Liberata (2018)*** the Court of Appeal agreed with the ET and EAT that an employer could not be found to have discriminated unlawfully against someone on grounds of disability if it had no knowledge of the disability. In this case Donelien had a very poor sickness absence record. She suffered from a variety of ailments and also took time off for reasons of stress. In her last year of employment she was absent for 128 days. Medical reports, however, were clear that there was no underlying condition that would mean she was disabled under the terms of the Equality Act 2010. Her dismissal on grounds of capability was fair and there had been no requirement for her employer to consider reasonable adjustments.

In ***Morris v Metrolink RATP Dev (2018)*** the Court of Appeal decided that it had been automatically unfair to dismiss a trade union rep on the grounds that he had retained leaked information about members of his union who had failed an assessment. Earlier the EAT had decided that the employer had acted lawfully in treating the incident as gross misconduct. This was overturned by the Court of Appeal which considered the dismissal to have been related to the rep's trade union activities.

Ali v Torrosian (2018) concerned a GP who was dismissed after a long period of sick leave. The employer had tried to justify its decision to terminate the contract of a disabled person on the grounds that its need to provide a high quality of care to its patients amounted to a proportionate means of achieving a legitimate aim. The EAT disagreed. The aim was legitimate but dismissal was a disproportionate response given that the doctor could have returned to work on a part-time basis.

In ***Brazel v Harper Trust (2018)*** the EAT reminded us that when someone works part-time, irregular hours, their holiday pay should be calculated in respect of earnings in the 12 weeks prior to them taking holiday. Paying a standard percentage of annual salary is common and administratively straight forward, but may result in someone being paid lesser sums than they are entitled to.

In **Thompson v Really Easy Care Credit (2018)** a pregnant employee was dismissed for reasons that were in hindsight pregnancy-related. However at the time of her dismissal her employer had not been told she was pregnant. The EAT held that this did not therefore amount to an act of unlawful discrimination. It went on to state that employers were not under any legal obligation to re-visit such a dismissal, and potentially consider reinstatement later, when a pregnancy is confirmed.

In **Fazackerley v DHL Supply Chain (2018)** a dismissed employee got his tribunal claim in late after being advised by an Acas official to wait until the internal appeals procedure was completed before doing so. This advice was flawed. The ET and the EAT both found that this was a situation in which it could be said that it had not been reasonably practicable for the claimant to get his claim in within the required three months. This is an apparent change to the existing position which is that poor legal advice is not a good enough reason for presenting a claim out of time. But we will need more cases before it can be concluded definitively that the law has changed.

In **Keeping Kids Company v Smith (2018)** the EAT ruled that the employer had breached redundancy consultation law in failing to start consulting collectively promptly after deciding that large numbers of redundancies were necessary. Managers said that they held off until they knew enough detail about who would be affected. There were other complicating factors that led to reductions in the size of the awards paid, but it was the failure to start consulting earlier that breached the law.

In **X v Y (2018)** the EAT found that an email sent by a solicitor to an employer, which advised it on how to go about 'cloaking' a dismissal on grounds of disability as a redundancy, was admissible as evidence in court. Because its purpose was to 'effect inequity', legal advice privilege (which would otherwise prevent its disclosure in court) would not apply.

R (on the application of AR) v Chief Constable of Greater Manchester Police (2018) concerned two employers turning down a man's job applications on the grounds that he had been tried for rape. He had, however, been acquitted at his trial and therefore considered that a refusal to employ him or issue him with a taxi license amounted to a breach of his human rights. The Supreme Court turned down his appeal. The fact that he had been acquitted did not mean that the accusations had no substance at all and the employers had not breached his human rights by erring on the side of caution and turning his applications down.

In **Talon Engineering v Smith (2018)** the EAT held that an employer acted unreasonably when it dismissed an employee at a hearing that went ahead without her being present. She had sought a postponement for 10-days to enable her trade union representative to accompany her. The employer refused, citing the regulations on the right to be accompanied which specify a maximum postponement time of five days. The EAT stated that rigidly complying with this set of regulations and automatically saying 'no' to the extension request did not mean that the employer had acted reasonably under unfair dismissal law. A finding of unfair dismissal was thus upheld.

