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CONTAINING A SELECTION OF ARTICLES WE PUBLISHED IN 2025, INCLUDING...

5 MUST-HAVE EMPLOYMENT CONTRACT CLAUSES

HOLDING HR LIABLE

RED BULL REVISITED

SUPREME COURT DEEP DIVE

RUNNING HR AUDITS

OUR **FIVE MUST-HAVE** EMPLOYMENT CONTRACT CLAUSES

The contract of employment is the bedrock of the employer-employee relationship. It defines not only the rights and obligations of both parties but also sets the tone for how the relationship will work in practice.

Since April 2020, all employees and workers in the UK have had a Day One right to a written statement of their terms and conditions. This 'section 1 statement' must cover key particulars such as pay, hours, holiday entitlement, and notice periods. But while meeting this legal minimum is essential, it's only the starting point. A well-drafted employment contract goes much further: it manages legal risk, protects the business, and helps avoid costly disputes.

For HR professionals, understanding the structure and impact of contracts is crucial. They are dynamic tools that should evolve with the business. From setting probationary expectations to safeguarding against poaching of clients, the right clauses provide clarity and protection for both employer and employee.

We will take a look at five clauses that every HR professional should have on their radar. These are clauses that regularly feature in disputes, tribunals, and legal advice: depending on how they are drafted, they can save or sink an organisation.

1. NOTICE PERIODS

If the contract of employment does not contain a notice period clause, then the fall-backs are the statutory minimum notice provisions contained in the Employment Rights Act 1996. These provide for:

- Notice of at least one week to be given by the employee to the employer.
- Notice of at least one week to be given by the employer to the employee after one month of employment, rising to two weeks after two years of continuous service and by one week per year thereafter up to a maximum of 12 weeks after 12 years.

Statutory minimum notice sets out the shortest notice periods the law will tolerate. If you include a notice provision in the contract of employment which is less generous than the statutory minimum, you will not be able to rely on it: the statutory minimum will prevail.

The statutory minimum notice provisions may do everything you need. If so, you can skip this section of the article and move on as you don't need to worry about inserting a contractual notice period. However, there are lots of reasons why employers might want to take a more bespoke approach to notice as a topic. If, for example, an employee holds a key position within the business then a longer notice period may be useful to allow time to recruit a replacement. For senior employees, there is a general expectation that notice periods will be a decent length.

If you decide to include bespoke notice periods in the employment contract, you should bear in mind the following:

- If any standard notice period is only going to kick in after successful completion of a probationary period, this should be expressly stated (see 'Probationary Periods', below).
- The notice period given by the employee should be distinguished from the notice period to be given by the employer.
- The form notice needs to take should be specified. It is usual to specify that

notice be given in writing. This is to avoid situations where a resignation may be ambiguous and to guard against 'heat of the moment' resignations.

Employees will generally continue to be employed during their notice period, and employment will not end until it ends. If notice ends sooner, and even if you pay a sum in lieu of the salary due, it will be a technical breach of the employment contract. This could lead to claims for damages if the sum paid doesn't cover the salary and value of benefits the employee would have received during their notice period. It could also undermine the enforceability of restrictive covenants (see below) which the employer may otherwise wish to rely upon to protect the business following the employee's departure.

It is possible to provide for employment to end earlier by including a payment in lieu of notice' ('PILON') clause in the contract. A contractual PILON clause should:

- Make it clear that the right to PILON is discretionary, not automatic. The employer has the discretion to bring the employment contract to an end during the notice period by making a PILON payment, but the employee has no right to require a one.
- Say that dismissal happens immediately when a payment is made in lieu of the salary that would have been earned during the notice period. This is to avoid a situation like that in *Societe Generale, London Branch v Geys* where making a full PILON payment into the employee's bank was not sufficient to bring the contract of employment to an end on its own.
- Identify what benefits and other payments (e.g., commission, bonuses, pension contributions) are included and excluded from the PILON calculation. If you have an express PILON clause, it is open for you to pay basic salary only: there is no need to compensate for the value of benefits unless you choose to. Remember, the employee is paid early here and isn't having to work.
- Consider whether the PILON payment will be made as one lump sum or in a series of instalments. If payment is made in instalments, it can be easier to use it as a way of encouraging the employee to comply with obligations which survive termination of employment: provisions relating to confidentiality and restrictive covenants.

2. RESTRICTIVE COVENANTS

Employees are generally free to work wherever they choose after leaving employment – including for competitors – unless the contract says otherwise.

Restrictive covenants are clauses that limit an employee's actions after employment ends. They're designed to protect legitimate business interests (such as client relationships, confidential information, or the stability of the workforce) and must be reasonable to be enforceable.

There are four main types:

- **Non-compete:** Prevents an employee working for a competitor and is the most restrictive form of covenant. It is worth noting that as part of a debate on the Employment Rights Bill, Baroness Jones, Parliamentary Under-Secretary of State for the Department for Business and Trade, confirmed that the Government intends to consult on non-compete reform 'in due course'. Previously, proposals were announced which would have limited non-compete clauses to three months in duration. These plans may be resurrected.
- **Non-solicitation:** Stops the employee from approaching your clients or customers.
- **Non-dealing:** Prevents any business relationship with your clients, even if they approach the employee.
- **Non-poaching:** Stops the employee from encouraging colleagues to move with them.

