GOSSCHALKS

EMPLOYMENT LAW UPDATE

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Welcome to this Gosschalks Employment Law Update seminar. Thank you for attending today, we hope you will find it useful.

We do these seminars to tell you about anything that has happened recently in the world of employment law and HR that might be of potential interest to you. We have been doing these seminars for at least fifteen years and it would probably be fair to say there has never been as much change and uncertainty as there is at the current time.

In these seminars we look at legislation, which is to say law emanating from the Government, which has been introduced in the last six months, is about to be introduced or is still on the horizon but likely to come into effect. There is plenty of that currently.

We also look at recent cases which have changed the law. No matter how much time has been spent debating and drafting Parliamentary legislation, whether that is Acts or Regulations, there are always grey areas which are left to the Courts and Tribunals to determine. It is not unknown for a piece of legislation that is decades old to be re-evaluated following a landmark decision. Sometimes we cover a recent case simply because it is a timely reminder of an important principle.

We also cover what we call Practice Points. We act for clients of all sizes across all sectors but sometimes between us we will notice that particular issues might be cropping up. If so, we take the opportunity to speak about those on the basis that if a fair proportion of our clients are having it raised as an issue, then it might be just around the corner for you. For this seminar we are looking at the principles of a fair redundancy procedure and National Minimum Wage compliance.

Let's get started.

New Legislation
The Employment Rights Bill and Labour's planned changes

When we did our last Employment Law Update in September last year, we were telling you all about the forthcoming Employment Rights Bill which Labour had promised within 100 days of taking power. It duly arrived on the morning of 12 October and landed with a resounding crash as befits the biggest set of employment law changes for decades.

On reflection it was in some ways something of an anticlimax. Yes, there was an awful lot in the 150 pages but much of it was irrelevant to the average employer and pretty much all of it had been disclosed in advance. The biggest fear that employers had, which was that changes would come in with immediate effect or worst still even retrospectively, did not come to pass. It is of course quite grand and dramatic to stand up in the House of Commons and promise to bring forward changes within 100 days but given the amount of work involved for what was a new Government all they could really do in the 100 days was put together a wish list of what they intended to do when they eventually got round to it and subject always to the usual consultations, debates, passages through the House of Lords, implementation periods, Codes of Practice etc. Nonetheless, it was a statement of intent like nothing before and they have where possible tried to move forward with getting most of their proposed changes onto the statute books.

Since 10 October the Bill has had three readings in the House of Commons completing the third on 12 March. It has now gone to the House of Lords to be debated there. The Bill, which now weighs in at 310 pages, is expected to receive Royal Assent in the Summer. So now that we are over five months on from the original Bill being unveiled where are we with regard to the areas of law it promised to change?

Unfair Dismissal Qualifying Period

This without doubt was the change that worried clients most in the run up to the Bill being unveiled in October. Some organisations genuinely considered whether they should make dismissals before the Bill landed in case this change, which had been promised for several years, was being brought in with immediate effect. In fact it seems likely that the changes will not come into effect until Autumn 2026. So, having treated ourselves to a huge sigh of relief – what is actually going to change?

We have had unfair dismissal protection in UK employment law since 1976 and there has always been a qualifying period ranging from 6 months to 1 year to 2 years. The two year qualifying period that we are all familiar with has been with us since 2012.

It is of course the case that it is not *quite* a two year rule because you count in the statutory notice period of 1 week, so it is 103 weeks rather than 104 that you have to make a risk free decision. And of course we all know even then letting the individual go might not quite be risk free because of claims that do not require any qualifying period at all. In that regard we all think of principally discrimination claims but also whistleblowing claims.

What changes after two years? Currently at that point the unfair dismissal regime comes into play. This brings with it the requirements that you be able to point to one of the five potentially fair reasons to dismiss under UK employment law (which include conduct, capability and redundancy) but also that you have to follow a fair procedure by complying at the very least with the relevant ACAS Code of Practice.

We have known for at least three years that Labour were going to make unfair dismissal protection a 'Day One Right' which in simple terms just does away with the qualifying period altogether and brings the whole unfair dismissal regime forward two years. This is what alarmed people. However, even as we approached a General Election which Labour were obviously going to win the talk on Westminster corners was of allowing employers to make use of some sort of statutory probationary periods.

Probationary periods have always been a feature of employment contracts but historically have had little significance as they do not affect or limit any statutory rights. Often, they were completely forgotten about. In future they are going to be of crucial importance.

There is still a lack of detail surrounding what is going to be the most important of changes but what we know is that there will be an "initial period of employment" where some laws and procedures, if not the full weight of unfair dismissal law, will apply. In the run up the Bill landing there was talk of this either being 6 or 9 months and it now seems to be likely that it will be 6 months with a potential 3 month extension.

What will happen during this initial period of employment? The devil as ever will of course be in the detail and we do not know but most commentators expect 'Unfair Dismissal Light'. It is expected that

during that period a less rigorous test for unfair dismissal will apply for performance/capability and conduct but redundancies during probation will have to comply with the law in the same way as they do after two years now. In any case, what does still seem to be clear is that this will not come into effect until late 2026.

Many businesses and employers are of course concerned about this change because it will bring within the unfair dismissal regime millions of employees who were not previously covered. Given that we have a system where employees can bring a claim online for free, and where employers cannot recover their costs even if they defeat that claim – except in exceptional circumstances - this inevitably suggests that there is going to be a lot more wasted costs not to mention management time and distraction. Is there anything positive that could be said about this? Two points perhaps.

Firstly, two years was probably too lengthy a period during which employees were allowed to coast along because employers knew they still had plenty of time to spare before parting company with them. The new regime should see employers putting a renewed focus on not just effective recruitment in advance of making appointments but more rigorous performance management from day one. That can surely only be a good thing. And of course that may as well start now.

Secondly, another potential upside is as follows. Defeating an unmeritorious unfair dismissal claim is potentially expensive and annoying but at least it is reasonably straightforward and in this Region can be done and dusted inside nine months. However, many of you will be familiar with cases where an individual with less than two years' service just cobbles together a claim based upon a supposed disability or alleged whistleblowing. Defeating those claims is usually far more time consuming and expensive involving as they do additional features such as preliminary hearings, medical evidence, longer final hearings etc. So perhaps another crumb of comfort is that that might happen less often in the new era. Possibly.

Employment Tribunal Claim Time Limits

As we all know most Employment Tribunal claims work on a three month (minus one day) time limit. In unfair dismissal claims that clock starts ticking from the dismissal and in discrimination claims from the last act complained of. The three months applies to almost every claim. Labour have announced that in due course this will be extended to 6 months. In some ways, this has been welcome because it

sometimes happens that a claim is issued simply because time is running out even though an appeal, or grievance, or both, are still ongoing.

