Episode 17 – 12 days of Christmas: 12 key employment law developments of 2023, with Patrick Brodie, Kelly Thomson, Victoria Othen, and Charlotte Reid

Ellie: Hi and welcome to the Work Couch Podcast, your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law, with the emphasis firmly on people. My name is Ellie Gelder. I'm a senior editor in the employment equality and engagement team here at RPC.

And I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curveballs that it brings to businesses today. We hope by the end of the podcast, you'll feel better prepared to respond to these people challenges in a practical, commercial and inclusive way. And to make sure you don't miss any of our fortnightly episodes, please do hit the like and follow button and share with a colleague.

Today, in our feature length Christmas special, we are celebrating the 12 days of Christmas with a look back at 12 of the key employment law and HR developments over the last year of 2023. Now for many of you listening, 2023 will have been challenging, unpredictable and busy. You may not have felt like you've kept up with all the developments in employment law but fear not because I'm joined today by four employment law gurus to give us an overview of 12 key developments. They're gonna help flag what you need to be aware of and why and the key steps or actions your business should be taking. So why not settle down perhaps with a mince pie and a cup of tea and let us give you the download on 2023 for HR.

So, a very warm welcome to our four guests. We've got Patrick Brodie, partner and head of RPC's Employment Equality and Engagement team. We have Kelly Thomson, partner and ESG lead for RPC. Charlotte Reid, senior associate and Victoria Othen, consultant. Thank you all for joining me again on the Work Couch.

Kelly: Thanks, Ellie.

Charlotte: Hi Ellie.

Ellie: **Let's dive in straight away, Patrick, to a case that has just recently been decided by the Supreme Court, it's *Chief Constable of the Police Service of Northern Ireland and another v Agnew and others*, and it concerns the recovery of holiday underpayments. So first of all, Patrick, can you just give us a quick background to the case?**

Patrick: Hi, everyone. It's lovely to join you for this Christmas podcast and look back at the year's significant stories. So, as you say, this is a holiday pay case from earlier this year, considered by the Supreme Court. Now, the core question was how far back recoverable holiday pay underpayments could go. The case also had a secondary question about the treatment of the two different sources of statutory holiday, the right to four weeks' holiday under the Working Time Directive and the UK's additional 1.6 week's holiday under the Working Time Regulations. Now each source has a slightly different basis for calculating holiday pay. The Supreme Court's answer to this secondary question was that all holidays should be treated as being part of a single box of what they described as consolidated holiday pay rights. Now, though this answer helps in deciding how far back under payments of holiday pay can go, it actually creates a real headache for administrating that pay. In practice, employers might, given this decision, probably play it safe and adopt a uniform single approach to calculating holiday pay. But then let's go back to the primary question. How far back should we go when remedying any holiday underpayments? Now, the barrier to back dating was the EAT's decision in the case of *Bear Scotland*. This was a case that established recovery stops when there's a gap of more than three months between any series of deductions.

Patrick: The *Bear Scotland* decision was certainly controversial at the time, and the Supreme Court has agreed, saying that where there's a common failure for the underpayments, it wouldn't matter that the intervals between unlawful deductions is in excess of three months. The deductions would still be connected. The consequence of the decision is that in Northern Ireland claims for holiday pay under payments can go back to 1998. The liability for this particular case is potentially significant. It could be as much as £40 million. However, for Great Britain, so excluding Northern Ireland, back dating will only travel back two years. This is because the Deduction from Wages Limitation Regulations 2014, quite a mouthful, creates a two-year back dating limit. So, the impact on this island is more limited.

Ellie: Thank you, Patrick. That's a very helpful overview of the case.