Gray v Mulberry Company (Design) (2018) concerned whether or not a belief in intellectual property rights meets the requirements for a protected characteristic for the purposes of the law on discrimination on grounds of religion or belief. In recent years these cases have tended to go in favour of claimants. Not on this occasion. Gray had not made others aware of her supposedly strong 'belief' in intellectual property rights nor was her employer aware of them before it sought to amend her contract of employment by signing an intellectual property agreement in respect of work she had carried out for the company. Moreover, the company had a legitimate aim and had used a proportionate means to achieve it. So the claim of indirect discrimination failed.

In **Lee v Ashers Baking Company (2018)** – popularly known as the 'gay cake case' – the Supreme Court overturned earlier judgments by the lower courts by finding in favour of the bakers who had refused to supply a cake iced with the words 'support gay marriage'. There had been no discrimination against the purchaser of the cake on grounds of his sexual orientation as the baker would have equally refused to ice the cake with that slogan whoever had asked for it. There had thus been no direct discrimination. The extent to which this ruling has any significant implications for employment is unclear. However, some commentators argue that it may make it harder to prove discrimination by association in some situations. Time will tell.

In **Wood v Durham County Council (2018)** the EAT confirmed that there is no protection under disability discrimination law when an individual's medical condition causes a 'tendency to steal'. Such conditions have been excluded since the Disability Discrimination Act was first passed in 1995. The extent to which this provision is lawful under EU law has always been questionable, but no appeal to the ECJ on this matter is now likely unless a future Brexit deal allows this to happen.

Matei v Brooknight Guarding (2018) concerned a situation in which a company employed someone on a permanent zero hours contract and then hired him out to work as a security guard to another employer. He claimed that to all intents and purposes he was therefore an agency worker and was entitled to rights under the Agency Worker's Regulations 2010, including equal pay with his directly employed colleagues. The employer argued that he was employed directly by its company and was not an agency worker. The EAT found that as he was employed to undertake temporary assignments, he was covered by the Agency Workers Regulations and was entitled to full agency workers' rights.

Future developments

Taylor report

The report, 'Good work: the Taylor review of modern working practices', published in July 2017, followed a government commissioned enquiry into atypical working across the growing 'gig economy'. It made dozens of recommendations, aimed at encouraging higher quality jobs as a means of boosting productivity and fairness at work.

The report's most important section from an employment law perspective relates to employment status. The report's most important section from an employment law perspective relates to employment status.

Employment status

While no really fundamental changes are suggested, the report makes a series of recommendations aimed at clarifying gig economy workers' existing legal position and enabling better enforcement of their rights.

The present situation is widely regarded as being unsatisfactory because:

- It is not always clear either to workers or their employers which employment rights apply. The courts have devised a variety of tests over the years, but there is little statutory guidance.
- HMRC tests for tax purposes have sometimes differed from those used by the courts to establish employment rights. For example, someone classed as 'self-employed' from a tax point of view, may be 'employed' for employment law purposes – or vice versa.
- There has been a perceived growth in 'bogus self-employment' – labelling employment relationships as 'self-employment' to avoid tax and employment rights.
- The limited legal penalties deterring bogus self-employment has incentivised employers to casualise labour, remove job security and avoid tax.

The Taylor report concluded that the existing three major employment categories – employee, worker and self-employed – should be retained but should be clarified and easier to enforce.

The key recommendations were:

- Relabelling the 'worker' category, with its basic employment rights such as the NMW and paid holiday, as 'dependent contractor' status.
- Developing clearer statutory tests to distinguish genuine self-employment ('in business on their own account') from 'dependent contractor' status, and including 'platform-based workers' operating in the gig economy and, potentially, anybody employed on a casual or flexible basis under the control of an employer.
- Permitting workers whose contracts entitle them to send a substitute to work in their place to retain 'dependent contractor' status and the rights associated with it.
- Developing clearer statutory tests to distinguish 'employee' from 'dependent contractor' status which should include a requirement for employees to perform work personally.
- Aligning tax law with employment law, so one status determines both employment rights and tax obligations.
- Giving dependent contractors, and employees, a 'day one' right to receive written particulars on their status and employment rights, and requiring employers to pay compensation if they fail to meet this statutory duty.

- Requiring employment tribunals to clarify claimants' employment status at a preliminary hearing.
- Reversing the burden of proof so employers must prove a worker is not an employee or a dependent contractor, rather than the other way round.
- Requiring employers to pay National Insurance contributions for dependent contractors as well as employees, thereby reducing the incentive to avoid a 'contract of service' and the wider range of employment rights associated with it.
- Giving dependent contractors statutory sick pay, with the length of time it can be claimed for accruing with length of service.
- Creating a government online tool enabling employers and workers to establish employment status easily.