However, it is also speculated that this change might mean that more claims are brought (with the ET system already overloaded). It also means you are going to be waiting even longer until you are sure you are 'out of the woods' if someone threatens to bring a claim against you. The timescale for this change is as yet unknown.

Fair Work Agency

This Government funded independent body was mentioned in passing in the October Bill when it was referred to it being established to police and enforce workers rights. At the time, given the lack of detail and the other fundamental changes being proposed, the Fair Work Agency (FWA) attracted little comment. What became clear earlier this month in an Amendment Paper is that the Agency will have significant powers, the likes of which have not been experienced in the UK before.

They will be entitled to bring Employment Tribunal claims on behalf of workers even if those individuals do not want to claim themselves. They will also be able to offer legal assistance with cases brought by individuals with the Agency's costs potentially recoverable if the claim is successful. They will have the right to pursue employers for unpaid holiday and sick pay with financial penalties on top if successful. This last power appears to be similar to the ones in respect of National Minimum Wage underpayments. All of this is undoubtedly significant. More details to follow as ever.

Sexual Harassment

We spoke about sexual harassment at length in our September seminar because of earlier changes in the law unrelated to the Employment Rights Bill. These involved changes in the law which came into force on 26 October 2024 because of the Worker Protection (Amendment) of the Equality Act 2010 (Act 2023). In simple terms this change in law meant that employers had to do more to prevent sexual harassment if they were going to persuade a Tribunal that they had done what they could to stop it happening. These new standards involve policies, training, reporting lines etc. This was all happening anyway.

What the new Bill is going to bring on to the statute books is liability for harassment by third parties. This can be customers, clients, employees of other companies you work alongside etc. Employers would potentially be liable for this unless they have taken "all reasonable steps" to prevent it. That is almost certainly going to mean having the full suite of protections you should have had anyway because of last October's changes but being prepared to extend all of that to potential harassment by third parties. This is not expected to come into law until 2026 and we should have more detail by the time we see you again in September of this year.

Flexible Working

This was another change that employers spoke to us about in the run up to the Bill being unveiled because it had been rumoured, wrongly, that flexible working was about to become an absolute right and that would include a right to a four day working week. That is not what has happened – nowhere near in fact.

Where we are currently is that workers have had a right to request flexible working since 2014. It is now a Day One Right and an employee can make two requests a year. However, an employer can turn those down based upon what are eight fairly vague statutory grounds those being;-

- Planned structural changes.
- Insufficiency of work during the periods the employee proposes to work.
- Detrimental impact on performance.
- Detrimental impact on quality.
- Inability to recruit additional staff.
- Inability to reorganise work among existing staff.
- Detrimental effect on ability to meet customer demand.
- The burden of additional costs.

All that has really changed is that to turn down a FWR an employer can still point to the eight statutory grounds (or as many of them as it can rely on) but now a proper explanation should be given as to why they are relied upon as opposed to a more blanket refusal in the past.

Other Changes

Clearly, there is a lot going on but other changes which were mentioned in the October Bill, the accompanying Next Steps paper or the updated Bill include:

- Simplification of the current system whereby individuals will either be employed or self-employed – doing away with that third intermediate status of 'worker';
- Changes to Statutory Sick Pay, to no longer have three waiting days and to set SSP as a percentage of pay;
- Changes to the fire and rehire regime;
- More protections for people currently on zero hours contracts;

- Gender pay gap reporting;
- Ethnicity and disability pay gap reporting for larger employers (at least to start with);
- Greater protection for pregnant employees and new mothers;
- Changes to Paternity Leave, Parental Leave and Bereavement Leave;
- Rules requiring employers to give employees on some contracts set notice of shift changes and compensation for cancelled shifts.

However, one change that is not now going to happen is the so called right to disconnect. This is legislation such as they have in Ireland and Belgium giving employees and workers a right not to be bothered out of hours by work calls or emails. Labour's 2021 Green Paper promised this but by early 2024 it had become something of a lukewarm commitment. The King's Speech on 17 July 2024, shortly after Labour had come to power, did not mention it and by the time the Employment Rights Bill arrived it only featured in the Next Steps paper. It is now widely reported that the Government are planning to pull the plug on this change (pun intended).

New Legislation
Neonatal Care Leave and Miscellaneous Amendments Regulations 2025

Neonatal leave and pay provisions come into force from 6 April 2025 which will give parents a right to up to 12 weeks' leave and pay when their baby requires neonatal care. The aim of the right is to allow parents time to spend with their baby while they are receiving medical care, without them losing time from their maternity, paternity or shared parental leave. The government have estimated that the new right will benefit around 60,000 new parents.

Who is eligible?

Neonatal Care Leave ("NCL") supports employees whose baby is receiving, or has received, neonatal care. Employees can benefit from NCL from day one of their employment. At the birth of the baby, the employee must be one of:

- the baby's parents,
- the baby's intended parents (in cases of surrogacy),
- partner to the baby's mother (who are unrelated and living with them in an enduring family relationship) with the expectation they will have responsibility for raising the child.

- The baby must be born on or after 6 April 2025.

Similar principles apply in the case of adoption.

NCL can only be taken to provide care for the baby (save in circumstances where the baby dies after NCL has been accrued when employees are still able to take the leave because the care requirement is disapplied).

What is "neonatal care"?

Neonatal care must have taken place or begun within the first 28 days of birth (counting from the day after the baby is born) and care must continue for a period of at least 7 continuous days (beginning on the day after neonatal care starts). It does not cover long hospital admissions after the first 28 days of life. There are three categories of medical care which is deemed "neonatal care":

1. any medical care received in a hospital;
2. medical care received elsewhere following discharge from hospital. This care must be under the direction of a consultant and includes visits to the child by a healthcare professional; or
3. palliative or end of life care.

How much leave do employees get?

The length of NCL will be dependent on how long the baby receives neonatal care but is capped at a maximum of 12 weeks. Parents will be able to take one week of leave in respect of each week the baby receives neonatal care without interruption. The week begins on the day after care started.

For parents of twins or other multiple births, neonatal leave cannot be claimed in respect of babies who are receiving care at the same time.

When can the leave be taken?

Any leave must be taken within 68 weeks of the baby's birth (or placement or entry to Great Britain in the event of adoption). In most cases, NCL will be tagged onto the end of the employee's family leave. This is because an employee whose baby is admitted for neonatal care is highly likely to already be off

on maternity or paternity leave. The idea is then that they would be able to take NCL at the end of their planned family leave, so that the time their baby spent in neonatal care is compensated for.

However, the regime also must have provisions for emergency situations when the employee isn't already on leave whilst the baby is in neonatal care. This is most likely to occur when the father has exhausted his entitlement to paternity leave.

