Lightfoots SOLICITORS

APRIL, 2025

EMPLOYMENT NEWSLETTER

Welcome to the latest edition of our employment newsletter

Our attention remains firmly focused on the planned legal changes under the Employment Rights Bill (ERB). In our January newsletter we considered the changes planned to the laws of harassment, including third-party harassment. In this edition we look at proposed changes to fire and hire and some other dismissals. We also look at some of the potential powers of the proposed Fair Work Agency, the new enforcement body planned, and the planned extension of time limits to bring tribunal claims.

Employers reading this newsletter will also want to take note of the recent Court of Appeal decision in Higgs v Farmor's School where dismissal following Facebook posts expressing Mrs Higgs personal beliefs was unlawful discrimination.

Finally at the end of this newsletter we set out the new statutory rates applicable from April 2025, and how the rates in relation to Statutory Sick Pay (SSP) may yet change under the Employment Rights Bill. Also, a reminder about the new right to Neonatal Care Leave that came into force on 6th April 2025.

DISMISSING EMPLOYEES – IS THIS ABOUT TO GET A WHOLE LOT TRICKIER?

The current legal position is that until an employee has two years' service, they have no right to claim unfair dismissal. Employers should, of course, still be alive to other claims not requiring any minimum length of service.

Under the ERB this will change, with protection from unfair dismissal kicking in on the first day of employment. This is expected to come in Autumn 2026 at the earliest, following which an employer will only be able to dismiss for one of five potentially fair reasons, as is currently the case for employees with two or more years' service, and where the dismissal is fair in all the circumstances.

The plan remains that this will be subject to implementing a new statutory probationary period during which time a "lighter touch" dismissal process will apply, excluding redundancy. There presently still remains a lack of detail at this stage as to how this will work in practice. Whilst the Government's preference is for the statutory probationary period to be nine months, this could still yet change.

However, and of importance, this is not the only change employers need to be alive to. The ERB also proposes to class as automatically unfair any dismissal where the principal reason for the dismissal is an employee's refusal to agree changes to their contract of employment. This will be a day one right, even if it comes into force earlier than Autumn 2026, which is possible. This could even be one of the first few main changes we see taking effect! However, to be clear we have no firm date for this yet.

Basically, the Government are looking to ban the practice of fire and rehire which happens where an employer dismisses staff refusing to agree a change of terms, offering to then re-employ them on the new terms. The previous Conservative Government have already sought to curtail this practice following the actions of P&O in 2022, of which further detail can be found here. This was by the introduction of a Code of Practice, which employers are now required to follow before resorting to dismissal and with Tribunals having the power to increase compensation by up to 25% if not adhered to. Provided the Code of Practice is followed, and the employer has sound business reasons for imposing change, they can currently dismiss those refusing to agree.

The intention is that the ban on fire and rehire will not apply where an employer can show the variation is needed to remove or significantly reduce financial difficulties that could otherwise force them out of business, and where the changes cannot be reasonably avoided in all the circumstances. However, this will not be the case in most instances where an employer is looking to amend employment terms. Even if the amendments are needed due to significant financial difficulties the onus will be on employer to prove this. There will also still be an expectation to follow an updated Code of Practice first, to limit the risk of the dismissal still being held unfair and, if collective consultation applies, employees will also need to be alive to the Government's plans to double the current protective award from 90 to 180 days pay should they not adhere to their obligations here.

It will also be important to appreciate that this change in the law will also apply where the employee resigns because of contractual changes imposed, and not just where an employer itself threatens dismissal if the new terms are not accepted.

It is also presently unclear how Tribunals will view the use of variation clauses once these legal changes take effect, and whether any conduct dismissals for refusing to comply with changes introduced could also be held automatically unfair. Certainly, these changes appear to bring with them some unintended consequences that will make it much more difficult for employers to change employment terms going forward.

It is also important to note the notes accompanying the ERB make it clear that this would extend to changes to any of the terms in your employment contract, whether they are written, verbal or implied into the employment relationship. If your current practice as an employer is to incorporate your employee handbook into the employment contract, these legal changes could significantly impede your ability to change that document too!

We also expect to see further restrictions being imposed limiting an employer's ability to dismiss pregnant employees or employees recently returning from statutory family leave in circumstances other than redundancy, where additional protections are already in place. Basically, the Labour Government wish to bar the ability to dismiss such individuals save in specific circumstances, yet to be detailed.

Watch this space!

What does this mean for employers?

It will be important to consider NOW how these changes will potentially impact your business, varying your contracts, as needed, while you still can! For example, if your employee handbook is contractual does it really need to be? What about your commission or bonus plans? What about other benefits provided where you may need to vary these from time to time? If changes are required once this new legislation has come into force, what will you do if not all employees agree?