Ellie: **Our next topic is HR's increasing focus on conduct in the workplace. And Kelly, this is something we've seen a lot of in the press recently. So, what's changed and what should employers be doing?**

Kelly: Yeah, it's probably one of the most kind of prolific headlines throughout 2023, isn't it? These high-profile news stories around toxic workplace culture and unhealthy working cultures more generally. And specifically, unfortunately, a lot in relation to kind of sexual misconduct in the workplace. So, in terms of just some examples of some of the headlines that we've seen this year, we've seen Dominic Raab resigning after the Tolley investigation found that he'd behaved in an intimidating way, talked about sort of abuse or misuse of power. There was the Guardian investigation, into sexual misconduct and toxic workplace culture at the CBI. And the CBI then admitting to a series of failings and mistakes, which in their language led to terrible consequences. The joint investigation by the Times and Channel 4 Dispatches, which accused Russell Brand, obviously, of various instances of misconduct in a work context and other stories behind both, besides, sorry, both high profile and less high profile. You said what's changed in that. I was thinking in many ways, in many ways nothing's changed in the sense that this behaviour that we're talking about in these sorts of stories was always unacceptable. But it was never okay to bully somebody or harass, obviously. But I do think it's worth sort of stating that. I suppose what has changed is perhaps our collective willingness to turn a blind eye to those kinds of activities or to not call them out and that's a really positive thing. Another thing that's changed I think is we're seeing increasing scrutiny from different quarters, from our own employees in our organisations, from sort of future talent and potential talent we might want to recruit from the general public and also in a number of sectors from regulators like the PRA and the FCA in the financial services sector, the SRA in law, taking much more of a kind of keen eye on what's going on in workplaces broadly from a cultural point of view. And I think as well for our kind of listeners who are HR professionals in particular and for anyone with a sort of leadership role, it's that increasing recognition that culture is important from all sorts of different angles to attract Gen Z and Gen Alpha talent, they're going to make their employment decisions in large part based on the understanding of kind of the culture and the values of a business. And also, just to create those sorts of environments where people can actually thrive and deliver for the business as well. So, there's a there's a real kind of business-critical kind of angle to it. And then businesses that are thinking about their ESG obligations, responsible business promises, et cetera. Part of that starts with culture. And so key steps and things for organisations to be taken, I guess we always say that culture is like a garden. It needs proactive tending. And also, it's really set by the worst behaviours that the leaders in a business are willing to tolerate. So, I would say to you, in your organisation, do you think you have anyone who's too big to fail, who, regardless of their behaviour or their conduct, would always be protected? Because if you do, you have a cultural problem.

Do you have a speak up culture? Do you have a robust process for dealing with issues that are brought to the fore? Don't be the organisation who shields a person and then is saying, "yeah, we all knew. That's not a surprise actually." When something comes out, you don't want to be in that situation for all sorts of reasons, including the human. And then just a kind of lawyery point to finish on, I guess, is that towards the end of next year, so 2024, the law will kind of require employers to take reasonable steps to proactively prevent workplace harassment. So, there are all sorts of different reasons why this is exactly the right time to be sort of taking a fresh look at your policies, but also your sort of behavioural expectations of your people.

Ellie: **Charlotte, let's move on to another item that has generated a fair amount of controversy and that's the potential repeal to the ban on employers using agency workers during strike action.**

Charlotte: Yes, this is an example of the government having a crack at what they clearly see as that pesky reg.7 of the, what I'll call, the Conduct Regulations, the full name being the Conduct of Employment Agencies and Employment Businesses Regulations 2003. Those have been in force in various forms since the 1970s and what reg.7 effectively does is prevents employment businesses supplying agency workers to cover the duties normally covered by a worker who's taking part in strike or other industrial action. The government has already tried to repeal reg.7 but was defeated at High Court level in no uncertain terms recently. But they're having another go at repealing it because they say there are questions over whether that kind of restriction, in other words, a restriction that effectively stops employment businesses offering their services to hirers who are facing strike action remains acceptable in the current economic climate. So, there's a consultation to seek views on whether there ought to be a repeal of reg.7. The government is saying it would give businesses the option to bring in agency staff during a strike if they choose to do so which in turn helps them to handle the strike action and causes minimum disruption to services and continuity, whilst maintaining the current status quo of allowing workers to participate in strike action should they choose to do so.

There's nothing employers need to do at present because we're just at consultation phase and I think we can all predict exactly who's going to fall which side of the line on this particular argument. Clearly the government is saying the economy needs continuity and minimum service levels whilst the unions are saying a repeal of reg.7 renders the right to strike completely toothless. And indeed, the NASUWT, which is the teachers' union, has been vociferous in its objections towards the proposal that reg.7 might be repealed. I think it's just a matter of watch this space and see where we get to.