These clauses need to be:

- **Tailored** to the employee's role and access to sensitive information.
- **Geographically and temporally limited**, with six to 12 months often the outer limit.
- **Revisited** regularly, especially after promotions or role changes.

Too broad? They'll likely be struck out. But a well-judged covenant can offer vital protection during the vulnerable period after an employee's departure.

3. PROBATIONARY PERIODS

A probationary period gives both parties time to assess whether the role is the right fit and usually runs for between three and six months. But despite how commonly used they are, probationary periods don't carry any special legal status unless clearly written into the contract.

To be effective, a probation clause should include:

- The length of the probation period.
- The right to extend it, and how this will be communicated.
- A shorter notice period during probation.
- A statement that full disciplinary or capability procedures won't apply until probation is passed.

It's vital to apply the clause properly. If, for example, you've included a shorter notice period during probation, but the dismissal is made after the

period ends, even by a few days, the employee may be entitled to full contractual notice. A safer approach is to state in the contract that probation continues until confirmed in writing.

Importantly, probationary periods don't limit employee rights. Day One rights such as protection from discrimination, sick pay, and the right to a written statement of terms still apply. While the risk of an ordinary unfair dismissal claim is currently low as it requires two years' service, automatic unfair dismissal and discrimination claims remain live risks – especially around health, pregnancy, whistleblowing, or protected characteristics.

Looking ahead, the Employment Rights Bill would make unfair dismissal a Day One right from 2027. This would reduce the protective 'buffer' currently offered by probation. That said, building robust probationary practices now will help future-proof your approach – particularly if the Bill introduces a 'lighter touch' dismissal framework for early employment, as expected.

Handled well, probationary periods remain a valuable tool for early performance management and risk reduction.

4. SUSPENSION CLAUSES

Employers may need to suspend an employee – typically during a disciplinary investigation – but the right to do so should be explicitly written into the contract. Without a suspension clause, the right to suspend must be implied, and this can only happen where suspension is necessary.

An effective suspension clause should:

- Confirm that suspension is a neutral act, used to maintain the status quo, not a punishment.
- Confirm that the employer has discretion to suspend.
- State that suspension will normally be on full pay as unpaid suspension risks claims for constructive dismissal.
- Cover what happens if the employee is sick during suspension: you can't automatically switch them to sick pay unless the contract says so (see *Wright v Seed*).
- Confirm that the suspension will be kept under review and for the shortest period necessary.

5. VARIATION CLAUSES

Once you have a standard contract of employment in place, it's inevitable that, from time to time, you are going to want to update it. Often, changes need to be enacted by the lengthy process of consultation with affected employees and agreement by way of signing an amended contract. Proceeding without express agreement to any change risks breach of contract or constructive dismissal claims. Pushing through changes by dismissing on old terms and offering re-engagement on new ones is about to become even more risky, with the Employment Rights Bill set to make dismissals for changing terms and conditions automatically unfair in many circumstances.

What is an employer to do?

There is the possibility of introducing flexibility within the contract of itself. Any flex should be focused on relevant areas – for example, place of work or working hours – in the first instance and be as clear and specific as possible. This will help avoid misunderstandings and reduce the risk of legal claims. Review the contract of employment on a clause-by-clause basis with a view to introducing contractual 'flex' where you think it might be needed.

However, even built-in specific flexibility clauses must be exercised reasonably to avoid a risk of constructive dismissal claims. Reasonableness in this context generally includes consultation with employees, measures to mitigate the impact of any change and plenty of notice being given.

The likelihood that the Bill will significantly curtail an employer's ability to lawfully change terms and conditions of employment through dismissal and re-engagement means that the possibility of including a more general flexibility clause in employment contracts has been gaining traction. The wording of such clauses, and their effectiveness, is largely untested. The only case of note on the issue is *Asda v Hoyland* where a clause allowing Asda to reserve 'the right to review, revise, amend or replace the content of this handbook, and introduce new policies from time to time' was held to be enforceable, and allowed Asda to introduce a new pay structure.

While this wording (or something similar) *could* be used, the right to vary would still need to be exercised reasonably (see above). You can find wording for a proposed general variations clause in both the junior and senior contract templates in the Vault.

FINAL THOUGHTS

Contracts are not just legal formalities – they are practical tools to manage the employment relationship. With one eye on the fact that the proposed future restrictions on 'fire and rehire' are going to make large-scale amendments to contractual terms difficult to action, HR should take the time now to understand the framework they are working within:

- Check for Section 1 compliance.
- Check contracts are clear and understandable.
- Check they are tailored to the business.
- Check, insofar as relevant, they 'master' the clauses considered in this article.
- Diarise regular reviews to keep pace with legal change and workplace realities.

PIERCING THE CORPORATE VEIL: WHEN DOES HR BECOME LIABLE FOR A DISMISSAL?

Employment tribunal claims are, generally, brought against the employer and the employer alone. After all, the employment relationship is a bilateral one between the employer and the employee. However, there are some circumstances where aggrieved employees are able to 'pierce the corporate veil' and bring claims against individuals working in the employer's business.

And as HR are on the front line when decisions that impact employees are taken, are you aware of the risk you are personally being exposed to? Here we take you through the risk areas and provide a raft of practical tips to help you to manage them.