If you do not already use probationary periods these should be introduced now so that everyone in the business gets used to using them effectively, including keeping records of reviews undertaken, targets set and feedback given.

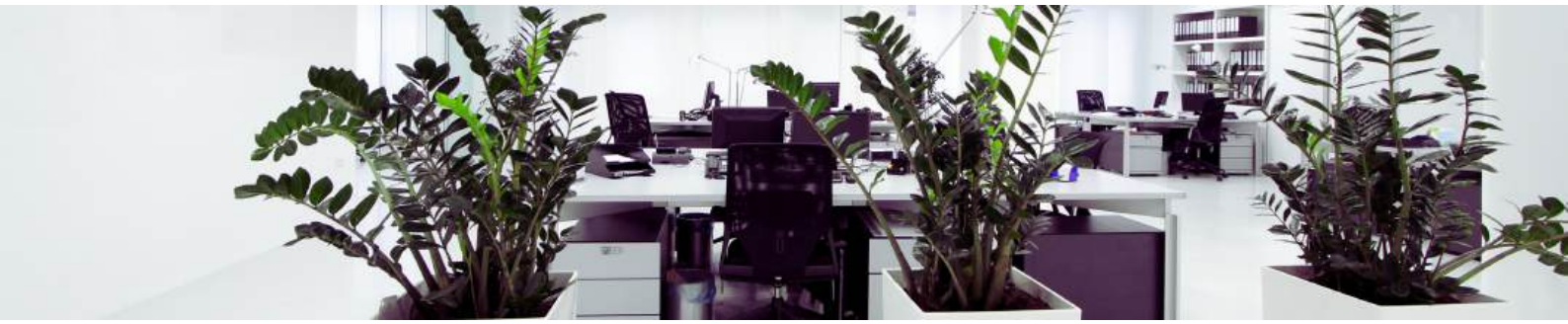
TRIBUNAL CLAIMS – HOW THE ERB INCREASES YOU RISK OF RECEIVING ONE!

The ERB proposes some fairly significant changes when it comes to the presentation of employment tribunal claims. This along with increased employment law rights will inevitably lead to more claims.

Extension of time limits

Currently for most types of employment claims anyone wanting to pursue a claim against their employer or former employer needs to register with the ACAS Early Conciliation Service within three months less one day of the act they are complaining of, and then present their claim to the tribunal within further strict timescales. Under the ERB the plans are to double these time limits to six months, giving employees longer to present their claims.

Not only will this add increased pressure on ACAS and the Tribunal service, when they are already struggling to keep on top of demand, it will add additional pressures on employers too.



Whilst a business is at risk of receiving a claim it is always important to safeguard any relevant documents and records that will help you challenge that claim. When these changes come in such records will inevitably need to be kept for longer.

It will also become even more important to investigate any grievance received at an early stage and whilst memories remain fresh. The longer an employee has to bring a claim the greater the risk of memories becoming stale or potential key employee witnesses moving on and being less willing to assist when asked, if their statement is needed to help challenge the claim.

Creation and remit of the Fair Work Agency

The ERB proposes to create a new enforcement agency, the Fair Work Agency, and which will be given the power, amongst other things, to bring claims on behalf of employees where the employee would not otherwise pursue the claim themselves, recognising that bringing a claim can be challenging, especially for those of limited means.

If the Fair Work agency does get involved, and the employee's claim is successful then they will also have the power to recover any costs incurred in connection with providing legal assistance. The ERB presently refers to this applying where the person assisted becomes entitled to their costs. It is therefore not entirely clear if this means the general costs rule that applies in tribunal proceedings will still apply i.e. no costs recovery save in limited circumstances, or whether given we are talking about the use of Government funds, employers will automatically find themselves at an increased risk of an adverse costs order where the claim has been effectively pursued by the Agency.

However, it would appear that not only does this proposed change increase the risk of tribunal claims being received if the Fair Work Agency gets involved, but they may become a whole lot more expensive for employers!

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SOCIAL MEDIA POSTS – WHAT EMPLOYERS NEED TO KNOW FOLLOWING HIGGS V FARMOR'S SCHOOL

The facts

Mrs Higgs worked for Farmor's School (the School), a secondary school, as a pastoral administrator and work experience manager. She was not a teacher although was responsible for overseeing students removed from class for disruptive behaviour. She is a Christian, with one of her children being a student at the school. She had another child at primary school.