To provide flexibility and reduced notice requirements in urgent cases, there is a distinction between the time the leave is used, referred to as tier 1 or tier 2 periods.

If NCL is taken whilst the baby is receiving care (and up to a week post discharge), this will be classed as a tier 1 period. Tier 1 leave can be taken in non-continuous blocks of a minimum of one week at a time. Other leave falls within tier 2 and must be taken in one continuous block.

What are the notice requirements?

In line with other parental leave, employees are expected to provide notice of their intention to take NCL stating:

- Their name
- The baby's date of birth (or date of placement/entry to Great Britain if adopting)
- The start date or dates of neonatal care
- The date neonatal care ended (if applicable)
- The date on which the employee wants to take the leave
- The number of weeks of NCL the notice is being given for
- That the leave is being taken to care for the baby
- Confirmation that the employee is eligible to take the leave due to their relationship with the baby

The required length of notice differs depending on when the leave is taken. However, employers should note that the employer and employee can agree to mutually waive any notice requirements.

How much pay?

The right to receive statutory neonatal care pay ('SNCP') requires 26 weeks of service and earnings on average of at least £123 a week. This is the same as maternity and shared parental leave pay.

What happens during NCL?

As with other family leave entitlements, employees remain entitled to the same terms and conditions of employment, with the obvious exception being that of pay. There are also similar rules around when an employee will be entitled to return to their original role, which is the case for a single period of NCL.

Employees who have taken 6 continuous weeks of NCL also benefit from extended redundancy protection rights (if these are not already applicable via maternity, adoption or paternity leave), with the right to be offered a suitable alternative vacancy applying from the day after the employee has taken six consecutive weeks of leave and ending on the day after the child turns 18 months old.

Dismissal of an employee for a reason connected with their taking NCL will be automatically unfair.

Employer considerations

- **Timing:** An employee will generally take NCL at the end of their other parental leave entitlement (unless interrupted). Whilst the underlying intention is to extend the overall period of leave that can be taken, employers may find that some eligible employees choose to end their maternity leave once statutory maternity pay ends at 39 weeks and then move to NCL and SNCP for 12 weeks. This would allow for almost a whole year of paid leave (albeit at statutory rates for employers who do not enhance). Therefore consider …..

- **Enhancements:** some employers have already announced early implementation of a neonatal leave and pay policy and some will want to enhance their offering now the details of the statutory scheme are known. Many will choose to do this on a discretionary basis.

- **Policies:** Employers will want to have a clear policy setting out the statutory right to leave and pay, as well as any enhanced rights.

- **Notice:** There is complexity in determining what level of notice will apply and whether the employee falls within tier 1 or tier 2. That might mean …..

- **Training:** Given the complexities of this new right, this may be a good opportunity for employers to offer refresher family leave training for HR staff, which covers this new right and upcoming changes in the Employment Rights Bill.

- **Redundancy:** Employers will need to add employees taking NCL of over 6 weeks to the groups of employees who will be entitled to priority status in the event of a redundancy. As the protection continues until the child turns 18 months, it will be important to consider tracking employees who take this type of leave in the same way as other types of parental leave.

Case Report – Unfair Dismissal, Gross Misconduct
Hewston v Ofsted
Court of Appeal

This is a Court of Appeal case from the last couple of weeks. It relates to dismissals for gross misconduct.

Andrew Hewston was an Ofsted Inspector who was carrying out a school inspection in October 2019. He happened to encounter a Year 8 pupil who had been caught out in heavy rain. Telling the poor thing that he looked like "a drowned rat" Hewston brushed rainwater off his forehead and shoulder. There was never any suggestion that this was more serious inappropriate touching, and it was acknowledged throughout that it was genuine and sympathetic. He was however subsequently disciplined. During the disciplinary process Hewston continued to maintain that he did not feel that he had done anything wrong. Even though touching a child was not an example of gross misconduct in Ofsted's disciplinary procedure he was dismissed. At first his Employment Tribunal case in November 2021 was unsuccessful. He appealed successfully to the Employment Appeal Tribunal (EAT) in June 2023 who overturned the original Tribunal decision and made a finding of unfair dismissal. Ofsted appealed to the Court of Appeal who heard the case in October 2024. They handed down their Judgment on 14 March 2025. The Court of Appeal agreed the dismissal was unfair.

The Court of Appeal took the opportunity to set out some general principles.

- Disciplinary procedures usually list what are examples of gross misconduct. Just because whatever the employee has done does not appear in the list, or cannot be slotted into one of the examples on the list, does not mean that it cannot be something they can be dismissed without notice for.

- If however, the misconduct is not on the list, it should be considered whether the employee might reasonably expect their employer to treat it as gross misconduct.

- Just because an employee being disciplined does not apologise or show any regret does not mean that the incident can be treated more seriously.

- Employees being disciplined should be provided with all of the relevant documentation in advance of their meeting (but you do not need the Court of Appeal to tell you that).

What this means for you

Sometimes, the misconduct an employee is suspected of does not fit into the examples of gross misconduct given in your disciplinary procedure or examples of less serious conduct. Often such lists are specially confirmed as being "non-exhaustive" but even if that is not stated either if it is reasonable to say that the individual surely should have anticipated that what they are doing was something their employer would sack them for (if they found out) then dismissal is likely to be fair. In very simple terms whilst you should of course have a disciplinary procedure it is not fatal if the misconduct is not listed in there.

Case Report - Chen v Cut Your Wolf Loose Ltd and Others
Sex Discrimination/Harassment
Employment Tribunal

This case was about a variety of claims namely automatic unfair dismissal, race discrimination and breach of contract. The reason for reporting on it in this seminar is to highlight the comments made in the sexual harassment claim. Sexual harassment covers a variety of unwanted acts that violates the dignity of the employee or otherwise create a hostile, intimidating or degrading environment.

The Equality and Human Rights Commission lists acts that can amount to sexual harassment including:

a) Unwelcome touching, hugging, massaging or kissing
b) Propositions and sexual advances
c) Sexual comments or jokes
d) Displaying sexually graphic pictures, posters or photos
e) Suggestive looks, staring or leering.
f) Making promises in return for sexual favours
g) Sexual gestures
h) Questioning about a colleague's private life or sex life or discussing your own private life or sex life.
i) Spreading sexual rumours about a person
j) Sending sexually explicit emails or text messages.

The sexual harassment alleged in this case was disputed. Miss Chen said that the manager had walked her home several times and they had hugged but on two instances she said he kissed her intimately on the neck which was not wanted. The hug was not put forward as sexual harassment. The manager said that they hugged, and he had air kissed her but not kissed her on the neck.

The Judge said that they believed it was an air kiss and not a kiss on the neck (based generally on findings that had been made about the evidence, inconsistency and credibility of the Claimant).