EMPLOYMENT TRIBUNAL CLAIMS

Liability for ordinary, vanilla 'unfair dismissal' lies with the employer. There is no ability to bring it against an individual. Internal or external HR advising on a situation which turns into an ordinary unfair dismissal claim can generally breathe easy. However, at the point where you're advising on a situation, you will not necessarily know how a future claim might be framed.

The position changes when a claim alleges that a dismissal was **discriminatory** in some way or, potentially, where **whistleblowing** is in play.

DISCRIMINATION AND WHISTLEBLOWING

Individuals can be held personally liable for acts of discrimination (including discriminatory dismissals) under Section 110 Equality Act 2010 if they are either workers or agents of the employer. Internal HR will tick the 'workers' box. An external HR Consultant can, in some circumstances, be considered to be an 'agent' of the employer.

The same concept of workers and agents exists for whistleblowing, although the path is decidedly rockier when claiming against an individual where the act complained of is dismissal!

Where the principal reason for a dismissal is whistleblowing, it will be automatically unfair under Section 103A Employment Rights Act 1996. However, this claim can only be brought against the employer, not individuals. What *can* be brought against individuals who are workers or agents of the employer is a claim of whistleblowing *detriment* (Section 47B of the Act).

The major detriment with HR involvement is a dismissal. Can dismissal be a detriment, allowing for a claim which can bring in individual respondents, but which sits separately to an automatic unfair dismissal claim? The recent Court of Appeal decision in the joint appeal in *Wicked Vision v Rice* and *Treadwell v Barton Turns* held that it could. The Court reluctantly followed the previous Court of Appeal decision in *Osipov v Timis* which held that workers or agents of an employer can be held personally liable for whistleblowing detriment where the detriment complained of is dismissal. The employer can then be held vicariously liable for those acts. This decision means that, under the law as it currently stands, HR personnel (whether internal or external) who dismiss an employee could find themselves named as a respondent in a whistleblowing detriment claim based on that dismissal.

EXTERNAL HR CONSULTANTS

External HR consultants will want to make sure, if possible, that their role does not at any point risk straying into the territory of them acting as an 'agent' of the employer. We got some great insight into how HR consultants may need to strike the balance on this from the recent Employment Appeal Tribunal decision in *Handa v The Station Hotel and others*.

Mr Duncan, an external HR consultant, had investigated a grievance against the claimant which was partially upheld. This led to a disciplinary investigation conducted by Ms McDougall, who was also an external HR consultant. Her

report concluded that dismissal for gross misconduct would be justified. This report, in turn, led the Station Hotel to hold a disciplinary meeting and take a decision to dismiss the claimant for gross misconduct.

The claimant claimed automatic unfair dismissal on grounds of whistleblowing and whistleblowing detriment. He sought to argue that Mr Duncan and Ms McDougall had acted as agents of the Station Hotel and were therefore liable for detriments (including the dismissal). The EAT held that they were not and made the following key points:

- External consultants can, in principle, act as agents for the employer. However, to be liable, they must themselves commit a causative act or omission.
- Neither consultant in this case had actually decided upon or implemented the dismissal (alone or jointly) and a decision on dismissal was not within their remit.
- Allegations that the Station Hotel had exerted control over their processes did not, as such, provide a basis for holding either of them liable as agents for the dismissal.

In this case both consultants made recommendations but made it clear that the employer was free to accept or reject them. This meant there was no arguable case against them as 'agents' of the dismissal itself.

When looking at whether an external provider is an agent, the EAT acknowledged that one of the key distinctions is whether the person is acting for the benefit of the employer (likely not an agent) or acting on behalf of it or under its authority (agent). But the EAT said that the employment relationship needed to be looked at more carefully than that and that external suppliers providing services related to the employment relationship might more easily be found to be 'agents' than other external providers.

The EAT held that, where the services they are contracted to provide relate to a significant aspect of the employment relationship, rather than some other aspect of the employer's business or activities, they could be regarded as the employer's agent in the course of carrying out those functions. A person who is retained to carry out an employment-related procedure, such as a grievance or disciplinary investigation, could be regarded as the employer's agent in the course of carrying out those functions.

WHAT ABOUT INTERNAL HR?

Internal HR are generally direct employees of the business. The law relating to discrimination makes it expressly clear that 'workers' of a business can be sued personally for discrimination committed in the course of their employment. It is actually easier for them to be joined as individual respondents to a tribunal claim as the concept of 'agency' does not need to be considered.

Whistleblowing detriment claims can be brought against 'workers' for detriments committed in the course of employment. *Wicked Vision/Treadwell* indicates that this extends to the detriment of dismissal.

The tribunal has discretion around how to apportion liability between the employer and individual(s), and claimants often pursue the employer for payment because of their deeper pockets. Still, the threat of personal liability remains real.

PRACTICAL INTERNAL HR RISK MANAGEMENT

If you are working in an employed position, you would hope that if an employee named you personally as a respondent your employer would agree to cover you for any losses flowing – including the legal costs of defending the claim. Often this happens seamlessly as the employer will have also been named as a respondent.

