

HR BYTES

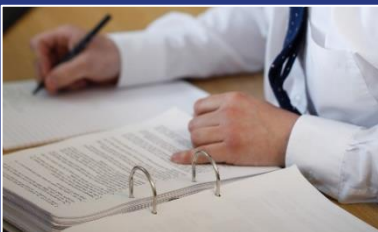
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Recent case law updates

We look at two key cases this term and consider the implications of these cases for schools.

Page 2-3



Forthcoming family friendly legislative updates

There are changes afoot for Flexible working, redundancy protection for employees post-maternity leave and neonatal care (leave and pay).

Page 5-6



Future Data Protection Reform

We look at some of the amendments proposed in the Data Protection and Digital Information (No 2) Bill introduced to parliament in March 2023.

Page 7



RECENT CASE LAW UPDATES

Term-time worker entitled to National Minimum Wage for unworked basic hours. *Lloyd v Elmhurst School Limited* [2022]

The Employment Appeal Tribunal (**EAT**) decided in the case of *Lloyd v Elmhurst School Limited* [2022] that the Employment Tribunal (**ET**) had erred by finding that a term-time salaried hours worker was not entitled to the national minimum wage for hours worked outside school term-time.

Ms Lloyd, a learning support assistant, worked three days a week during school terms and was paid her salary in monthly instalments. Ms Lloyd's employment contract stated that she was entitled to "*usual school holidays*" as "*holiday with pay*." Her contract did not include any provisions in respect of hours of work, her rate of pay for school holidays or her annual salary. She brought a claim for unlawful deduction from wages under the Employment Rights Act 1996, contending that she had not been paid the national minimum wage.

The question for the ET was whether Ms Lloyd's basic hours should be calculated over 52 weeks or the 36 weeks she actually worked (plus four weeks of leave entitlement). The ET dismissed her claim on the basis that her basic hours for the purpose of regulation 21(3) of the National Minimum Wage Regulations 2015 were based on 21 hours over 40 weeks, which were the 36 weeks she worked during school terms and her leave entitlement of four weeks under the Working Time Directive. The ET considered that the additional 12 weeks' contractual holiday did not form part of her basic hours. Ms Lloyd appealed the ET's decision.

The EAT held that the ET should have focussed on Ms Lloyd's employment contract rather than the hours she had in fact worked. The EAT found that a worker's basic hours do not depend on the hours actually worked, and basic hours can include periods of absence where contractual salary is due to be paid. It was wrong of the ET to focus on whether the Claimant was working outside school terms or not.



Comment

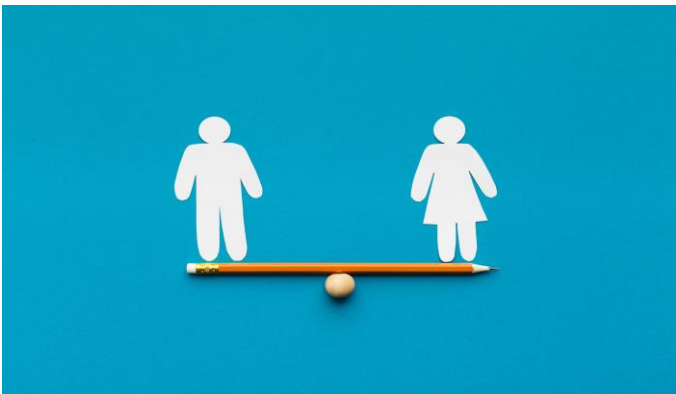
Following the Supreme Court's decision in *Harpur Trust v Brazel* [2022] this case and the decision again places emphasis on the complexities relating to part-year workers.

The EAT's decision provides clarification on what is meant by "basic hours" within the meaning of regulation 21(3) of the National Minimum Wage Regulations. Employers should identify a worker's basic hours by using their employment contract, not the actual hours that they work. Employers should also take care to ensure the drafting of worker's contracts are detailed and precise. In Ms Lloyd's case, the wording of the clause in her contract was a key consideration in the EAT's analysis of how her basic hours should be calculated.

RECENT CASE LAW UPDATES

Failure to make reasonable adjustments as part of a dismissal process does not mean that the dismissal itself is necessarily unfair.