These recommendations would together amount to a major reform of the existing system, were they all of to be implemented. People would know where they stood and be able to make better-informed choices about the work they did. However, some employers could take the opportunity to reclassify employees as 'dependent contractors', hence reducing employment rights for some. It is also possible that increasing taxation as implied by the recommendations would deter employers from hiring, thereby increasing unemployment.

Other recommendations

The Taylor report deals with a wide range of other issues, such as apprenticeships, taxation and improving the quality of work, but there are plenty on employment regulation too, including the following:

- Amending the NLW/NMW legislation to take account of gig economy 'platform work'.
- Allowing workers to retain continuity of employment when they have gaps of up to a month between assignments with an employer.
- Giving casual workers the right to rolled-up holiday pay, in effect a 12.07% supplement on top of their hourly pay. (This will only be possible after Brexit as the ECJ has ruled such arrangements unlawful under EU law.
- Giving agency staff the right to request a direct contract once they have worked for a single 'end-user' organisation for 12 months.
- Giving on zero hours workers the right to request fixed hours after 12 months' service and a higher NLW/NMW hourly rate.
- Requiring employers to publish data on the number of agency and zero hours workers they use, and on the number of requests they receive for direct employment contracts and fixed hours.
- Encouraging formal information and consultation arrangements in organisations by reducing the threshold for the number of staff requesting it from 10% to 2% of the workforce.
- Amending the flexible working regulations so that people have a right to request temporary alterations to their working arrangements and not just permanent contractual changes.
- Giving workers returning from lengthy ill-health the right to return to the same job as is the case for those taking maternity, paternity, adoption and shared parental leave.

- Consolidating all regulation relating to pregnancy and maternity into a single piece of legislation and providing greater clarity in guidance provided for employers and workers.

Enforcement

The Taylor report recommendations on employment law enforcement include:

- Enhancing the Director of Labour Market Enforcement and Low Pay Commission roles.
- Making employers subject to civil penalties if they fail to pay employment tribunal compensation to claimants.
- Increasing the use of aggravated damages and cost orders by tribunals when employers repeatedly lose cases.
- Giving HMRC responsibility for enforcing holiday pay rights, as well as the NLW/NMW and statutory sick pay.

While the report's recommendations were received favourably by ministers, not all will become law. However, as there would be cross-party support for many of them, it is plausible to conclude that these will find their way on to the statute book over the next few years. Some require further work and some will be controversial, but in any event they are likely to form the basis of debate on the future development of UK employment rights for several years.

Select committee responses

In the autumn of 2017, two parliamentary select committees (the Business Committee and the Work and Pensions Committee) held a series of joint hearings, resulting in the publication of a draft bill which they asked the government to support.

Key clauses were aimed at achieving the following:

- Clearer statutory definitions of the terms 'employee', 'dependent contractor' and 'self-employed' based on existing case law.
- Making the dependent contractor status the default position for those employed as part of substantial groups who are not employees, so that employers have to show they were self-employed if they wished to avoid basic employment rights.
- Requiring employers to pay zero hours workers higher NLW/NMW levels by way of compensation for their income insecurity.
- Introducing a system of punitive fines for employers found to be using bogus self-employment.
- Authorising a government inspectorate to undertake pro-active investigations into employment practices in industries or regions where there is evidence of bogus self-employment.

Good work plan

In December 2018 the government formally responded to the Taylor report by announcing the 'Good work plan'. Further consultation will be required on some bigger issues relating to employment status, enforcement of rights, atypical working and labour market transparency, however, a series of regulatory changes have been announced that will come into effect – probably in April 2020 - and will not be subject to any formal period of consultation.

In some respects these go rather further than Taylor's recommendations envisaged. They include:

- Giving all workers (not just employees as presently) the right to receive written particulars from day 1 of employment
- Aligning the law on employment status across the tax and employment law systems
- Increasing the reference period for the calculation of holiday pay to 52 weeks
- Increasing the length of a break in service while preserving continuity of employment from the current two to four weeks
- Improving transparency regarding payment arrangements for agency workers
- Introducing a new right for all workers 'to request a more predictable contract' after 26 weeks' service
- Simplifying the process for enforcing tribunal awards when they are not paid
- Formal 'naming and shaming' of employers who fail to pay tribunal awards
- Repealing the so-called 'Swedish derogation' which allows employers to pay agency workers less than permanently employed colleagues if their agency employs them on permanent contracts and pays them between assignments.