However, it is important to note that it is not a given. If faced with this situation you should take the following practical steps:

- Ask the employer to agree in writing to cover all legal costs associated with defending the claim, including elements relevant to you as a named respondent.
- Prompt the employer to consider whether the same solicitor can act for both the employer and you, or whether there may be a conflict of interest (e.g., if the employer denies the act happened or says the employee acted outside their role). If there's a conflict, you should seek independent legal advice, ideally funded by the employer.
- Make sure that any settlement negotiated by the employer includes settlement of the claims against you as an individual as well as those against the business.
- Consider asking the employer to provide a written indemnity confirming that they will cover in full any award made against you as an individual. After all, you have only been exposed to this risk as a result of your employment with them.
- Ask for copies of any relevant insurance policies. If the employer has employment practices liability insurance, you will want to understand whether it covers the claim against you personally as a 'worker'. If you are a statutory director, you will want to know whether directors' and officers' liability insurance covers employment claims against individuals.

MANAGING EXTERNAL CONSULTANCY RISKS

Consultants should treat whistleblowing and discrimination dismissals as high-risk territory. Practical steps include:

- **Clarity of role:** Define in writing whether you are an adviser or a decision-maker. Avoid being the person who signs off on a dismissal rationale.
- **Document advice neutrally:** Emails should record objective legal guidance, not advocacy for a particular outcome.
- **Challenge unlawful motives:** If the client indicates a retaliatory or discriminatory reason, record that you advised against it.
- **Avoid pretextual documents:** If you know the stated reason is false, decline to draft correspondence that perpetuates it.
- **Professional indemnity insurance:** Check policy coverage for statutory torts, whistleblowing, and discrimination claims. Many policies exclude deliberate acts; ensure advice given in good faith remains covered.
- **Seek an indemnity from your client:** Ensure this is included in your standard terms of business and the client agrees to cover any legal costs associated with flowing litigation and to cover any award made against you personally.
- **Training and supervision:** If you work in a team environment, make sure everyone is aware of where 'support' becomes 'participation'.

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*For a deeper dive into this topic, visit the HR Inner Circle Vault to access the recording and transcript of our September 2025 session, Risk Proofing Your HR Consultancy. In this discussion, Daniel Barnett, Inner Circle member Caroline Hitchen, and Thomas Pangbourne of Indemnity Law explore the legal and practical risks facing HR consultants and how to manage them effectively.

Daniel also covers *Handa v Station Hotel* in this month's Audio Seminar.

LOOKING FOR A SPECIFIC TEMPLATE OR CHECKLIST? HERE'S WHAT YOU CAN FIND INSIDE

THE MEMBERS' VAULT

Here are all the time-saving documents you'll currently find in the HR Inner Circle members' area Vault. Included are the most popular and frequently-used HR forms, assessments, agreements, checklists, flowcharts, letter templates, questionnaires, and reports. And we're adding to them all the time!

Absence

- AWOL flowchart
- AWOL - request for contact
- AWOL - invite to disciplinary meeting
- AWOL - invite to re-arranged disciplinary meeting
- AWOL - letter confirming dismissal for gross misconduct
- Notice pay while on sick leave flowchart
- Letter suspending employee on health & safety grounds (pregnancy)
- Letter suspending employee on health & safety grounds (medical suspension)
- Long-term sickness absence policy
- Long-term sickness absence checklist
- Phased return to work plan
- Letter to employee asking for consent to contact occ health
- Letter to employee asking for consent to contact doctor
- Letter to employee doctor requesting report
- Letter to occ health requesting report
- Confirmation that SSP is ending
- Confirmation that company sick pay has been exhausted
- AMRA - consent form

Capability and performance

- Appraisal form (manual worker)
- Appraisal form (office worker)
- Performance improvement plan
- Performance improvement kick off meeting
- Performance management flowchart
- Performance review meeting overview
- Performance review - invitation to stage 1 meeting (PM1)
- Performance review - stage 1 outcome letter (PM2)
- Performance review - invitation to stage 2 meeting (PM3)
- Performance review - stage 2 outcome letter (PM4)
- Performance review - invitation to final meeting (PM5)
- Performance review - final outcome letter (PM6)
- Personal development plan

Contracts

- Contractual changes letter
- Cease and desist letter to new employer
- Cease and desist letter to ex-employee
- Cease and desist - draft undertaking to be given by new employer
- Cease and desist - draft undertaking to be given by ex-employee
- Deduction from wages clause
- Discretionary bonus clause
- Discretionary bonus scheme
- Employment Contract - junior employee (England & Wales)
- Employment Contract - senior employee (England & Wales)
- Employment Contract - junior employee (Scotland)
- Employment Contract - senior employee (Scotland)
- Expiry of fixed term contract letter
- Guide to being a workplace companion
- Letter removing old contractual policies (variation clause)
- Letter removing old contractual policies (no variation clause)
- Letter introducing new policy
- Letter confirming new policy (trade union)
- Letter offering bonus in consideration for employment contract changes
- Probationary period clause
- Probation review meeting invitation
- Probation letter - extension of probationary period
- Probation letter - successfully passed
- Probation letter - termination of employment
- Restructure checklist
- Workplace companion confidentiality statement
- Zero hours contract