Knightley v Chelsea and Westminster Hospital NHS Trust (2022)



The Employment Appeal Tribunal (EAT) decided in the case of *Knightley v Chelsea Westminster Hospital NHS Trust* that a failure to make reasonable adjustments leading up to the dismissal of a disabled employee will not necessarily make their dismissal unfair.

Ms Knightley was employed by Westminster Hospital NHS Foundation Trust as a Lead Midwife for Mental Health from February 2009. She had been suffering with stress, anxiety and depression from around 2007 which affected her attendance at work involving two long periods of sickness absence, both of which were managed under the hospital's sickness absence procedure, which included OH advice and review meetings.

The impact of Ms Knightley's absence on the service to the public gave rise to serious concerns about the welfare of patients. In an OH appointment, which took place when she had been absent for about six months during the second long period of sickness absence, Ms Knightley made clear that she did not consider that she would be able to return to work in the foreseeable future, that there were no steps which the hospital could take to enable her to do so, and that she wished to apply for ill health retirement. She reiterated this view at a long-term sickness absence hearing, following which she was dismissed in April 2018. Mrs Knightley was informed she had 10 days to appeal this decision. 13 days later she asked for an extension and submitted a three line appeal a week later. Her employer did not consider the appeal on the grounds that "it was out of time."

Ms Knightley brought several claims against her employer including for their failure to make reasonable adjustments, unfair dismissal, and discrimination arising from disability.

The Employment Tribunal (ET) held that her employer should have made adjustments by allowing more time to appeal the decision to dismiss and awarded £3,000 for injury to feelings for their failure to make reasonable adjustments. Despite this, they found that the procedure as a whole was fair and that she was not unfairly dismissed. Ms Knightley appealed this decision on several grounds including that if the ET found that it was reasonable to allow for an extension to appeal then it ought to have led to her other claims succeeding.

The EAT dismissed her appeal confirming that it considered that her employer should have allowed more time to appeal the decision, however in the circumstances it did not mean that her other claims should succeed since the legal tests for the three claims (unfair dismissal, discrimination arising from a disability, and failure to make reasonable adjustments) are different.

Comment

This case underlines the importance of carrying out a full and fair procedure in relation to dismissing an employee and emphasises the additional care that should be taken when the potential grounds for dismissal relate to ill-health or disability, as there are greater risks involved with the dismissal.

Employers should be wary of rigidly enforcing deadlines in dismissal and appeal procedures, particularly where the employee suffers from a disability. If they decide to refuse a request to extend deadlines for a reasonable period, employers must make sure that they have very good reasons for this decision, or they will be at risk of successful disability discrimination and unfair dismissal claims.



Latest Pay Updates

NJC for Local Government Services: Pay Agreement 2023-24

The National Employers met in February and agreed unanimously to make the following one-year (1 April 2023 to 31 March 2024), full and final offer to the unions representing the main local government NJC workforce with effect from 1 April 2023:

- an increase of £1,925 (pro rata for part-time employees) to be paid as a consolidated, permanent addition on all NJC pay points 2 to 43.
- an increase of 3.88% on all pay points above the maximum of the pay spine but graded below deputy chief officer.
- an increase of 3.88% on all allowances

The offer would achieve a bottom rate of pay of £11.59 with effect from 1 April 2023 (which equates to a pay increase of 9.42% for employees on pay point 2) and everyone on the NJC pay spine would receive a minimum 3.88% pay increase.

The NJC Unions (Unite, GMB, Unison) met with the National Employers on 8 March and sought a 'significant improvement' to the £1,925 headline offer. The National Employers rejected the unions' request and reaffirmed their offer as full and final.

UNISON has announced a ballot for industrial action, whilst GMB and Unite members will be consulted on the basis of a recommendation that the offer be rejected.

You can find detailed updates on the [Support Staff Pay and Allowances](#) pages of our website.

Latest Pay Updates

School Teachers' Pay 2023

The DfE have asked the STRB to deliver recommendations for an award that:

- Delivers the commitment of a £30,000 starting salary, supported by a competitive early career pay package and training;
- Provides uplifts for all teachers and leaders that are comparable with the rest of the public sector and broader workforces, and competitive, especially when taking into account wider benefits including pensions;
- Supports schools to manage their overall budgets, without creating unnecessary or unmanageable pressures.