Sunday working

The June 2015 budget statement proposed changing the law to permit local authorities and elected mayors in England and Wales to extend Sunday trading hours. Draft regulations were brought forward that included safeguards preventing retail workers from being forced to work on Sundays. These were, however, defeated following a debate in the House of Commons in March 2016. For the time being the status quo applies.

Race and ethnicity pay gap reporting

Proposals to extend gender pay gap reporting requirements to cover race and ethnicity were included in the Conservative and Liberal Democrat manifestoes at the 2017 election. As the Labour Party also proposed introducing a form of ethnicity pay auditing, there would apparently be cross-party support for new measures in this area. The government started consulting formally on the detail of proposed approaches in October 2018. This would suggest that legislation might come into effect in 2020 or 2021.

Executive pay gap reporting

In July 2018 new regulations were issued which will, in due course, require companies or groups of companies which employ more than 250 people to publish additional information about executive pay in their annual reports. The new rules will apply from 2020.

Companies are already required to state how much their chief executives are paid each year and to express this in the form of a single figure. The new obligation will be to show how big the gap is between chief executive pay and that of the average employee. Further figures will have to be published showing median pay for employees (ie, the pay of the person at the 50th percentile of all employees in the organisation), and also figures for those positioned at the 75th and 25th percentile point.

Three alternative ways of calculating the figures are set out in the regulations, two of which allow companies to draw on the existing figures they have compiled for the purposes of gender pay gap reporting. Administratively, therefore, the additional burden of work is being kept to a minimum. In addition to including these figures, annual reports will also have to provide some commentary on which of the three methodologies was chosen and why, an explanation as to why the executive pay gap has either increased or decreased over the year and whether or not the gap is consistent with the company's wider remuneration policies.

It is inevitable that adverse press comment and, potentially, damaged corporate reputation will follow the publication of these statistics in 2020 where pay gaps are unusually or unjustifiably high. A failure to provide a full and adequate explanation in annual reports will make this situation worse. There are also significant potential knock-on effects for employee engagement. Considerable care will thus need to be taken preparing for the first publication date.

Parental bereavement leave

Law which will entitle most parents of children who die before their 18th birthdays to at least two weeks' paid bereavement leave will come into effect in April 2020. The parental Bereavement (Leave and Pay) Act 2018 received Royal Assent in September.

Consultation on detailed regulations is now underway. Leave will be a universal right for all employees with any kind of parental responsibility for a child (ie, someone under the age of 18) who dies. The right will be to two weeks' paid leave for employees who have completed 26 weeks' service. The right will apply to parents of still born babies once 24 weeks of a pregnancy have elapsed. It will be possible either to take two weeks as a single block at the time of the death or two separate blocks of one week during the subsequent 56 days.

Volunteering

The government has confirmed its intention to bring forward proposals which will require all employers with over 250 employees to permit them to take three days of leave each year in order to carry out voluntary work. The details of this scheme have yet to be published, but it can be expected that such a scheme will be launched over the coming few years. In the 2015 Conservative Party manifesto the commitment was to make this additional 'paid leave'. There now appears to be some question over whether or not the right will in fact be to take 'paid leave' or just 'leave'.

Carers' leave

The Conservative party manifesto for the 2017 general election contained a proposal to give workers a statutory right to take a year's leave for the purpose of caring for a relative. This would be unpaid, but would give the individual concerned a right to return along similar lines to the existing shared parental and maternity leave schemes.

Employment tribunal reform

Ministers have signalled their intention to bring into effect some further changes to the Employment Tribunals system. Proposals include moving to a completely digital system for lodging claims and responses and the delegation of some activities from Employment Judges to caseworkers. These would require amendments to be made to the Employment Tribunals Act 1996 and would thus need Parliamentary approval.

The Law Commission is now consulting on further proposals for broadening the competence of Employment Tribunals to hear many more cases relating to breach of contract that can currently only be heard in the County and High Courts.

In July 2017 the tribunals fees system, introduced in 2013, was abolished following a ruling from the Supreme Court that it was unlawful. A scheme for refunding fees paid between 2013 and 2017 was launched in November 2017. The government has not ruled out introducing an alternative fees scheme at some point in the future. At a recent select committee hearing the Permanent Secretary of the Ministry of Justice confirmed that plans for the reintroduction of some kind of fee system were being considered.