Disciplinaries and grievances

- Code of workplace behaviour
- Disciplinary appeals flowchart
- Disciplinary investigations flowchart
- Disciplinary - appeal outcome letter
- Disciplinary - letter requesting attendance at hearing
- Disciplinary - letter confirming dismissal following previous warnings
- Disciplinary - letter requesting attendance at dismissal appeal meeting
- Disciplinary - letter following non-attendance
- Disciplinary proceedings flowchart
- Framing allegations in disciplinary proceedings
- Grievance flowchart
- Grievance outcome letter
- Grievance appeal outcome letter
- Suspension letter (with pay)
- Suspension letter (without pay)

Dismissal

- Constructive dismissal flowchart
- Dismissal and re-engagement letter
- Dismissing senior executives table
- Gross misconduct dismissal letter
- Guide for handling a successful appeal against dismissal
- Reference template (factual reference)
- Resignation flowchart

Equality & Diversity

- Equality & diversity monitoring form
- Neuroinclusive Recruitment Guidance
- Religion or belief direct discrimination flowchart
- Religion or belief manifestation checklist for managers

Family friendly

- Bereavement policy
- Breastfeeding risk assessment
- Carers leave flowchart
- Carers leave postponement letter
- Maternity return to work form
- Neonatal care leave policy
- Neonatal care leave notice form
- Paternity leave flowchart - birth
- Paternity leave flowchart - adoption
- Pregnancy acknowledgment letter
- Shared parental leave eligibility declaration
- Shared parental leave flowchart - mother/primary adopter
- Shared parental leave flowchart - partner

Flexible working

- Confirmation of trial period
- Extension of time for considering request
- Flexible working checklist
- Flexible working flowchart
- Homeworking policy
- Invitation to flexible working meeting
- Invitation to appeal meeting
- Letter accepting request
- Letter accepting request following appeal
- Letter rejecting an application
- Letter treating application as withdrawn
- Letter rejecting appeal
- Lone working policy
- Lone working risk assessment
- Remote working checklist
- Template for use by managers proposing to refuse request

Holiday and Working Time

- Compressed hours checklist
- Compressed hours guidance
- Guaranteed hours flowchart - who qualifies
- Guaranteed hours flowchart - notice of shifts
- Guaranteed hours flowchart - cancellation/curtailment of shifts
- Holiday accrual during absence
- Holiday pay flowchart
- Holiday request approval
- Night working policy
- Night working risk assessment
- Sabbatical leave policy
- Sickness during holiday period letter
- Working Time Regulations opt-out letter

Mental Health & Wellbeing

- Access to work employer support letter
- Reasonable adjustments request letter
- Stress at work policy
- Stress incident log
- Stress concern notice form
- Stress risk assessment
- Spotting and responding to stress checklist
- Wellbeing assessment form

Miscellaneous

- Adverse weather policy
- AI Checklists
- AI in job applications flowchart
- AI in recruitment flowchart
- Anti tax evasion policy
- Conflicts of interest policy
- Data Privacy Notice
- Employee forum terms of reference
- Employment Rights Act Overview
- Generative AI usage policy
- Harassment and bullying policy
- Harassment - asking the right questions
- Harassment flowchart
- Harassment flowchart - rejecting sexual advances
- ICE Regulations Checklist
- Immigration costs recovery agreement
- Menopause policy
- Online ballot best practice guide
- Professional boundaries policy
- Relationships at work policy
- Recording of meetings policy
- Return to work interview form
- Stay interview guidance
- Stay interview template script
- Whisteblowing dismissal and detriment table

Protected & 'without prejudice' Conversations

- Protected conversation information sheet
- Protected conversation information and agreement letter
- Protected conversation script
- Protected conversation follow-up letter
- Without prejudice flowchart

Redundancy

- Redundancy flowchart
- Ballot Form for election of employee representatives
- Draft script for use at individual consultation meeting (pool)
- Draft script for use at individual consultation meeting (no pool)
- FAQs on collective redundancy
- Invite to second consultation meeting (standalone role)
- Invite to final consultation meeting
- Invite to a redundancy appeal meeting
- Letter implementing lay off or short-time working
- Letter requesting applications for voluntary redundancy
- Letter advising employee they are initial at risk (pool)
- Letter confirming provisional selection (pool)
- Letter confirming provisional selection (standalone role)
- Letter confirming deselection from pool
- Letter inviting nominations for employee representative
- Letter to employee representative explaining role
- Letter confirming dismissal for redundancy
- Letter confirming outcome of redundancy appeal
- Nomination form for employee representatives
- Notice of ballot for employee representatives
- Notice of election result
- Notifying the government of collective redundancies factsheet
- Scoring matrix
- s188 letter to representatives
- Voluntary redundancy request letter

Settlement agreements

- Acas COT3 agreement
- Contractual settlement letter
- Counterpart clause
- Entire agreement clause
- Legal costs contribution clause
- Non-disparagement clause
- No new job warranty
- Post employment notice pay clause
- Restrictive covenants clause
- Return of company property clause
- Tax indemnity clause
- Warranty that the employee hasn't misbehaved

TUPE

- Ballot form for election of employee representatives
- Employee Liability Information Checklist
- Nomination form for employee representatives
- Letter inviting nomination of representatives
- Letter confirming nomination of representatives
- Letter to employee representatives
- Measures letter (no representatives - micro businesses)
- Measures letter (employee representatives)
- Measures letter from transferee to transferor (no measures expected)
- Measures letter from transferee to transferor (measures expected)
- Welcome letter following TUPE transfer