Mrs Higgs used her personal private Facebook account in her maiden name to reshare posts that expressed gender critical beliefs. One of her posts also referred to Christian beliefs in relation to same-sex marriage with a link to a petition against Government plans to make relationship education mandatory in primary schools.

The posts contained wording that was described by the Court of Appeal as "objectionable" but not "grossly offensive". Most of the wording used in the posts, including the most objectionable parts were not Mrs Higgs own words, they were reposts including posts by campaigners in the USA regarding their own school system. She had, however, added to one of the posts wording to the effect "Please read this. They are brainwashing our children". Her Facebook account did not mention where she worked.

One of the parents at the School nonetheless saw the posts and lodged a complaint with the Head Teacher that Mrs Higgs was expressing "homophobic and prejudiced views" against the LGBT community on her Facebook account, providing screen shots of the posts in question.

The school duly investigated, suspending Mrs Higgs during this time.

Mrs Higgs did not deny sharing the posts in question, nor did she regret doing so. She did acknowledge the messages could have been shared in a different way, for example using her own words. She otherwise agreed with the content of the shared posts. She also made it clear she was not homophobic or transphobic and that she loved “all people”. She shared the posts concerned to ensure people were aware of what is going on in primary schools as a result of Government policy, one of her children being of primary school age.

Mrs Higgs did not consider that the posts compromised her position of trust when working with children and that those viewing the posts on Facebook knew her and her beliefs and would know that as a person she would not discriminate.

The investigating officer in their report found no evidence that Mrs Higgs views had ever been expressed in school.

Mrs Higgs was then invited to a disciplinary hearing following which she was summarily dismissed for gross misconduct. In a nutshell the decision to dismiss was based on the language of the posts and that anyone reading them may consider Mrs Higgs to be homophobic and transphobic, along with the fact Mrs Higgs was unable to confirm she would not post something similar again.

The School also felt the posts had the potential to damage its reputation, albeit acknowledging they had no direct evidence of any actual damage caused. Whilst the posts were also said to call into question Mrs Higgs suitability to work with children, the dismissal letter again expressly acknowledged that no concerns had, in fact, been raised about her conduct at work.

Mrs Higgs appealed her dismissal but was unsuccessful.

She subsequently brought proceedings against the School alleging that she was the victim of discrimination and harassment under the Equality Act 2010 (Equality Act) because of her religion or beliefs. In particular Mrs Higgs asserted she had been discriminated against due to both her gender critical and religious beliefs, or lack of certain beliefs. It is common ground since Forstater[1] gender critical beliefs are protected beliefs under the Equality Act.

Initially the Employment Tribunal dismissed Mrs Higgs claims. It felt her dismissal was not because of her actual beliefs, which were protected under the Equality Act, but rather the fact the posts gave the perception she held homophobic and transphobic views, beliefs that are not protected under the last limb of the test in Grainger[2], and which Mrs Higgs herself expressly confirmed she did not hold.

Mrs Higgs appealed, initially to the Employment Appeal Tribunal (EAT) and then to the Court of Appeal. Whilst the EAT allowed her appeal it was felt their decision did not go far enough. In effect whilst the EAT held the posts were a manifestation of Mrs Higgs own beliefs, which were protected, the EAT had sent the claim back to the Tribunal to decide whether the School were nonetheless justified in dismissing her. It was felt the EAT should have decided this point too.

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1 Forstater v CGD Europe and others [2021] UKEAT/0105/20/JOJ
2 Grainger Plc and others v Nicholas [2009] UKEAT/0219/09/ZT

The Court of Appeal decision – why is it important?

The Court of Appeal upheld the further appeal and found that the School had unlawfully discriminated when they dismissed Mrs Higgs.

They confirmed that dismissing an employee merely because they have expressed certain beliefs will be unlawful discrimination. If, however, the employer's issue is not with the belief itself but how it has been expressed and there is something reasonably objectionable about that, then any dismissal will only be lawful if it was a proportionate response. In this instance the School's response was not proportionate. Neither the language of the posts or the risk of reputational harm justified dismissal.

This was especially given there was no suggestion any discriminatory attitudes had been displayed at work.

From a practical point of view this case is important for employers faced with complaints about employees who have expressed strongly held personal beliefs outside of work, especially on public forums such as social media. It is an important reminder that dismissal may not always be the most appropriate sanction and could leave employers at risk of claims. It also provides useful guidance on what employers should consider before they act.

The decision is also important in other ways as it affirms the earlier Court of Appeal decision of Page v NHS Trust Development Authority[3] and (unless overturned by the Supreme Court on appeal) makes it clear that whilst an employee will be protected from discrimination when expressing their protected beliefs, if the manner in which they do so is inappropriate and objectionable in some way, then an employer can safely take proportionate steps to address this.

