Bird & Bird

# UK Employment Legal Updates for the Hotels, Hospitality & Leisure Sector

*July 2023*

***Latest report from the Migration Advisory Committee ("MAC")***

Ministers requested advice from the MAC on whether job roles in the hospitality industry, such as hotel and accommodation managers and proprietors, restaurant and catering managers and proprietors, chefs, catering or bar managers, should be added to the shortage occupation list.

The MAC's interim report did not recommend these roles to be added to the shortage occupation list. The interim report's recommendations are temporary and subject to change pending a full review of the shortage occupation list. The MAC plans to reconsider its recommendations during the full review.

The deadline for submitting evidence was 26 May 2023. We are now awaiting the full review of the MAC report and will have more information once available. You can find more information on the MAC website.

***Annual increase in Employment Tribunal compensation limits published***

The Employment Rights (Increase of Limits) Order 2023 has been published, setting out the annual increase in Employment Tribunal compensation limits. These include the following:

- compensatory award for unfair dismissal - £105,707 (previously £93,878)
- a "week's pay" (for calculating, inter alia, the unfair dismissal basic award and statutory redundancy payments) - £643 (previously £571)

The increases took effect from 6 April 2023.

***Private Members' Bill on workers' rights to request a predictable working pattern is in the House of Lords***

As part of its commitment to create a new right for workers and agency workers to request a more predictable work pattern, the government has announced it is supporting the Workers (Predictable Terms and Conditions) Bill 2022-23 (the "**Bill**"). This is a Private Members' Bill which is making its way through the House of Lords, where the second reading is currently in progress.

The Bill would give workers and agency workers the right to request a predictable working pattern where their present work pattern lacks predictability. "Work pattern" includes hours, working days, working times and the duration of the employment or engagement. There is an assumption that a fixed-term contract under 12 months lacks predictability.

The new right will operate in a similar way to the current flexible working regime. For example, there is expected to be a 26 weeks' qualifying service requirement, with workers and agency workers able to make up to two requests in a 12-month period (although these may not be made concurrently). Employers will be able to refuse requests for seven specified statutory reasons. This would mean that employers in industries that rely on unpredictable working arrangements are still likely to be able to refuse requests in appropriate circumstances.

Workers and agency workers will have the right not to be subjected to any detriment and/or dismissed for having made such a request. If the worker's contract is terminated during the decision period, the employer is still required to respond to the request but additional grounds for rejecting the request will then be available (that the worker has resigned or been dismissed for a qualifying reason – i.e., one of the five potentially fair reasons for dismissal).

The Bill is unlikely to be enacted before 2024 but employers should keep an eye on progress and may wish to ensure that if and when it becomes law, they have appropriate policies in place for handling such requests.

### *New legislation to extend redundancy rights for employees on maternity leave receives Royal Assent*

The Protection from Redundancy (Pregnancy and Family Leave) Act 2023 (the "**Act**"), which started life as a Private Members' Bill and was backed by the government, has now received Royal Assent. The new Act extends the protection from redundancy during or after pregnancy or after periods of maternity, adoption or shared parental leave.

According to a study by the Equality and Human Rights Commission, around 54,000 new parents a year lose their jobs because they are pregnant, while three in four working mothers experience maternity discrimination. The Act seeks to address concerns that current statutory protections are inadequate to prevent dismissals during maternity leave.

Currently, if an employee has been selected for redundancy while on maternity, adoption or shared parental leave the employer must offer them a suitable alternative vacancy, where one is available, in priority over other employees. The employee may be able to bring an automatic unfair dismissal claim where the employer fails to comply with its obligations in this respect. Failure to comply may also give rise to a claim of discrimination on the grounds of pregnancy and/or maternity under the Equality Act 2010. The "priority" right to be offered suitable alternative employment is not currently available to pregnant employees, or to those who have recently returned from maternity leave.

The Act extends this redundancy protection to cover pregnant employees from the moment the employee discloses their pregnancy to the employer. It also extends redundancy protection for those taking maternity, adoption and shared parental leave for a specified period (currently expected to be six months) after their return to work.

It is unlikely that the increased protections will come into force earlier than 2024, however employers should ensure the relevant policies are updated and training is provided so that managers are aware of the expanded protection and their obligations towards pregnant employees and those on maternity, adoption or share parental leave.