Wages

- Competency pay framework
- Competency pay framework checklist
- Expenses policy
- Overpayment of wages letter
- Salary sacrifice factsheet for employers
- Salary sacrifice flowchart
- Letter from employee confirming salary sacrifice (cycle to work)
- Letter from employee confirming salary sacrifice (pension)
- Letter confirming receipt of salary sacrifice letter
- Tips and gratuity policy
- Training fee repayment letter

LOG ON AT WWW.HRINNERCIRCLE.CO.UK AND HEAD FOR THE VAULT

RED BULL GAVE HIM WINGS:

THE EMPLOYMENT LAW CONSIDERATIONS BEHIND CHRISTIAN HORNER'S EXIT

Red Bull has confirmed Team Principal Christian Horner's dismissal – without warning, without process, and while he remains under a long-term fixed-term contract set to run until 2030. The move came a year after Horner was cleared – after two internal investigations – of sexual harassment allegations amd a swirl of media speculation and leaked WhatsApp messages.

In this article, we explore the employment law issues raised by his abrupt exit, from potential unfair dismissal risks and contractual implications, to how employers can keep key talent out of the hands of competitors.

UNFAIR DISMISSAL – NO PROCESS, NO WARNING

Christian Horner has been dismissed. He may, at present, be serving his (substantial) notice period (more on that below), but he has been given notice of the termination of his employment with Red Bull.

Horner has been at Red Bull for two decades and has clear eligibility to claim ordinary unfair dismissal under the Employment Rights Act 1996. It's equally clear that his dismissal is an unfair one. To have a chance at defending an unfair dismissal claim, Red Bull would need to point to a potentially fair reason for dismissal: conduct, performance, illegality, redundancy, or some other substantial reason. It's not even clear what 'potentially fair reason' they would be relying upon. There is no mention of any culpable 'reason' in the press releases surrounding Horner's exit. And, given someone has already taken over his operational role, this is clearly not a redundancy situation. Could it possibly be shoe-horned into SOSR? There are whispers that Horner had lost the confidence of Red Bull's Thai owners and that this motivated the exit decision.

Even if a 'potentially fair reason' could be identified, it is clear that Horner's dismissal is procedurally unfair. There was no disciplinary meeting, no warning, no right of appeal. In short, no process whatsoever. Reports indicate that Horner was ambushed at a meeting at which he had expected to be discussing something entirely different.

So, technically, Red Bull have unfairly dismissed Horner. However, they will not be particularly worried. With those holding senior positions like Horner, commercial reality trumps technical legal risk. Even if Horner claimed unfair dismissal, his basic award would be a paltry £21,570 (based on 20 years of service and being aged 51 at the date of dismissal) and his compensatory award claim would be limited to the current statutory cap of £118,223. This is small-fry in the context of Horner's reputed annual

salary of around £8 million and the fact that he is currently tied in under a fixed-term contract which is due to run until 2030.

Unfair dismissal, a technical risk but, in practice, a red herring.

THE FIXED-TERM CONTRACT – WHAT NOW?

Having been removed from his position as team principal with immediate effect, Horner appears to currently be on garden leave. His notice period is running. But it is no ordinary notice period. Although we have no official confirmation, reports indicate that Horner's fixed-term contract was not due to expire until 2030. This is an incredibly long fixed term. Contracts such as this would generally include a break clause allowing either party to walk away in certain, specified circumstances. Triggers could include team performance or changes in sporting regulations. We don't know if any of these apply in Horner's case. The fact that he has been placed on garden leave indicates that they do not.

Unless the fixed-term agreement can be brought to an end early by relying on some form of 'break clause', the only way in which Red Bull or Horner could legitimately walk away early would be if there were some form of fundamental breach of contract by the other party. In those circumstances, the wronged party could accept the breach and leave with immediate effect, treating themselves as discharged from any ongoing obligations under the fixed-term contract. We touch on this point below.

So, the lengthy fixed term is an issue, likely for both parties. While it might be tempting for Horner to sit back and accept hefty pay cheques for the next five years, Formula 1 is a fast-paced business environment and, after a lengthy time out, he is unlikely to secure another senior role. Likewise, Red Bull will not want to continue to eat into their precious budget cap by paying out large sums of money to someone who is on garden leave. The practical solution is obvious: a negotiated settlement will be reached (and likely a substantial one). We will probably never know its value, but much will depend on what leverage both parties have – whether Horner has a new job lined up, his access to sensitive information, the risk to Red Bull of PR damage if they sideline one of the sport's biggest personalities, the need for Horner's assistance with any ongoing legal proceedings, and Red Bull's budgetary constraints.

CAN HORNER GO TO A RIVAL?

Employers have no free-standing legal right to prevent their ex-employees from working for a competitor. Whether Red Bull can prevent Horner going to a rival team will – leaving aside the notice period point considered below – depend on the terms of his employment contract. Does it include a restrictive covenant preventing him from working for a rival team? If so, it is only likely to be enforceable insofar as it goes no further than reasonably necessary to protect Red Bull's legitimate business interests. As a rule of thumb, 12 months is the longest restriction the courts are likely to enforce. Red Bull could also seek to protect the team and its personnel through enforcement of any non-solicitation of employees clause in Horner's contract. Again, such a clause would need to be limited in duration to have any chance of being enforced – 12 months at best. And these restrictions, if they exist, will likely be reduced in duration by each day that Horner spends on garden leave.