Ellie: **So our fourth topic is flexible working requests. So, Victoria, tell us where the law now stands on flexible working.**

Victoria: Okay Ellie, so the background to this was, listeners may remember, back in December 22, so a year ago, there was a drive by the government to increase the prevalence of flexible working really and to make the workplace more flexible. So, it confirmed its intention to introduce reforms which would enable the right to request flexible working to become a day one right rather than it being limited to employees who have got a minimum period of employment under their belt. So since then, we now have a particular piece of legislation snappily entitled the Employment Relations Flexible Working Act that received royal assent in July this year. Now this changes the right to request flexible working so that employees no longer have that kind of quite formulaic need to explain what effects their request to change may have on an employer and employees will be entitled to make two requests in any 12-month period rather than one. In addition, employers will have to consult with employees who make those requests and decisions will have to be delivered within two months rather than three months.

In addition to that, and kind of hot off the press, as of yesterday in fact, the Department of Business and Trade published the Flexible Working Amendment Regulations 2023. And they provide the right to make a flexible working application, applies when an employee begins employment, ie this is a day one right.

Those regulations come into force apparently on the 6th of April 2024, so a few months away. In the meantime, the Department of Business and Trade has also issued a call for evidence on non-statutory flexible working and that's designed to develop government evidence based on a non-statutory flexible working strategy.

So, the call for evidence closed on the 7th of November. And that followed a publication by ACAS of a consultation document on an updated code of practice on handling statutory flexible working requests. The code will accompany the new legislation that I just mentioned. So that's a whistle stop tour around all the legal developments as far as key steps and actions for employers to take, in light of all this. Clearly, what's obvious is there's a big drive and focus now on flexible working in the workplace. That's the key message. And that can be a really important tool to help employers develop and foster a diverse and inclusive workplace and importantly to attract and retain the best talent. Obviously, it goes without saying that the right checks and balances have to be put in place to make sure that workloads don't become unmanageable and that those who are working from home or who have flexible working patterns are included in exactly the same way as all others who work a more traditional pattern and whose faces may be more visible on a day-to-day basis.

Ellie: Absolutely, and we actually explored that topic in much more detail on one of our previous episodes. and we heard about your and Kelly's experiences of flexible working so do tune into that one.

Ellie: **Kelly, we've seen a lot this year about how employers should be dealing with gender critical beliefs, which is a difficult one. So can you give us an overview of where the law stands on this?**

Kelly: Yeah, that's right, Ellie. We've had some really interesting cases on what, as you said, is a difficult, challenging topic for lots of people in lots of different ways. The case that I want to mention is an EAT case earlier this year called *Higgs v Farmor's School*. And what it didn't look at was whether a gender critical belief, so the belief that sex is immutable, for example, it didn't look at whether that could be a protected belief under the Equality Act. We know from other cases that it can.

The reason I say it didn't look at it is because the tribunal had sort of accepted that this person's beliefs were protected, and the case looked at a different aspect which I'll come on to. In this situation you had a Christian employee who claimed discrimination and harassment on grounds of her beliefs including that gender can't be fluid and that an individual can't change their biological sex or gender. So that was how her belief was kind of formulated. And the tribunal as I said accepted that was protected but they said well... actually her dismissal was about some posts she'd done on social media and the content of those posts as opposed to about her belief. She appealed to the EAT who remitted it back to the Tribunal because what they found was that the Tribunal hadn't properly engaged with the question as to what had led to her dismissal. Was it the manifestation of her beliefs per se or was it because she'd manifested her protective beliefs in an objectionable way? and the need to apply a kind of balancing test to that question. So, as I say, just pausing for a minute, we know that gender critical beliefs can potentially be protected under the Equality Act, and it depends on the circumstances. But *Higgs* is looking really at that situation where a protected belief of any kind, in this instance, gender critical belief, potentially comes into conflict with the rights of other people, for example, trans employees here. And the law tries to strike this balance between freedom of expression and the ability to manifest one's beliefs in a free society on the one hand against the protection and rights and freedoms of other people on the other. And essentially, put really simply as an employer, you can lawfully act against inappropriate actions that people take, but less so when actually what you're acting against is the protected beliefs that may be underlying those actions. And that is a really difficult line to draw in practice, especially in these sorts of cases where you've got very kind of emotive beliefs or identities that are really core to people's fundamental kind of sense of self, and they're potentially butting up against each other.