However, the Judge also said, 'I do not consider that an air kiss is unwanted conduct of a sexual nature'. Alternatively, if it is sexual, it is not at a level, even taking into account the Claimant's perception where it was reasonable for it to have the prescribed effect on her (i.e. that it was not enough to violate her dignity or create a hostile, intimidating or degrading environment).

If the hug and the air kiss had been unwanted, then potentially this would have amounted to sexual harassment. But a wanted hug followed by an unwanted air kiss, was not seen to amount to sexual harassment or have such a negative effect on her and the allegation failed.

What this means for you:

Overall it is better, particularly where the parties are of different seniority, to make sure that personal boundaries are not breached at work. In this case, the Judge had dismissed all of her other claims and viewed her as an inconsistent witness. It is likely the Judge thought she was trying to create a claim out of something very minor and that is the reason it was dismissed. But it does show what a fine line there is and it shouldn't be taken that air kisses are never a problem. Context is everything!

Case Report Hennell-Whittington v W Metcalfe & Sons Ltd
Sex Discrimination
Employment Tribunal

Ms Hennell-Whittington claimed sexual harassment by the director of the Respondent, Mr Peter Metcalfe. The Claimant met Peter Metcalfe in March 2021 following her acquaintance with him whilst she worked as an administrator at a supplier of the Respondent. When she left that role she suggested they remain in touch. They met for coffee although the Claimant was in a relationship with her fiancé and she asked that this meet up be kept secret. They messaged flirtatiously a number of times. The Claimant suggested he employ her as a personal assistant. It was noted by the Tribunal that Mr Metcalfe was wealthy and some of the discussions were around money.

Mr Metcalfe expressed that he wanted to be in a relationship with her but she said she was engaged to someone else. He suggested they continue to be friends and see where it may lead. She agreed and at no point did she tell him she wasn't interested in him romantically.

Mr Metcalfe's messages were very affectionate and he told her he loved her. She did not respond in kind but would usually respond with a smiley face. The Claimant would mention financial needs on a number of occasions. She would tell him about financial problems or desires which he would ask for further information about and then offer to pay to which she accepted.

She also would push forward the discussions about creating a personal assistant job and would comment on financial benefits such as needing a company car and requesting a salary higher than the recommended salary of £25K. He agreed to give her a salary of £30K and a company car. Numerous text messages went on about the car she wanted, with her sights initially set on a Range Rover Evoque. It was clear that the job wasn't a necessary one for the Respondent but the belief on Mr Metcalfe's part was that it would allow them to spend time together without arousing the suspicions of the fiancé and so was created for her including requiring her to spend time away so that they could be together. Mr Metcalfe created the personal assistant job that she wanted and she started working for him in June 2021. The relationship was intimate to the point where they texted each other first thing in the morning and last thing at night with up to 30 text messages per day. They met for coffee a couple of times a week and spoke on the phone. The Claimant repeatedly confided that she was unhappy in her relationship with her fiancé.

The Tribunal found that she did as she wished in the role, occasionally doing tasks that she wanted and not others. She worked the hours she chose and it was unlikely she was doing more than 10 hours work a week on a generous estimate.

By July 2021 Mr Metcalfe was hoping that their relationship had developed to a point where she would leave her current relationship to be with him. His messages made it clear that is what he wanted. By September 2021, he reduced his expression of affection as he was worried it wasn't going anywhere. The Claimant would reassure him that she was 'going nowhere'.

Over the course of this time he purchased a vehicle for her outright and transferred thousands of pounds to her for private dental treatment, beauty treatment, bags, shoes and clothes. He went on shopping trips with her paying for what she wanted. He also went with her to arrange a viewing on a property so she could be a landlord although no property was ultimately bought as it had already been sold. She also suggested to him that her fiancé would move out and suggested Mr Metcalfe purchase his share of the house. Mr Metcalfe offered to pay £45,000 towards this if it were to happen. They went on trips together.

The relationship had never been physical at this point. In September 2021, during a shopping trip, he tried to hold her hand and touch her bottom. She messaged him later to say that she didn't want him to do that and asked him to stop telling her how he felt. He apologised and said he wouldn't do it again. In respect of an allegation that he did it again in November 2021 (during another shopping trip) the Tribunal did not accept this evidence.

In November 2021, she met Mr Metcalfe's friend Iain Brown and discussed the relationship (Mr Brown was a witness in the proceedings). She said in that discussion that she wouldn't move her relationship forward with Mr Metcalfe until her daughter had finished her exams. Again, at no point did she say she wasn't interested in Mr Metcalfe romantically but was suggesting things had to be kept quiet and delayed.

In July 2022, the Respondent held a charity gala. The Claimant attended with another man. She was still with her fiancé at this point but had told Mr Metcalfe that she would be ending it soon. The other man was a person she had met at the gym and unbeknownst to Mr Metcalfe, she had started a relationship with him two months earlier. Mr Metcalfe informed this person of his relationship with

the Claimant and it finally dawned on Mr Metcalfe that he wasn't actually in a relationship with her and this new person was.

He spoke to and messaged the Claimant over the next few days about his understanding that she was in this new relationship saying he didn't see how they could continue to work together in a job that had been created for her to allow them to be together. The Claimant asked for notice pay. Mr Metcalfe paid her two months although the contract only said a week. He also collected the car. Her employment ended in July 2022.

By August 2022, the Claimant had ended with her fiancé and moved in with her new boyfriend then issued a claim against the Respondent for sexual harassment and discrimination. She asserted that it had been clear throughout that there had been no relationship at any stage nor did she want a relationship. It was noted by the Tribunal that despite these assertions she couldn't identify any text messages of this nature in the 2 lever arch files of evidence nor could she recall any discussion where it had taken place that she was not interested in Mr Metcalfe.

The Tribunal viewed that the Claimant had knowingly allowed Mr Metcalfe to believe there was a possibility of a romantic relationship both before and during her employment and did not accept her claims that she was harassed. They found that Mr Metcalfe created the role in order to spend time with her but ultimately let her do what she wanted. They found the Claimant pushed for and entered into the role because she wanted to live a particular lifestyle that Mr Metcalfe could provide for financially.

The legal position was that the behaviour of Mr Metcalfe did not have the effect of violating her dignity or creating a humiliating, degrading or hostile environment and as such could not amount to harassment.

What this means for you

This is an unusual case where not only is the Respondent not guilty of any unlawful behaviour but where actually Mr Metcalfe can be seen to be the victim of his own employee. It is perhaps at best a good warning to employers and employees alike to try to avoid mixing business and romantic relationships where possible because of the fall out it creates and the legal claims that can follow. Mr Metcalfe did ultimately win this case but felt humiliated both in what happened at work and then

ultimately felt publicly humiliated both having to explain what happened at a Tribunal and then see these events become national news.