Outside of restrictive covenants, Horner's contract is likely to include stringent confidentiality provisions. These will survive the termination of employment and limit what Horner is able to 'take' – in the form of confidential knowledge and documentation – to any rival team

All this is, in reality, fairly academic. The best protection that Red Bull have against Horner moving to a rival team is his lengthy notice period. Provided that Red Bull continue to pay him, Horner will be unable to go and work for a rival team even if he wanted to. In an ironic twist, Horner may end up on the receiving end of one of his own tactics: holding departing employees to their full notice. Horner did this recently with Will Courtenay, Red Bull's departing Head of Race Strategy. Courtenay resigned to take up a role as McLaren's Sporting Director. McLaren hoped that Red Bull would offer an early release from Courtenay's long notice period, but Horner confirmed that Red Bull would hold him to the full period, delaying his actual departure until mid-2026. Red Bull could, if they choose, adopt the same approach for Horner.

CAN HORNER BE DISMISSED WITH IMMEDIATE EFFECT?

It would appear that Horner's contract of employment is fixed term and is not due to terminate for several years. Immediate termination in such circumstances is a high-risk strategy. Horner could claim his notice pay monies through a breach of contract claim if Red Bull got it wrong. It would only be lawful if Red Bull could demonstrate that he had committed a fundamental breach of contract justifying summary termination. Only something as serious of gross misconduct is likely to suffice.

There is no evidence that Red Bull have anything of the sort up their sleeve as regards Horner. While he was investigated following the allegations of sexual harassment last year, he was cleared internally following two separate investigations. It's clear Red Bull's performance has deteriorated this year but, quite apart from the fact that it would be difficult to lay the finger of blame solely on Horner for their problems, performance issues alone – unless they amount to gross negligence – are never going to justify immediate termination.

If Red Bull made a misguided attempt to terminate Horner's contract with immediate effect, they would – based on the information currently in the public domain – risk a substantial breach of contract claim and would also have let Horner off the hook in terms of any otherwise ongoing obligations of confidentiality and restrictive covenants. This is because, once the employer has committed a fundamental breach of contract, which terminating with immediate effect without cause would undoubtedly be, the employee accepting that breach is discharged from any otherwise ongoing contractual obligations.

It would be a high-risk strategy indeed. Unless new evidence surfaces, Red Bull likely needs to negotiate a clean exit, not enforce termination for cause.

BROADER LESSONS: MANAGING HIGH STAKES EXITS

- Reputational risk can drive decisions more than legal process in high-profile exits.
- HR in elite environments needs to:
  - Maintain tight contract drafting (especially covenants and termination clauses)
  - Be ready to pivot fast – reputation and control matter as much as legal niceties
  - Balance legal rights with commercial diplomacy when dismissing senior employees.
- For HR professionals, the lesson is clear: where the stakes are high, exit planning must be watertight, flexible, and reputationally aware.

You will find more insight on this topic in Dismissing Senior Executives, the latest book in the HR Inner Circle Employment Law Library, a copy of which is included free with this month's magazine.

'All reasonable steps' defence

Under the Equality Act 2010, employers can be held liable for harassment by their employees carried out 'in the course of employment'. This can feel like a high bar, especially since employers can't fully control what employees say or do. However, there is a defence available, albeit rarely successful: if an employer can show it took all reasonable steps to prevent the harassment, it may avoid liability.

Tribunals apply a two-stage test, as confirmed in *Canniffe v East Riding of Yorkshire Council*:

- Identify the steps taken by the employer.
- Consider whether there were other reasonable steps that could have been taken. If so, the defence fails.

The recent case of *Campbell v Sheffield Teaching Hospitals NHS Foundation Trust & Hammond* is a rare example of this defence being upheld. Mr Hammond, a trade union member, made a racially abusive comment during an argument with Mr Campbell, a trust employee and union branch secretary. The tribunal found the comment had been made but ruled the employer, the NHS Trust, was not liable. The Employment Appeal Tribunal agreed.

The Trust's proactive steps included:

- Induction sessions on dignity at work, introducing core 'PROUD' values
- Annual performance assessments considering EDI compliance
- Posters promoting workplace values
- Mandatory EDI training every three years, which Mr Hammond had recently attended.

No additional reasonable steps were identified during the hearing. As a result, the defence succeeded.

The new duty under Section 40A of the Equality Act requires employers to take reasonable steps to prevent sexual harassment. If breached, tribunals can uplift awards by up to 25%. Although the language differs slightly (the word 'all' is missing from the new duty), upcoming changes in the Employment Rights Bill are expected to formally align the two tests.

To rely on the defence:

- Carry out regular harassment risk assessments
- Maintain up-to-date policies and training
- Train managers to recognise and act on concerns
- Ensure policies are followed in practice, not just on paper.

FOR WOMEN SCOTLAND: THE SUPREME COURT'S IMPACT

We're returning to the Supreme Court's judgment in *For Women Scotland v Scottish Ministers* because although the dust has at least begun to settle, HR professionals are now faced with finding practical ways to interpret the decision. This is an unenviable task: this judgment was always going to be controversial, regardless of the outcome.