What we're talking about here is kind of human beings with deeply held beliefs and identities, and that's what we're trying to sort of manage with that tightrope. So, nothing's changed with this EAT case, *Higgs* that I mentioned, but what they did do was give some helpful guidance as to how an employer might try to sort of strike that balance. So they drew on some earlier case law, but they kind of put it in the context of, you're an employer and you're trying to consider how to respond to an employee that's manifested their belief, whether it's on LinkedIn or in an email or in any other kind of way, what are you doing when you're sort of balancing that versus the rights of other people that might have been impinged and deciding your action? And they said the things that you need to have regard to are the content of that manifestation, that communication, its tone, its extent, like how widespread is it? The person who made that communication, made that manifestation, did that what was their understanding of the likely audience. What's the extent and the nature of the intrusion on the rights of other people and consequential impact on your ability to run your business? Did the worker make it clear that their beliefs were their own or is there potential that it kind of links back to your organisation and it could create a reputational risk for you? Is there a power imbalance? I thought this was quite interesting between the worker that's manifesting the belief and the individual potentially suffering an intrusion on their rights. What's the nature of your business as an employer? Especially if you have services for vulnerable users and clients, that will be relevant to the balancing exercise. And then in kind of very classic sort of discrimination law territory here, any limitation that you're seeking to pause on that person's manifestation of their belief, whether it's a policy saying you can't, whether it's a sort of disciplinary action in response, is that limitation the least intrusive measure available? So, the least intrusive way of stopping that person kind of manifesting. The reality is it's always very context specific, but I thought that was quite a useful kind of checklist for employers.

Ellie: Yeah. Yeah, really helpful checklist. Thank you, Kelly.

Ellie: **Moving on now to another very complicated topic of holiday pay, which we know can cause real headaches for employers. So, Charlotte, tell us what's due to change and what employers should be doing to prepare.**

Charlotte: Yes, it can indeed cause headaches and there has been some draft legislation to reform holiday pay calculations for part-time workers and those with irregular hours and the changes they're not particularly exciting but they're important particularly for those who do engage workers who may have irregular hours or on a part-time basis and the change is coming to effect in January 2024 so everyone in that situation needs to be aware of them. The government has said the changes are intended to simplify calculations for holiday pay. The new legislation will calculate holiday pay entitlement for those with part-time and irregular hours as 12.07% of the hours worked in a pay period. The new calculation is supposed to increase transparency and prioritise fairness, so in other words, making sure that everyone is paid fairly sort of as according to the hours they've worked in a particular period. The other important change is that rolled up holiday pay for part-time workers and those who work irregular hours will also be allowed. This enables employers to effectively include an amount for holiday pay on top of the sort of the hourly rate in regular pay packets. And this is quite interesting in the sense that it's a return to a previous position many years ago, although unfortunately I'm still just about old enough to remember it, where rolled up holiday pay was permissible. But it was made unlawful as a result of concerns that workers might not be incentivised to take leave because they would potentially earn more holiday pay by staying at work and working longer hours, et cetera. So, in effect, it was ruled unlawful as a result of quite specific health and safety concerns. There are still going to be concerns about that. And in fact, 45% of those who took part in the consultation preceding the draft legislation said they didn't support rolled up holiday pay because of that very concern. In terms of take-home points, practical points, familiarisation with the changes and liaising with payroll departments, et cetera, to ensure they're aware of what needs to be done. That's the real takeaway point, but also just remembering the changes only apply to those who work part-time or irregular hours and agency workers. For everyone else, nothing changes.

Ellie: **So, our next topic relates to transfers of undertakings, specifically the rules around consultation with affected employees. So, Kelly, what's changed here?**

Kelly: Can I just say I'm thrilled that we haven't missed TUPE out of this festive round-up because no festive period is festive enough without TUPE and I sound sarcastic, but I am not being sarcastic. Correct. Mince pie, a little bit of transfer of undertaking.

Ellie: No Christmas treat would be complete, no.