### *First-Aid (Mental Health) Bill*

The First Aid (Mental Health) Bill (the "**Bill**") requiring employers to provide mental health first aid training as part of their physical first aid training has been presented to Parliament.
Conservative MP Dean Russell proposed the Bill in hope that it will lead to more people spotting the early signs of mental health issues in the workplace. Mr Russell said that employees spend a large proportion of their life at work yet, when they are struggling mentally, many feel the need to continue to maintain a sense of professionalism which prevents them from reaching out for help. He has argued that "heart of the bill is to create parity between mental health and physical health first aid in the workplace".

Under the Health and Safety at Work etc. Act 1974, employers have a general duty of care to their employees. This means that they must take reasonably practicable steps to ensure their health, safety and wellbeing at work. It is important to note that this duty extends to both physical and mental health.

If the Bill is passed, the training requirement is likely to result in additional costs for employers. However, Mr Russell has pointed out that these costs must be viewed in the context of the long-term, positive economic

impact for employers, and that it will likely lead to a reduction in the number of sick days lost to ill mental health.

***New Vento bands from 6 April 2023 under Sixth Addendum to Presidential Guidance on injury to feelings awards***

On 24 March 2023, the Presidents of the Employment Tribunals in England and Wales and in Scotland issued the Sixth Addendum to the Presidential Guidance on Employment Tribunal awards for injury to feelings in discrimination cases (the so-called "**Vento Bands**").

The updated Vento Bands have been adjusted to take account of the RPI measure of inflation:

- a lower band of £1,100 to £11,200 for less serious cases
- a middle band of £11,200 to £33,700 for cases which do not merit an award in the upper band
- an upper band of £33,700 to £56,200 for the most serious cases
- amounts in excess of £56,200 can be awarded in the most exceptional cases

In respect of claims submitted in Scotland, the bands remain subject to paragraph 12 of the Presidential Guidance issued on 5 September 2017.

***ACAS launches guidance on reasonable adjustments for mental health at work***

ACAS has recently published comprehensive guidance on reasonable adjustments for mental health. The new guidance is intended to assist both employees and employers in navigating reasonable adjustments for mental health, and covers the following:

- what reasonable adjustments for mental health are;
- examples of reasonable adjustments for mental health;
- requesting reasonable adjustments for mental health;
- responding to reasonable adjustments for mental health requests;
- managing employees with reasonable adjustments for mental health; and
- reviewing policies with mental health in mind.

The guidance is available here.

***Consultation on reform of Working Time Regulations 1998 and Transfer of Undertakings (Protection of Employment) Regulations 2006***

Following the announcement of proposals to reform the calculation of annual leave, holiday pay and record-keeping requirements under the Working Time Regulations 1998 ("**WTR**"), and the consultation requirements under the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE**") in the policy 'Smarter Regulation to Grow the Economy', published by the Department for Business and Trade on 10 May 2023, the government has launched a consultation on 'Retained EU employment law reforms'. Three areas of employment legislation are being assessed to see whether they are currently working in the best interests of business and workers.

The consultation seeks views on the following proposed reforms:

| Area of reform | Proposed reform |
|---|---|
| Record keeping requirements under the WTR | Employers would not have to record daily working hours of their workers. |
| Simplifying annual leave and holiday pay calculations under the WTR | Merging the current annual leave entitlements to create a single annual leave entitlement of 5.6 weeks where a worker works 5 days a week and introducing rolled-up holiday pay. |
| Consultation requirements under TUPE | Changing the consultation requirements to allow employers to consult directly with their employees, to simplify the transfer process, for smaller businesses (fewer than 50 employees) or with a smaller transfer of employees (where fewer than 10 employees are transferring). |

The consultation closes on 7 July 2023.

***Non-compete clauses to be limited to three months***

On 12 May 2023, the Department for Business and Trade published its response to a consultation on measures to reform post-termination non-compete clauses in contracts of employment and will proceed by introducing legislation to limit the length of non-compete clauses in contracts of employment and worker contracts to three months. Non-compete clauses are a form of restrictive covenant which seek to restrict an individual's ability to work for a competing business, or to establish a competing business for a defined term after termination. The government hopes that limiting the length of non-compete clauses will boost flexibility and dynamism in the labour market.

The government further decided:

- it will not introduce a requirement to pay compensation for post-termination non-compete obligations, citing substantial direct cost to businesses; and
- it will retain the existing legal position that employers can unilaterally waive a non-compete clause.

The change will only become law when introduced in primary legislation, which will occur "when parliamentary time allows".