Case Report Gallagher v McKinnon's Auto and Tyres Ltd
Pre -Termination Negotiations Inadmissible in ET
Employment Appeal Tribunal

Kevin Gallagher was a manager for the Respondent at one of their branches until his dismissal in August 2022. Mr Gallagher sought, as part of the Tribunal process, to use pre-termination negotiations as part of his evidence. The Employment Tribunal ruled that the discussions were 'protected' and were inadmissible under s111 Employment Rights Act (ERA) 1996. Mr Gallagher appealed to the Employment Appeal Tribunal. Most people will no doubt be familiar with the concept of 'without prejudice' discussions or 'protected conversations', which are off the record and as per the name, prejudice neither party should successful negotiation not be forthcoming.

S111 of ERA is clear that pre termination negotiations are inadmissible as evidence in claims of 'ordinary' unfair dismissal, unless there was improper behaviour during the discussions. Mr Gallagher argued to the EAT that the employer's conduct had indeed been improper, and he pointed to three specific allegations which he claimed made the evidence admissible.

- The meeting had been set up under false pretences having been described as a 'return to work' meeting that had been used to offer a severance package.
- He was given only 48 hours to consider the severance package, contrary to ACAS guidance.
- The employer had exerted undue pressure by stating that dismissal was inevitable if the offer was not accepted, and that Mr Gallagher's role was to be made redundant.

The EAT dismissed Mr Gallagher's arguments.

- The ET had found no improper behaviour during the meeting or afterwards. The discussions had been held in a calm manner and Mr Gallagher had been given the opportunity to consult with his family and seek professional advice.
- The meeting purpose was not transparent, but this was not sufficiently improper to override the statutory inadmissibility of the negotiations.
- The EAT felt that 48 hours to consider the offer was sufficient. Mr Gallagher could have made a counter-offer or rejected the offer but did not do so.
- The employer's comments regarding the role being redundant was found to relate to the genuine initiation of a redundancy process, rather than being a threat of dismissal.

- The EAT also considered the cumulative impact of the alleged impropriety. The EAT felt that the ET had not erred in the first instance and had considered the allegations in context.

What this means for you

The case is a good reminder of the importance of the 'protected conversations' and their general inadmissibility as future evidence. It also demonstrates that the ET will not generally depart from the view that the negotiations were intended to be 'protected' and allegations to depart from that position would need to be severe and strong evidence must exist.

It is also clear that the ACAS Guidance on Settlement Agreements is just that - guidance. Employers are able to deviate from those recommendations without necessarily engaging in improper behaviour.

Case Report Jones v Vale Curtains and Blinds
Unfair Dismissal
Employment Tribunal

This recent case relates to the law of unfair dismissal. Meliesh Jones worked for Vale Curtains and Blinds from 2021 onwards. In June 2023 she was dealing with a customer complaint and the general sense was that the customer was making repeated complaints to try and get a full refund. At one point Jones decided to forward the complaint to her superior saying "Hi Karl – can you change this… he is a twat so it doesn't matter if you can't". What happened next was that Jones lived out in real life that nightmare scenario we all fear because she accidentally pressed Reply rather than Forward. Not long afterwards the customer's wife called in asking "Is there any reason why you called my husband a twat?". Technically, of course there *were* good reasons but in a world where the customer is always right you are not supposed to say stuff like that out loud.

In the aftermath of the incident the customer smelled blood and wanted free curtains off the back of Jones' mistake. Jones herself was mortified, apologised profusely and offered to pay £500 out of her own pocket as a gesture of goodwill. Importantly, Jones' manager, Jacqueline Smith, also apologised and said that Jones would be reprimanded.

The customers were not giving up easily and said that they would publicise the incident on social media and leave a poor review on Trust Pilot. At this point the employer decided to sacrifice Jones.

Following a brief disciplinary process, they sacked her. Immediately afterwards they wrote to the customers saying "following the disgraceful email that was sent to your husband in error" Jones had been dismissed. The Employment Tribunal found the dismissal to be unfair.

Why was that? On the face of it calling a customer a twat might be viewed as gross misconduct and the test that Tribunals apply is construed quite widely in favour of employers in these circumstances which is to say that the decision to dismiss must simply fall within a really very wide "range of reasonable responses". However, specific factors led the Tribunal Judge to that conclusion.

Firstly, the Judge found that the employer did not actually consider the event to be gross misconduct because at the time they only thought it was worth a warning. It was the threats by the customer to go public on social media that led to the dismissal not the actions of Jones herself. Secondly, the disciplinary process did not amount to a fair procedure. Mrs Smith acted as investigator, disciplinary officer and appeal decision maker. Jones was not given adequate time to prepare nor was it ever explained to her in advance the basis upon which she might be dismissed. Overall, the process was declared a sham and the Judge concluded that "the decision was a foregone conclusion based entirely on the threats made by the customer". The Judge did make a 10 percent reduction on a contributory fault basis given Jones' actions in the first place - but in essence she won her claim.

What this means for you

This case emphasises the importance of procedure. It would probably be true to say that if they had genuinely thought Jones' actions amounted to gross misconduct and had then followed a fair procedure in law (and let us be honest – procedural requirements are not particularly onerous) then they could have safely dismissed her. However, their actions made it clear that it was not their unhappiness with what she had done that led to dismissal but was their fear of reprisals on social media. The defective and hasty procedure followed was further evidence of that. Finally, of course what we can all learn from this is that you should look and look again before pressing Send!

Practice Point – beginners guide to redundancies

A Guide to Redundancy

Many of our clients have told us that either they, or their customers, are getting a bit nervous about the future because of changes in the National Minimum Wage, changes to Employer National Insurance contributions and perhaps because of the economy generally. We do of course help our clients with a wide range of employment law issues and even in the best of times one or two clients will be making redundancies for various reasons. We have however noticed recently that more clients are at least thinking about it. On that basis we thought we would set out some of the fundamentals in this Practice Point.

A redundancy situation arises, in broad terms, in three ways. The employer can be stopping altogether doing what they employed the individual or individuals to do. Alternatively, the employer can be ceasing that activity in a particular place. Perhaps more commonly however the employer has decided that their need for employees to carry out work of a particular kind in the place where the employee is employed has ceased or diminished or is expected to cease or diminish. The last definition is the most common. The business is moving forward but has identified that it can do so with less staff.

If an employer comes to this conclusion, then generally speaking the law will not interfere with their decision-making. It is also important to note that a business does not need to be making redundancies as a last resort or in a crisis situation. If an employer thinks they can live without certain roles in their structure that is up to them. In truth most employers only think about redundancies when they need to cut costs but legally a highly profitable business can make redundancies if it thinks that there is scope to do so.