Kelly: Okay, well, listen, brace yourselves, because it is a treat. And so, in actually, it is a bit of a treat, because the government did a really quick consultation process. So, in May, they published a policy paper quickly followed by a consultation paper proposing changes to TUPE information consultation, as you said, Ellie, and then in November, publish their response on the draft regulation. So pretty snappy, actually, from what we've become more accustomed to in terms of fairly lengthy consultation processes and quite a gap between end of that and the results coming out. So, the plan at the moment is for the TUPE to be amended by regulations that come in on the 1st of January 2024, so New Year's treat, and it will apply to any TUPE transfers that take place on or after the 1st of July 2024. And it's quite a simple change that essentially means that... if you are involved as an employer in a TUPE transfer and you as an employer either have fewer than 50 employees total or regardless of how many employees you've got kind of overall, there are fewer than 10 involved in the particular transfer. So, in either of those scenarios, there will be the possibility to not elect representatives and to instead look to consult directly with employees. So quite a welcome practical relaxation, I think for many. Oftentimes, if you've got a transfer that's only involving a small group of employees, those individuals often prefer to be consulted with directly anyway. So quite helpful, I think, from both an employer and potentially employee perspective. Just a few little warnings or kind of words of caution, I think, for employers. It's not going to apply if you've got a trade union or an existing appropriate representative body in place. You can't bypass that. And this is for a scenario where you would otherwise have to elect.

Also, really important to check terms of existing service agreements, because you might have a TUPE transfer that's happening next September, but it's governed by a contract you have in place with your outsourced service provider, for example. Those contracts won't, in all but the most unusual circumstances, be automatically amended by this legislative change. You're going to have to check those contracts as well before you start going off and not electing.

And then I think it's just remembering that there are sometimes reasons why actually having representatives are the best thing to do, even in what might otherwise look like a relatively small transaction. But if you're a business that's got 50 employees and they're all involved in a transfer or they're all impacted by a transfer, it

might actually be easier logistically and it might actually be better for the individuals to elect representatives. So, it's always sort of taking a case-by-case decision.

Ellie: **Okay, so number eight on our list is probably one of the most talked about topics in general, especially in the HR world. So, it's AI and its impact on the workforce. Patrick, I know you're advising many clients on this area at the moment. Can you summarise what employers' concerns are or employees' concerns are and how employers can tackle these?**

Patrick: I'll do my best, I'm conscious I've only got a couple of minutes to describe a truly amazing, interesting, existential, however you want to describe it, topic. Let's do a bit of background first. So broadly, we're moving into our fourth industrial revolution. And as many of us know, AI is currently the poster child and focus of this new age. We know that the convergence of technologies including AI will fundamentally alter workplaces, maybe not immediately, but certainly in the medium-term. Jobs will evolve because tasks undertaken by people will be better performed by AI and complementary technologies. Now, academic research predicts, a starting figure, more than 50% of jobs are susceptible to automation. The precise percentage varies. Some research suggests it could be up to 80%. And if business leaders listening are looking for a more sobering statistic, research from the US suggests that if the full complement of technological capabilities, including AI were deployed, about 50% of all tasks could be automated. But all is not lost. Bear in mind that...on the eve of the second industrial revolution, 40% of the workforce was engaged in agriculture. Now it's 2%, but impressively, unemployment remains low, meaning new jobs are created. That provides a picture of some optimism. Now, initially, basic AI will replace narrow tasks. This is because the combination of computing power and the volume of data makes the predictive capability of AI more effective than actually than any of us in undertaking a concise and defined data dependent task. This feeds into a vision where for corporates where AI will free up precious expertise for more complex high value tasks that requires our uniquely human emotional skills, skills that AI can't currently replicate.

But with this in mind, organisations are looking increasingly to embed machine learning. Now that will include generative AI into their business operations. However, the speed of adoption must be balanced against governance, regulatory, legal, and ethical risks. The more obvious concerns which are frequently discussed include privacy, confidentiality, bias, IP, accuracy, or as it's more colloquially referred to and in part to soften the impact, hallucinations. And then there's explainability, can AI be explained? In the workplace, the challenges really do come into sharp focus for AI that facilitates decisions that directly impact on an individual's work opportunities. These might include, for example, AI that automates recruitment, performance assessments, or monitoring. And it's in relation to these automated tasks that concerns about employee privacy and the risk of bias and discrimination are most stark. AI in a nutshell.