To achieve a starting salary of £30,000 the DfE is suggesting the STRB recommend the greatest uplift for the minimum of the pay scale (M1) of 7.1% uplift to the minimum of the Rest of England pay scale, and uplifts to starting salaries in London, reflecting differences in pay structure and workforce bringing starting salaries to £30,000 or above in all regions of the country in 2023/24.

In addition to the substantial uplift at M1, the DfE is suggesting tapered uplifts to the remaining pay points on the main pay range, to ensure a coherent pay structure, with consistent progression between pay points with experienced teachers receiving a 3% pay award in 2023/24.

You can find more information on the [Latest News](#) area of our website.

Forthcoming changes to Family Friendly Legislation

Changes to Flexible Working

Last October, the Government confirmed that it will support the [Employment Relations \(Flexible Working\) Bill](#).

The bill, if passed, will make the right to request flexible working a **Day One Right** (it is currently only available to employees with 26 weeks' continuous service), and this remains a right to *request*, not a right to a flexible working arrangement.

It will simplify the process to apply for a flexible working arrangement by removing the requirement for an employee to explain any potential effect they think the change in their working pattern will have on their employer.

An employee will be allowed to make two applications (rather than one) for a flexible pattern of work during any 12-month period.

It will be a requirement for an employer to consult with the employee about their flexible working application before refusing it.

Finally, the employer will have to notify the employee of its decision about their flexible

working application within two (rather than three) months.

There will be no change to the list of eight reasons currently in place that employers may use to refuse a request for flexible working.

These are as follows:

- *The burden of additional costs;*
- *Detrimental effect on the ability to meet customer demand (e.g., pupils/parents);*
- *Inability to reorganise work amongst existing staff;*
- *Inability to recruit additional staff;*
- *Detrimental impact on quality*
- *Detrimental impact on performance;*
- *Insufficiency of work during the periods the employee proposes to work;*
- *Planned structural changes.*



At the moment there is no timetable for when these changes might be implemented, but the Bill is progressing though

Changes to redundancy protection for employees post-maternity leave

Employees on maternity leave already have the right to be offered any suitable alternative vacancy in a redundancy situation. Changes are in progress to extend this protection to cover the period from the employer finding out about the pregnancy to six months after the maternity leave ends. The main proposals are:

- Ensure that the redundancy protection period, which gives the right to be offered any suitable alternative vacancy in a redundancy situation, applies from the point that the employee informs the employer that they are pregnant (whether this is done orally or in writing).
- Extend the redundancy protection period to six months after a new parent has returned to work, with the protection period starting once maternity leave is finished.
- Mirror the extension of the redundancy protection period for those taking adoption leave and shared parental leave (but not paternity leave).

The bill is progressing through parliament at the moment.

Forthcoming changes to Family Friendly Legislation Contd.

The Carers Leave Bill

The Carer's Leave Bill, which could see working carers get access to one week of unpaid carer's leave, has been passed by MPs.



The bill contains a very specific definition of dependent, restricting the scope to a spouse, civil partner, child, or parent of the employee, who lives in the same household as the employee, who reasonably relies upon the employee to provide or arrange care, and has a long-term care need.

The Bill has passed the report stage and third reading in the House of Commons and will now face scrutiny in the House of Lords. If passed, employees who care for a relative or friend would be entitled to one week of unpaid leave each year to manage planned caring commitments.

The Neonatal Care (Leave and Pay) Bill

In October 2022, the Government confirmed that it was backing the Neonatal Care (Leave and Pay) Bill, which was introduced to Parliament on 15 July 2022.

The Bill, when enacted, will allow parents to take up to 12 weeks' paid leave if their baby requires neonatal care after birth. This entitlement is in addition to existing entitlements such as maternity leave.



If the Bill successfully completes all parliamentary stages in 2023, it is likely to come into force 18 months after that date so likely 2024/25.