It is important to remember that redundancy is a dismissal in law. That means redundancies are subject to the general rules on unfair dismissal (provided, at least for now, that the employee has two years). However, redundancy is one of the five potentially fair reasons to dismiss under UK employment law so that is a good start. How does the employer turn a potentially fair reason to dismiss into a legally sound fair dismissal? The answer of course, as is so often the case in employment law terms, is to follow a fair procedure.

The key to a fair redundancy process is planning. Start by looking at your current structure either for the whole business or just the part of it where you might think you need to make redundancies. Work out what roles you think you might be able to function without. Focus on job titles and roles, not the names of the people in those roles-there is nothing personal about it nor is redundancy a criticism of

the individual in the role in theory. Always remember that at this point all you are looking at is a proposal. You have not made any decisions yet-that comes at the end of the consultation process when you have met with the potentially affected staff.

Your procedure should involve letters and meetings as part of a fair consultation process. If you are choosing from a pool you should have an objective matrix to mark people against. A fair matrix reflects the skills and attributes the role requires (and avoid the pitfalls of including length of service and illness absences on your matrix). The point of the consultation process overall is that you explain the basis of the potential redundancies to the affected individuals – giving them the opportunity to comment – before any decision is taken.

So, you are allowed to make redundancies, and it is one of the five fair reasons to dismiss in UK employment law. The key ingredients to doing it lawfully are planning, procedure and, as always, patience.

Case Report Pitt v Cambridgeshire County Council
Harassment on the grounds of protected belief and sexual orientation
Employment Tribunal

Ms Pitt is a lesbian and also was found to have gender critical beliefs which are protected beliefs under religion/philosophical belief protection. A number of previous cases have said gender critical beliefs are protected beliefs.

This case made the national newspapers after the outcome was published in September 2024.
The facts of the case are as follows. Ms Pitt and her colleagues were in a zoom meeting of the Respondent's LGBTQIA+ group. One of the attendees explained that his dog was gender fluid and he put a dress on the dog to have a debate about gender. Ms Pitt expressed views that were critical of gender fluidity in particular in respect of women's sports and women's spaces.

Some attendees took the view that Ms Pitt was aggressive in tone and found her input offensive. Generally though the complaints were about her actual views as opposed to the way in which she was expressing them – an important distinction.

The Respondent was told that concerns had been raised and the Claimant was asked to attend a meeting to hear her version as to what happened. She denied being aggressive. When she was asked whether the meeting was the appropriate place to discuss her views she questioned what the group was for if not for that type of discussion.

The Respondent prepared a report stating that Ms Pitt had expressed non-inclusive and transphobic views causing significant offence and which had a detrimental impact on the mental health and wellbeing of the other attendees. She was instructed to ensure that her personal views and beliefs did not manifest themselves in the workplace as that may discriminate against others. She was told she couldn't attend any of the group meetings for the LGBTQIA+ and shouldn't contact the members. She was told that this was informal action taken under the disciplinary procedure.

Ms Pitt raised a grievance and ultimately proceedings for harassment on the grounds of her sexual orientation and protected beliefs. The Respondent had tried to defend the proceedings on the basis that she was being spoken to for her aggressive manner as opposed to the beliefs themselves but the evidence didn't support this and they conceded liability on the first day of the hearing.

As a result Ms Pitt received £56K approximately in damages.

What this means for you

This follows on from a number of similar cases. Employers cannot take action against employees for protected beliefs, even if there are other colleagues who do not agree with the beliefs or in fact hold the exact opposite beliefs. Action can only be taken (if appropriate) where the manifestation of that belief is inappropriate for example if the views had been aggressively put or forced on others.

Constructive Unfair Dismissal

Walker v Robsons (Rickmansworth) Limited

Employment Tribunal

This was a constructive dismissal claim. Constructive dismissal is a type of unfair dismissal claim but where the conduct of the employer has been such that it has destroyed the trust and confidence of the employee. This is referred to as a fundamental breach of contract.

The Respondent are Estate Agents with branches in Rickmansworth and Chorleywood in Hertfordshire. This case was widely reported as being about a desk – which in a way it was – but there is more to it than that. The Claimant was manager of the Rickmansworth office from 2017 to 2022. It is important to note that as manager in Rickmansworth he sat at the desk at the back surrounded by the ledgers. This was traditionally where the manager of the branch sat and everyone understood that. In February 2022 they moved him to manage the Chorleywood branch, but they only told him this in a phone call out of the blue. They replaced him in his managerial role in Rickmansworth with someone new – a candidate who was "too good to miss out on". Later they left a letter about changing his commission scheme on his chair rather than speaking to him.

In 2023 the Respondent planned to bring him back to Rickmansworth but only as joint manager. There was in fact a plan in place for him to share the job, but on the basis that he dealt with the more high end, large value work but no one thought to tell him this. The individual with whom he would be job sharing as manager moved in first and took the back desk. This meant that the Claimant was going to have to sit at a desk in the middle.

The director dealing with the matter was new and was not aware of the significance of the back desk – and therefore the insult that the middle desk represented. Perhaps unwisely the director decided to go over to Chorleywood to resolve the issue. On the way there, because he had convinced himself the Claimant was going to resign and join a competitor - he spoke to an advisor who prepared him for battle. He fell into that mindset.

Both he and the Claimant started the conversation in an emotional state and it went downhill from there. Raising his voice he told the Claimant that he could not believe "a fucking 53 year old man" was making a fuss about a desk. He threatened the Claimant with disciplinary action if he did not move back to Rickmansworth and sit where he was told. The Claimant threatened to resign and he replied "go on then". The Claimant did. The Tribunal ultimately concluded that he had been constructively dismissed.

What this means for you

Really this case is about failures of communication and the unwillingness we all suffer from when it comes to having difficult conversations. The Claimant had accepted changes to his role and status on

occasion so was not unrealistic. However, as matters began to spiral out of control towards the end it seems clear that if the director had spoken to staff, he would have understood the significance of the desk and if he had spoken to the Claimant more constructively and earlier he might have had the chance to resolve matters. As it happens both parties went into the final conversation in a heightened state of emotion accepting the worst so that is perhaps inevitably what they ended up with. But early and open conversations might have saved the employment relationship. It's good to talk.

Practice Point – are you NMW Compliant?

Background

The National Minimum Wage (NMW) came into force in 1999. The primary aim was to ensure a minimum wage was paid and also that the wage paid was in cash and not made up of employer benefits – the only benefit that can count (up to an applicable allowance) towards NMW is accommodation provided to the employee (see below).

The National Living Wage (NLW) was introduced in April 2016 which topped up pay for over 25s. Since 2024, the over 25s is no longer a separate category and is now back to over 21s who are all entitled to the top level of NMW.