So, with all of that in mind, many organisations are going to be working through what they should be doing, what steps and processes should be in place to most effectively implement AI combined with technology to advance their organisations, whilst at the same time diminishing any of the risks I've just spoken about. And there are a few obvious steps. First one is education of all individuals in the workplace who will be engaging with AI, so they properly understand, importantly, its capability. And often that capability is simply not as significant as we expect it to be, but that understanding, I think, is hugely important. The organisations are looking more closely at establishing governance boards which will look carefully at the impact in relation to the introduction of AI, particularly with a view to mitigating risks around privacy, bias, breaches of IP and confidentiality, equally those which we talked about, and having more rigorous processes in relation to AI, which is regarded as high-risk AI. And that's AI which will influence judgements particularly in relation to, as we talked about, as I talked about, workplace opportunities for individuals.

Ellie: That's excellent Patrick and we will be looking at AI much more closely in season 2 of The Work Couch in 2024. So do look out for that one.

Ellie: **Number nine on our list is menopause support at work. And Victoria, we spoke about this on our very first episode of the Work Couch back in March, but just remind us why this topic is so important on the HR agenda at the moment.**

Victoria: Well, first of all, I can't believe it's March. I mean, this year has absolutely flown. But it's an area which there's just loads going on and loads has gone on. It's hard to kind of pinprick at a point when it all started, but I guess back in 2021 there was a Women and Equalities Committee inquiry regarding the menopause and that resulted in a report dated the 28th of July 2022, Menopause in the workplace. And many regarded as the key point to come out of that, the recommendation that menopause be deemed a protected characteristic under the Equality Act. I'm assuming obviously that all our listeners will be aware that it's not, and that to be able to bring a claim for disability discrimination, an employee has to get over the hurdle of being regarded as disabled under the Equality Act in accordance with the statutory criteria. So, following that recommendation, the government rejected it in January of this year. So that was the situation where we were up to really at the time of our previous podcast episode.

Since then, various things have taken place. So first of all, in March the government appointed a so-called menopause employment champion, and that champion has introduced a four-point plan which is initially designed or intended to focus on various sectors including hospitality, retail, care, manufacturing. The four-point plan includes a portal for employers within a particular sector to share best practice, an allyship programme for women and then menopause friendly employers to act as advocates within a sector and also a sector-based communications plan. So that was back in March. Fairly recently in October, actually on the 18th of October, the government published a policy paper which included new guidance for employers and on the same day an all-party parliamentary group published a manifesto for menopause which called on all political parties to commit to various reforms ahead of the next general election. The employment aspects of those reforms included, for example, requiring employers with over 250 employees to introduce action plans, providing specific guidance to small and medium enterprises, and introducing tax incentives. Curiously, I think this is an interesting one, introducing tax incentives to encourage employers to integrate menopause into occupational health.

Alongside that has been some case law. So, in October, a tribunal began hearing the case of *Rooney v Leicester City Council*. And this is the first case where someone's menopausal symptoms have been deemed by an appeal court to potentially, and I emphasise that word, potentially amount to disability for the purposes of the Equality Act. So, preceding this, the EAT, or that's the Employment Appeal Tribunal, set a legal precedent back in February 22 when it concluded that menopausal symptoms could meet the legal definition of disability and it remitted that specific question, the question of whether or not Miss Rooney was disabled as far as those symptoms were concerned, back to the Leicester Employment Tribunal. It considered that that particular question needed a fresh and careful analysis based on the facts of that particular case. So, the tribunal re-heard the case on the 2nd of October 2023. So far, there has been no decision that we are aware of, but it is awaited at the moment.

So, the key points for employers to take away from all those developments, I think again, the same as flexible working, the direction of travel is really clear. Menopause has stopped being a taboo subject. It needs to be talked about. It is being talked about. It's become part of common parlance now, I think, in the workplace, particularly in bigger, larger organisations who may have many numbers of female employees who have reached the really the pinnacle of their career or their careers at a time when they may be affected by the menopause. So, it's really important to include menopause awareness as part of a wider diversity, equity, inclusion strategy. So, this could include consulting, for example, with employee resource groups or committees. If employers don't engage with these issues, again, similar to flexible working, there's a real business risk of losing a valuable pool of talent from particular organisations and also the issue of brand perception as it becomes more discussed and as wider awareness of this particular issue becomes ingrained in society and in workplace culture.