QTS for Overseas Teachers: International Qualified Teacher Status (iQTS)

Overseas Trained Teachers (OTTs) are those who are recognised as qualified teachers in a country outside the UK but who do not hold QTS. OTTs are allowed to work as unqualified teachers in maintained schools or non-maintained special schools for a maximum period of four years after which time they can only normally be employed if they have gained QTS.

From 1 February 2023, the way that QTS is awarded has changed. The number of countries where an individual is automatically eligible to apply for QTS has been expanded.

In addition, there are an extra 7 countries where if the teacher has a subject specialism in languages, mathematics or science and a teaching qualification to teach 11 to 16-year-olds, they will be able to use the service to check if they meet the requirements.

Teachers from all eligible countries will have to show they meet a consistent set of criteria for the award of QTS. Over time, this route will be opened to qualified teachers from every country outside the UK.

Guidance on who can be employed, including all the new countries, is available on our [website](#) and via [GOV.UK](#).



Data Protection Reform – what's on the horizon?



On 8 March 2023, the Government introduced the Data Protection and Digital Information (No. 2) Bill in Parliament. The Bill, if brought into force, would amend various provisions in the UK General Data Protection Regulation and the Data Protection Act 2018.

Some proposals in the bill which will have the greatest impact on HR processes and procedures include:

- The replacement of the "manifestly unfounded or excessive" request threshold that data controllers can rely on to refuse, or charge a reasonable fee for meeting, data subject rights requests, with a "vexatious or excessive" requests threshold; clearly setting out circumstances that should be considered when determining if a data subject rights request is "vexatious or excessive"
- Specifying the circumstances where the response time for a data subject request could be different from one month of receipt
- Modification of current record-keeping requirements with a requirement to keep "appropriate records" of processing activities only where the processing is likely to result "in a high risk to the rights and freedoms of individuals" (for example, when processing large volumes of sensitive data about people's health)
- Replacing the requirement to undertake a data protection privacy impact assessment with a requirement to carry out an assessment of high-risk processing consisting of a summary of the purpose of the processing and whether it is necessary, as well as the risk to individuals of the processing and how the risks will be limited
- Setting out clear requirements and procedures for how data controllers should deal with complaints

The Bill replaces the earlier Data Protection and Digital Information Bill, which was introduced on 18 July 2022 and has subsequently been withdrawn. We will keep you updated on the progress of the Bill and any future developments.

The contents of this newsletter are for information and guidance purposes and should not therefore be relied upon as a substitute for specific, tailored HR or legal advice.

Statutory Rates changes from April 2023

	April 2022	April 2023	Date Effective
Statutory Maternity, Paternity, Adoption, parental bereavement and shared parental pay	£156.66	£172.48	2 April 2023
National Minimum Wage			1 April 2023
Age:	£	£	
23+	9.50	10.42	
21-22	9.18	10.18	
18-20	6.83	7.49	
<18 (above school leaving age)	4.81	5.28	
16-17	4.81	5.28	
Apprentices	4.81	5.28	
Statutory Sick Pay	£99.35	£109.40	6 April 2023
Statutory Cap on a week's Redundancy Pay	£571	£643	6 April 2023

Online Training Next Term

Course Title	Date(s)	Time	Price & Booking Link
Managing and Processing DBS Checks	20 & 25 April 2023	9:30-12pm	£220
	13 & 20 June 2023	9:30-12pm	£220
Managing the Single Central Record	10 May 2023	09:30-12:30	£125
	06 June 2023	09:30-12:30	£125
	11 July 2023	09:30-12:30	£125
The Foundations of HR in Education	Modular: 16, 18, 23 & 25 May 2023	09:30-12:30	£450
Managing Difficult Conversations	8 June 2023	09.30-12:00	£125
Managing Absence & Supporting Wellbeing	22 June 2023	09.30 –12:00	£125
Preparing for Appraisal	27 June 2023	09:30-12:00	£125
Safer Recruitment for School Managers	29 June 2023	09:30-12:00	£125
Equality, Diversity and Inclusion (EDI)	6 July 2023	10.00-12:00	£125

Bespoke training

Don't forget we also provide a wide range of group training workshops in the management of human resources as well as whole staff workshops which can be delivered at your individual school or setting at a time to suit you. The content and duration can be tailored to your particular requirements.

[Find out more >>](#)