NMW used to be seen as a safety net and indeed previously there was a bit of a stigma in only paying NMW. However, it is a lot more common nowadays.

Often NMW is just thought of as hourly rate and when workers are paid a salary, it used to be assumed that this meant the person was automatically receiving a higher rate than NMW. However, when we've undertaken due diligence on businesses recently as part of a purchase, we can see some of the salaries are now actually less than NMW and this has had to be quickly resolved. It is important that salaries meet NMW as well as hourly rates.

Failure to pay NMW is dealt with by the NMW Regulator.

Eligibility

NMW applies to all workers under a contract of employment or a contract for services, including agency workers but does not apply to anybody who is self-employed. It applies to directors who are employees but not to non-executive directors.

Volunteers are not paid NMW but this is subject to the type of employer and conditions being met – usually related to charitable work.

Internships are also heavily monitored – there are some exceptions which allow employers to take on unpaid interns but these are usually related to student work placements or school children. Otherwise anyone doing work is entitled to be paid NMW.

Similarly, the use of 'work trials' to decide if somebody get the job is monitored and must be part of a genuine recruitment exercise and only for a length which is reasonably necessary to test the candidate's ability. Otherwise they are entitled to be paid NMW.

Current Amounts

From 1st April 2025 the figures will be (per hour):

21 and over	£12.21 (up from £11.44)
18-20	£10.00 (up from £8.60)
Under 18	£7.55 (up from £6.40)
Apprentice	£7.55 (up from £6.40) (except for if they are in the second or later years of apprenticeship and are 19 or over then it is the NMW for their age group)

What this therefore looks like for a salaried worker is as follows:

From 1st April 2025 (for over 21s) (based on there being 52.14 weeks in a year)

A salaried worker who is contracted to 40 hours a week must receive a minimum salary of £25,465.18
A salaried worker who is contracted to 37.5 hours a week must receive a minimum salary of £23,837.60
A salaried worker who is contracted to 35 hours a week must receive a minimum salary of £22,282.03.

As well as considering your hourly paid workers therefore you do need to keep track of the salaried workers to ensure they are also receiving the proper National Minimum Wage

How NMW is assessed – Types of work

The Regulator will look at the relevant pay period and the total remuneration received in that pay period as well as the number of hours worked, to check NMW is being paid. The pay period cannot be greater than a month. Most employers pay monthly, weekly or 4 weekly.

The Regulator will also need to consider what type of work is being carried out.

There are four types, salaried work, time work, output/piece work or unmeasured work. It is not possible to do more than one type of work at the same time under the same contract.

Salaried hours work – is where a worker is paid an annual salary by reference to a fixed amount of hours per week (or annualised hours).

Time work is where a worker is paid solely be reference to the time they work. This is normally for workers who are paid by the hour or those who are paid solely by commission according to set hours. Their pay normally varies in each pay period.

Output work – is where a worker is paid according to their output generally known as piecework. They are paid according to how many items they make, process, produce etc. There are detailed rules about how the rate per item is calculated based on NMW and an average time to make an item.

Unmeasured work – is anything else and is usually for workers who are paid a salary but their basic hours are not fixed. In this case every hour worked must be at NMW rates.

How NMW is assessed – what is working time

The Regulator will consider all time spent working is working time but there are some other areas to be aware of.

Travel time – travelling for work is considered working time unless it is commuting. So travelling from home to a normal place of work or a first assignment is not working time. However, if a worker's normal place of work is home, then travelling from their home to other sites would be working time.

If a worker is doing 'unmeasured work' as above the situation can be more complicated but this is the general position.

Training – time spent training that is approved by the employer is working time including travelling from the workplace to the training provider.

On call – if a worker is required to be available for work when called at or near the workplace, then this is considered to be working time even if not actually working. There are two exceptions where a) a worker is at their home when they are on call or b) when the worker is asleep whilst on call. If the worker is actually called out in respect of these two exceptions then this becomes working time. Again, there is a lot of case law on this point and more complicated rules depending on the type of work being done but this is the standard position.

How NMW is assessed - calculating remuneration

The employer, as stated above needs to make sure NMW is paid for the pay reference period which is usually a weekly, four weekly or monthly.

Payments that count towards NMW are

a) Basic salary
b) Bonus, commission and incentive payments based on performance
c) Accommodation offset (see below)

Payments that don't count towards NMW are

a) Benefits in kind
b) Loans or advances
c) Pension payments (provided not done by way of salary sacrifice)
d) Redundancy payments
e) Premium payments for overtime or shift work.
f) Expenses
g) Tips and gratuities
h) Dividends
i) Salary premiums (for example being paid extra for night work)

NB If a worker gives up part of their salary by way of salary sacrifice then it is the salary after the sacrifice has been deducted that is used to calculate NMW, not the salary before the sacrifice.

Accommodation offset

The accommodation offset allows an employer to provide accommodation to a worker. If the accommodation is free then the employer can add the daily offset rate to the salary paid for the purposes of calculating NMW (the current daily accommodation offset rate is £9.99 which will go up to £10.66 in April 2025).

If the employer charges more than the accommodation offset then the difference is taken off the salary for the purpose of calculating NMW.

Deductions from salary

If the employer deducts payments from the worker in connection with the employment then NMW is assessed after the deductions are made rather than before. So for example, an employer deducting from the salary, payments to do with the purchase of tools and uniforms will be risking a breach of NMW if the salary after the deduction does not meet NMW.

Please note that this can be extended to payments that are not deducted but paid to third parties such as for a uniform requirement.

For example if an employer provides a top with a logo for free but requires a worker to provide black trousers or a skirt to wear with the top as part of the uniform, at their own cost, then the Regulator can consider this expense of the black trousers or skirt, a deduction for the purpose of NMW even though the worker didn't make this payment to the employer but purchased from a shop. The worker must therefore be receiving NMW after this deduction is made.

Record Keeping

Employers keep records of pay to be made available for either the workers to check or Revenue and Customs Enforcement officers. These must be kept for a minimum of 6 years.

Enforcement

Failure to pay NMW is a criminal matter as well as an employment tribunal matter. As well as public naming and shaming, the Regulator can issue civil penalties and criminally prosecute. The civil penalties can amount to 200% of the underpayment with a maximum penalty of £20,000 per underpaid worker. Criminal enforcement is usually for persistent offenders of those who are falsifying records.

Workers can sue for underpayment of NMW in the Employment Tribunal as unlawful deduction of wages or breach of contract (if the contract terminates) or in the civil courts as breach of contract (the contract doesn't need to terminate for the claim to be brought here).

We've highlighted below some specific problem areas that could arise.

PROBLEM AREA 1 – MISTAKING UNMEASURED WORK FOR SALARIED WORK.

If a worker is paid an annual salary for a fixed amount of basic hours each week they are doing salaried work not unmeasured work.