Ellie: **Charlotte, can we talk next about the rules on dismissal and re-engagement or as some people refer to it as the fire and rehire rules? Where does the law stand on this now?**

Charlotte: Yes, we have incoming when parliamentary time allows the code of practice on dismissal and re-engagement, which we'll just call the code slightly ominously. It was first published on 24th of January 2023. The government had asked ACAS to look at practices around changing contractual terms and conditions and that was partly against the backdrop of P&O allegedly failing to consult with employees and dismissing about 800 of them in 2022. So that consultation ended in April, 2023 and the finalised code is, as I said, intended to be brought into force soon. The code sets out expectations on employers in situations where an employer decides that it wants to make changes to its employment terms and conditions, and this is the language, "it envisages that if the employees do not agree to those changes, the employer may dismiss them and either offer them re-engagement on the new terms or hire other employees to perform the relevant roles on those terms. So, the guidance is, it sets out expectations, but is also intended to provide kind of practical guidance to employers in terms of what they need to do. There's crucially no ban on firing and rehiring; that remains lawful practice. Rather, the code is supposed to encourage the employer to take steps to explore alternatives to dismissal, use dismissal and re-engagement as a last resort, provide information so as to allow the employer to engage meaningfully in consultation with employees and trade unions and other employee representatives in good faith and to encourage the employer to avoid using threats of dismissal to pressurise employees into agreeing the new terms.

In terms of what the code says and the potential consequences of not following the code, the key points are broadly as follows. The code applies irrespective of business aims of the employer and irrespective of its reasons for seeking the changes to those terms and conditions. The focus is, of course, on consultation with employees and unions. Crucially, consultation will be required regardless of the number of employees who might be affected by the proposals. In other words, there will be an obligation to consult even where fewer than 20 employees would be affected by the changes. But the draft code apparently doesn't apply to redundancy dismissals, and I think there's potentially quite an interesting interplay between situations where consultation might be required in any event. But I'll come on to that.

In terms of penalties for not following the code, the position will be similar to the position of the ACAS code of practice on disciplinary and grievance procedures isn't followed. There will be no direct penalties, but whether the code has been followed or not will be admissible in evidence in either tribunal or court proceedings, and the tribunal can award an uplift of up to 25% of any award if the employer has unreasonably failed to comply with the code. That works both ways they can equally decrease an award by up to 25% where an employee is the one who has unreasonably failed to comply with the code. In terms of take-home points, the code recognises that a hire and fire and rehire is still going to be legitimate practice and emphasises that dismissal is supposed to be a last resort. I question that because I think it already is a last resort. I think most employers don't want to get to that point. Equally, I feel that a lot of what's set out in the code is already regarded as best practice, particularly in situations where you may have to fire and rehire. Quite often, I think our view is that actually, potentially, considerations under TULCRA apply if you're proposing to dismiss 20 or more employees, even if it's in the context of a rehire as opposed to a redundancy, so I think there's a potential for quite a lot of confusion where there's interplay or where there's another redundancy consultation process potentially in the background or in the offing.

And of course the usual considerations will apply in the context of making changes to terms and conditions such as assessing whether a group with a particular characteristic is impacted by the proposed changes more than a group without the protected characteristic, making sure you provide plenty of notice of the specific change, having a think about whether a phased introduction might be needed there and ensuring employees have had full opportunity to ask questions about the change and are given informed consent, etc.