[3] Page v NHS Trust Development Authority [2021] EWCA Civ 255, [2021] ICR 941

The Court of Appeal's decision both here and in Page recognises the need to balance both the rights of employees and employers in such circumstances, taking into account not just the Equality Act itself but also the qualified rights to freedom of expression, thought, conscious and religion under the European Convention on Human Rights.

This is helpful when, save for some limited exceptions, there is generally no defence of justification in discrimination claims. The motives behind the discriminatory conduct, no matter how benign, are generally irrelevant. Without this balance the Court of Appeal acknowledged that employers may otherwise be forced to tolerate all forms of manifestation of belief no matter the form it took.

Ultimately, however, the steps taken by employers and any sanction imposed, if any, needs to be proportionate in all the circumstances.

Guidance for employers

In the event you receive a complaint about something an employee has posted on their personal social media account it will be important to consider the following, taking appropriate legal advice as needed, before instigating disciplinary proceedings.

1. Take the time to read the post properly. What does it actually say?
2. Is the post an expression of a protected belief held by the employee?
3. What is the tone of the post?
4. Who is likely to see it?
5. Has the employee made it clear the views expressed are personal views?
6. Is there any real risk the post could be seen as representing the views of the business?
7. If so, what is the actual risk of reputational harm?
8. What is the least intrusive measure to take to address any genuine and reasonable concerns arising from the post?
9. Be prepared to have to justify your decision, including adducing evidence of reputational harm.

It will be important to ensure that any actions you take are because of the inappropriate expression of the belief, not the belief itself, and that your response is proportionate in all the circumstances. The nature of your business, the employee's work, and any potential impact on vulnerable service users will also be relevant factors. It goes without saying that it will also be important for employers to ensure they have appropriate policies in place, such as a social media policy, that makes it clear to staff what counts as unacceptable conduct on such platforms, and which may leave them open to disciplinary proceedings and potential dismissal.

IT'S THAT TIME OF THE YEAR AGAIN - A REMINDER OF INCREASES TO NATIONAL MINIMUM WAGE AND OTHER STATUTORY PAYMENTS

It being April this newsletter would not be complete without a summary of the annual increases made to the following statutory rates.

National Minimum Wage:	£12.21 for those aged 21 and above (national living wage), £10 for 18-20 years, £7.55 for those under 18, and apprentices under 19 or during first year of their apprenticeship.
Statutory maternity, paternity, adoption pay, shared parental pay and parental bereavement pay:	£187.18 per week* or 90% of employee's average earnings, whichever is lower. * Employee entitled to 90% of their average earnings for the first six weeks of any period of statutory maternity or adoption leave.
Statutory Sick Pay (SSP):	£118.75 per week**
Week's pay for statutory redundancy pay calculations:	£719 per week, increasing from £700. An online statutory redundancy calculator can be found here.

**the ERB seeks to remove the current 3 day waiting period before SSP becomes payable. For those earning less than £125 per week (with effect from April 2025) not currently eligible for SSP, they will become entitled to 80% of their normal weekly earnings. It is not yet clear when this change will take effect, be it to coincide with changes to statutory payments in 2026 or before. Whilst the Government has promised to work with small and medium sized businesses to help implement these reforms when they come in, no financial aid to support smaller businesses has been proposed.

NEONATAL CARE LEAVE

Back in January the Labour Government confirmed it would be pushing ahead with the introduction of Neonatal Care Leave, under legislation originally passed by the previous Conversative Government. This new right is now available for parents whose child is born on or after 6th April 2025 and receives at least seven consecutive days of neonatal care before they are 28 days old.

The Government has also subsequently confirmed it will support the introduction of bereavement leave for those who experience a miscarriage, which we may yet see introduced via an amendment to the current ERB.

Further details about who will be eligible for new right to Neonatal Care Leave, and what they entitlement will be can be found here.

Any questions please do not hesitate to get in touch.

HOW CAN WE HELP?

We can help you with any employment law needs, but we thought it would be useful to summarise how we can help you if you come across any issues or needs relating to the content of this newsletter so please do get in touch with us if that's the case (contact details below):

- We can review existing employment contracts and internal policies to ensure they are fit for purpose or provide new ones tailored to your needs;
- We can help you navigate the complexities of the Equality Act 2010 to help avoid discrimination claims arising; and
- We offer a full legal representation service if tribunal proceedings need to be issued or defended, providing straight forward pragmatic advice on your options.

You should seek legal advice before relying on the content of this newsletter as every situation is different and the law in employment is ever changing.

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