This is really important because if a worker is doing this type of work and is paid monthly, the legislation considers NMW is met even though the working days in each month vary and there could be a possibility of NMW not being met in one of the months. The legislation overrides that and allows the whole year's salary divided by the whole year's hours to be the test of NMW regardless of the days in the months varying. This is not the case for unmeasured work where every month must meet NMW requirements.

A worker will not be doing salaried hours work if their contract of employment does not make their basic hours clear and ascertainable.

Working example (for 1st April 2025 onwards where NMW is £12.21 per hour):

> *If Joe Bloggs contract states he works 40 hours per week for a salary of £26,000 a year and is paid monthly, then he can be considered to be doing salaried hours work and he is deemed to work the same hours each month despite the fact that months are different lengths with different numbers of working days. That*

means he is deemed to work 40 x 52.14/12 = 173.8 hours per month. He is paid £26,000/12 = £2,166.67 per month. £2,166.67/173.8 = £12.46 an hour. He is paid over NMW.

But where the contract says something that means the basic hours could vary (which many contracts do) such as '*at least 16 hours per week'* or *'40 hours plus additional hours as may be required from time to time*' – then this means the work is not salaried hours work but is back to being unmeasured work and as such, the pay each month cannot go below NMW based on the hours that month. There is no scope to treat the months as apportioned equally.

(Please note that it is fine for contracts to have clauses allowing for overtime hours to be worked in addition to the basic hours if and when overtime hours are required. The key is to ensure that the basic hours themselves are fixed and the wording of the contract does not suggest they are variable. Overtime should be separate.)

Working example (for 1st April 2025 onwards)

Joe Bloggs contract states he must work a minimum of 40 hours per week and is paid a salary of £26,000 a year. His basic hours are variable and so he is considered to be doing unmeasured work. As such, each month he is paid must meet the National Minimum Wage requirements.

He is paid £2,166.67 a month. However the working days/hours in each month differ.

Take 2025

June	*21 days @ 8 hours a day = 168 hours*
July	*23 days @ 8 hours a day = 184 hours*
August	*21 days @ 8 hours a day = 168 hours*
September	*22 days @ 8 hours a day = 176 hours*

Whilst he meets NMW requirement in June, August and September – note July!

£2,166.67/184 = £11.78 per hour – below NMW.

So you would want to either

a) Adjust to 4 weekly pay as if he was paid 4 weekly, he would meet the requirements. This is because every 4 weeks he would be paid £2,000. £2,000/4/40 = £12.50 an hour; or

b) Alter the pay each month to reflect the number of working days whilst still ensuring the annual pay is £26,000 altogether; or

c) Pay an annual salary of £26,959.68, paid equally across each months to ensure that the months with the most working days meet NMW requirements; or

d) ensure all new contracts going forward or existing contracts are changed by agreement to ensure basic hours are fixed and overtime is separate if that works for your business. That doesn't rectify and past issues but it does make sure it won't happen again in the future.

PROBLEM AREA 2 – AGREEING TO SALARY SACRIFICE AND GOING BELOW NMW

Another tricky area is salary sacrifice.

A salary sacrifice is where a worker gives up part of their salary in exchange for a benefit which can only be done with the worker's contractual agreement.

As the salary has been given up, there is no contractual entitlement to that part of the salary and therefore what remains only is what is included in the calculation for NMW – you cannot use the value of the benefit in order to calculate NMW.

There are certain deductions made from a salary that do not reduce the salary used to calculate NMW.

These include the deductions for the employee's 5% pension contributions. NMW is calculated before these deductions are made. (Employer pension contributions are not part of the pay used to calculate NMW as they are paid directly to the pension provider).

However, where the employee's contributions are made by way of salary sacrifice, those deductions do reduce the salary and NMW is therefore calculated after these deductions are made.

(NB The reason some employers pay the pension in this way is because of the savings made in the tax and National Insurance on the amount sacrificed to the employer. The employee essentially sacrifices part of their salary and the employer then is responsible for the full amount of the contribution (8% as the minimum) to the pension trustees.)

Working example (for 1st April 2025 onwards)

> Joe Bloggs works 40 hours a week and is paid £26,000 a year. He has agreed to salary sacrifice 5% of his salary to his employer (who has then agreed to pay 8% employer contributions to his pension) and so his new salary is £26,000 x 0.95 = £24,700. £24,700 is the salary used to assess NMW requirements
>
> He is paid 4 weekly and so every 4 weeks receives £1,900 and works 160 hours in that period. £1,900/160 = £11.88 an hour – below NMW. This salary sacrifice cannot be done. If the 5% however simply came out of Joe Bloggs own salary without salary sacrifice it would not be a breach as the salary of £26,000 would still be utilised.

Make sure therefore if the employee pension contributions are made by way of salary sacrifice, that the remaining salary meets NMW requirements. If not do not agree to do it by way of salary sacrifice or increase the pay to ensure there isn't a problem.

PROBLEM AREA 3 – ADDING UTILITIES ONTO ACCOMMODATION CHARGES

Getting the calculations right when accommodation is provided is key and it is important to understand that an employer charging utilities in addition to rent can breach NMW guidelines if the total amount left does not meet NMW (even if the charge by the employer is less than the charge the actual provider would make directly)

Working example (for 1st April 2025 onwards)

Joe Bloggs works 40 hours a week and is paid £26,000 per annum or £500 a week (£12.50 per hour). He is provided with accommodation across a full week and is charged £70 a week for that accommodation. He pays his own utilities. He gets paid every week.

a) Income received in that period is £12.50 x 40 = £500.
b) Cost of accommodation in that period is £70
c) The accommodation offset rate in that period is £10.66 x 7 = £74.62
d) £500 - £70 + £74.62 = £504.62
e) £504.62/40 = £12.62 per hour so is over NMW and fine.

However, if the employer also decides to charge an extra £30 a week for gas, electricity, water and TV licence (which is cheaper than if the employee contracted directly with the suppliers themselves) then this is a problem despite the apparent savings.

The calculation would change to

a) Income received in that period is £12.50 x £40 = £500.
b) Cost of the accommodation and utilities in that period is £100.
c) The accommodation offset rate in that period is £74.62.
d) £500 - £100 + £74.62 = £474.62
e) £474.62/40 = £11.87 per hour so is below NMW and a breach of NMW legislation.

The resolution here is to ensure the worker contracts for his utilities separately even though it may be more expensive.

GOSSCHALKS

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> *"In over 30 years in business, I've never heard half an hour like it in terms of employment law – absolutely brilliant!"*

Thomas Martin -
Chair at Arco Ltd & Chair at FEO
Speaking in his capacity as Chair of FEO following a Gosschalks Employment Law update to its members.

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