Ellie: **So, our penultimate item on our Christmas list is industrial action, which Charlotte mentioned earlier in relation to agency workers. So, Victoria, what's the latest on the government's moves to ensure that there are minimum service levels in certain sectors?**

Victoria: Yeah, so the background to this really ignoring any political interpretation is a purported concern of the government about the effect of strike action on essential services. And we all know really where this has come from with the recent strike action and other industrial action in various sectors. So what has changed is again a very snappy title, a piece of legislation called the Strikes Minimum Service Levels Act 2023 and that received Royal Assent on the 20th of July this year. And it amended TULCRA, which is the piece of legislation that we're all familiar with and that Charlotte was just talking about then, to allow minimum service levels to be applied in the fields of health, transport, education, fire and rescue, etc. I won't list all of the particular sectors, but the way the whole thing is going to work is as follows. So where a union calls a strike in a service to which the minimum service regs apply, the employer may, first having consulted with the union, give the union something called a work notice. And that's going to identify the workers that are required to work and the work they're going to be required to do to ensure that this minimum service level is met during any strike. So, it's quite a significant change with potentially serious effect. What could happen if a trade union does not do this? So, if it doesn't act appropriately on receipt of a work notice issued by an employer, is that a union could face legal action if it fails to take reasonable steps, quote unquote, to ensure compliance by any union member identified in that work notice. And then for employees who take... employees who take strike action contrary to the work notice, they will lose their automatic protection from unfair dismissal for industrial action. So, you can see from that why this has become such a battleground between the government and trade unions. So, after debate the government announced it would introduce a statutory code of practice to really define what reasonable steps a trade union is required to take and what they look like, what they are and that was after quite an amount of consultation. So, the Code of Practice itself was just recently published on 6th of December and it came into force on 8th of December, really very recently, and we'll include a link to the code on the podcast page.

The code applies to specific sectors including health, education, and transport services, which is quite timely given the further recent industrial strike action. In addition to that, on 16th of November, the Department of Business and Trade issued guidance on the issuing of work notices, the work notices that I mentioned before.

So, this is going to be quite a new and significant development for employers who are in those sectors and who have unionised workforces. It may not affect many employers at all if they don't work in those sectors. It's worth noting though that Labour has repeatedly said it will repeal the act if it gets into power, and Scottish ministers have announced that it will refuse to cooperate with the new regulations.

Ellie: **Finally, and this is our most recent development actually, the Supreme Court handed down its decision in the case of *Independent Workers Union of Great Britain v Central Arbitration Committee and Deliveroo*. So, Patrick, can you give us a rundown of this case, what it means for employers?**

Patrick: Of course, Ellie. It's a case about employment status and collective rights. The case goes back seven years when a group of delivery riders from Kilburn in North London, yes, that hotbed of independent thought and revolution, which is fighting back against the Shoreditch hipsters, my world. When they first look to gain recognition for collective bargaining. Under our domestic legislation, an independent trade union can only secure trade union recognition in relation to the term is "workers". And as we know, to be a "worker", the person or in this case, the rider, had to be engaged under either an employment contract or alternatively a contract to perform work personally or provide personal services the starting point, the riders had to be workers under our laws. And through, interestingly through all stages of the litigation, the courts were clear that the riders, because of a genuine unfettered right of substitution, couldn't be workers. Now, ordinarily, this should have been the end of the claim, but as a guiding principle, our legislation, including TULRCA, which is our statute that governs the availability of collective rights, must be, as we know, compatible with related rights under the European Convention on Human Rights. This then takes us to Article 11 of the Convention, which enshrines a right of freedom of association, including to join a trade union. Now these freedoms are protected where there's an employment relationship. Now that's as this term is understood by European law. Broadly, that term reflects our worker principles, albeit its true meaning is described by a particular international labour organisation recommendation. There's a level of detail which I won't go into, but not least because it's Christmas. So, look, I'll skip the technical stuff and go straight to the answer. In a nutshell, the Supreme Court said that where there's a genuine right of substitution, so that's where practice reflects what's on paper, the riders won't be in an employment relationship. As said, that's akin to our worker status.

It's only if a genuine and sufficiently unfettered right of substitution is absent that the courts will look to engage a broad and more holistic and balancing review of the features of the relationship to determine if the dominant feature is a worker one.

Ellie: Well, thank you all so much to my wonderful guests for that whistle stop tour of 2023's employment law developments, our Christmas gift to you all! We hope you found this helpful in getting to grips with what's changed this year and how employers should be responding. In the meantime, we wish you all a very happy festive period and we look forward to you joining us again for season two of The Work Couch, which will kick off on the 17th of January.

We have a brilliant line-up of guests, so please do hit the follow button to make sure you don't miss an episode.

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