Fathers' rights

The Women and Equalities Committee of the House of Commons has made a series of recommendations putting the case for a fairly radical improvement of paternity rights in a number of

areas of family-friendly employment law. In the committee's view existing law does not reflect social changes that are occurring in this area of UK life. The proposals included the following:

- paternity should be included in the Equality Act 2010 as a protected characteristic in the same way that maternity is
- statutory paternity pay should be paid at a rate equivalent to the higher rate of SMP rather than the lower rate as is currently the case
- fathers should have equivalent rights to mothers in respect of attending ante-natal care appointments. That would mean that this was paid time off rather than unpaid time off as at present
- fathers should not be required to share leave with mothers under the shared parental leave scheme that was introduced in 2015. They should have a free-standing right to take 12 weeks' paid leave during the first year of their child's life.

While there has been no formal government response, recent history would suggest that these are very much the sorts of proposals that are likely to be included in the next tranche of new family friendly employment entitlements.

Sexual harassment

In the wake of the #MeToo campaign and revelations about sexual harassment in the film industry, the Equality and Human Rights Commission (EHRC) published a report entitled 'Turning the tables: ending sexual harassment at work'.

Here a variety of proposals are put forward for tightening up employment law in this area. They include the following:

- employers should be required to publish their harassment policies on their websites
- tribunal time limits for claimants alleging sexual harassment should be extended to six months
- confidentiality and non-disclosure provisions included in settlements reached with victims of sexual harassment should not be permitted and rendered void if agreed
- a new statutory code of practice should be issued providing clear guidance to employers about how they should respond to cases of sexual harassment.

These are all credible proposals that could have a positive impact. The obvious question is why not also extend them to cover racial harassment and harassment in respect of the other protected characteristics included in the Equality Act 2010?

Shared grandparental leave

In October 2015 the government announced its intention to introduce further flexibility into the shared parental leave regime launched in April. The aim was to extend the scheme in 2018, so that a mother to would be able to share her maternity leave with working grandparents as well as the baby's father.

In May 2018, the government announced it was delaying this, pending a much wider-ranging review into the whole system. Take-up of shared parental leave has been very low and there is a perceived need to establish why this is the case before extending the scheme further.

No new date has yet been set for the introduction of any changes.

Further information

Taylor report

DEPARTMENT FOR BUSINESS, ENERGY AND INDUSTRIAL STRATEGY (2017) *Good work: the Taylor review of modern working practices*, is available to download free from <https://www.gov.uk/government/publications/good-work-the-taylor-review-of-modern-working-practices>

CIPD knowledge hub

Recent and forthcoming legislation – rolling legislative timetable up to 2020
<https://www.cipd.co.uk/knowledge/fundamentals/emp-law/about/legislation-updates>

Statutory rates and compensation limits – SMP/NMW rates and tribunal award limits
<https://www.cipd.co.uk/knowledge/fundamentals/emp-law/about/statutory-rates>

Employment law topics – subject pages on issues such as recruitment, maternity rights, discipline and grievance, holidays, redundancy, dismissal, contract terms, and Tupe, listing a range of resources including factsheets, case law, Q&As and guides
<https://www.cipd.co.uk/knowledge/fundamentals/emp-law>

Tribunals and law reports

Employment Tribunal – published decisions on employment claims
<https://www.gov.uk/courts-tribunals/employment-tribunal>

Employment Appeal Tribunal – published appeal decisions on employment tribunal judgments
<https://www.gov.uk/courts-tribunals/employment-appeal-tribunal>

Bailii – free law reports provided by the British and Irish Legal Information Institute
<https://www.bailii.org/>

Legislation

Bills and Acts of Parliament – bills before parliament, statutes and committees
<https://www.parliament.uk/business/bills-and-legislation/>

Statutory instruments – UK, Scotland and Northern Ireland regulations
<http://www.legislation.gov.uk/browse>

Government departments and organisations

Department for Business, Energy and Industrial Strategy – tools and guidance for employers
<https://www.gov.uk/government/organisations/department-for-business-energy-and-industrial-strategy>

Department for Work and Pensions – benefits and pensions
<https://www.gov.uk/government/organisations/department-for-work-pensions>

Acas – information, advice and help on resolving workplace disputes
<http://www.acas.org.uk/>

ICO – Information Commissioner's Office (data protection authority)
<https://ico.org.uk/>

Equality and Human Rights Commission – national non-departmental equality body
<https://equalityhumanrights.com/en>



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