As it is, we have the finding that under the Equality Act 2010 'woman' and 'female' mean someone who is a biological woman, while 'man' and 'male' mean someone who is a biological man. Whether or not a person holds a Gender Recognition Certificate is, for the Act's purposes, of no relevance.

The Equality and Human Rights Commission's promised updated guidance is going to take several months to collate and it has meanwhile issued a short 'interim update'. In this article, we offer our own interim guide, using as our key reference points the EHRC's interim update, the Supreme Court's judgment, and the wording of Act itself.

THE JUDGMENT

At its base level, the Supreme Court held that a 'man' under the Equality Act 2010 is a biological man, and a 'woman' is a biological woman. With or without a GRC, a trans man remains a 'woman', and a trans woman remains a 'man'. This means that all the Act's protections and rules now apply based solely on the biological sex of the individual.

Employment and services

As employment and services are dealt with separately under the Equality Act, the implications of the Supreme Court's judgment in these areas also need to be explored separately.

Implications for service providers

Section 29 states that service providers must not discriminate against someone seeking a service by refusing to provide it, offering it on less favourable terms, or subjecting them to any other disadvantage.

However, there are exceptions for single-sex services. These are outlined in **Schedule 3, Part 7**, allowing service providers to offer separate or different services for men and women if:

- A joint service would be less effective, and
- The approach is a proportionate way to achieve a legitimate aim.

A service can be lawfully limited to one sex in the following cases:

1. **Need:** Only one sex needs the service.
2. **Joint service less effective:** The service is offered to both sexes, but a joint service would not work as well.
3. **Not practical to provide separately:** A joint service would be less effective, and it's not practical to provide separate services for each sex.
4. **Special care settings:** The service is provided in a hospital or care facility.
5. **Privacy concerns:** The service is used by more than one person at the same time, and someone might reasonably object to the presence of the opposite sex.
6. **Physical contact:** There is likely to be physical contact, and a person might reasonably object to contact with the opposite sex.

Paragraph 28 of Schedule 3 provides a similar exemption for claims of gender reassignment discrimination, as long as the single-sex service can be justified as a proportionate means of achieving a legitimate aim.

In light of *For Women Scotland*, these provisions, taken together, mean that separate services can be provided for biological men and biological women provided that the service provider can show that the approach is a proportionate means of achieving a legitimate aim. There can be no claim of either sex discrimination or gender reassignment discrimination in relation to such a provision.

Importantly, Schedule 3 does not mandate single-sex services; it simply protects providers from discrimination claims if they choose to separate services based on sex under the specified conditions. However, if a provider opts to separate services based on gender identity rather than biological sex, they risk discrimination claims from anyone excluded or treated differently under that arrangement.

Implications for employers

Taking it back to basics, the 2010 Act protects employees and workers from discrimination in employment. The framework outlines nine 'protected characteristics' giving protection from discrimination in its various forms. One of these characteristics is 'sex'. Another is 'gender reassignment'. Both are relevant.

Sex discrimination

Under s11 of the Act, the protected characteristic of sex means being either a man or a woman. Following *For Women Scotland*, this is based on biological sex, not gender identity.

- **Direct discrimination**

Under s13, direct discrimination happens if someone is treated less favourably **because of a** protected characteristic. A trans man (biologically female) would therefore need to show less favourable treatment because of being a woman, which is unlikely to be their claim.

However, direct discrimination also covers perception and association, meaning a trans employee could still bring a direct sex discrimination claim if they are treated badly because they are perceived to be, or associated with, a particular sex.

- **Indirect discrimination**

Section 19 says indirect discrimination happens if a provision, criterion or practice (PCP) puts people sharing a protected characteristic at a disadvantage. A trans man could only claim on the basis that a PCP discriminates against women and they share that disadvantage. Again, unlikely.

However, under s19A, an individual can claim should they suffer the same disadvantage as the protected group, even if they are not a member.

For example, a PCP indirectly discriminating against men could allow a trans man to claim if similarly disadvantaged.

- **Sex-related harassment**

Under s26(1), harassment happens when unwanted behaviour related to a protected characteristic violates someone's dignity or creates a hostile environment. The victim need not have the characteristic themselves: a trans man could claim if the unwanted behaviour relates to their connection with being a man.

- **Sexual harassment**

Section 26(2) covers unwanted sexual behaviour which violates dignity or creates a hostile environment. This is about conduct of a sexual nature, not sex or gender identity, so trans employees are protected without needing to link it to a protected characteristic.

- **Victimisation**

Victimisation under the Equality Act occurs if someone suffers a detriment because they have carried out, or might carry out, a protected act — bringing a discrimination claim or grievance, for example. There's no need for the person to have any specific protected characteristic.

Gender reassignment discrimination

Trans employees have the right not be discriminated against because of gender reassignment.

Gender reassignment means proposing to undergo, undergoing, or having undergone a process to reassign your sex. To be protected from gender reassignment discrimination, you do not need to have undergone any medical treatment or surgery to change from your birth sex to your preferred gender. EHRC guidance states:

> *'You can be at any stage in the transition process, from proposing to reassign your sex, undergoing a process of reassignment, or having completed it. It does not matter whether or not you have applied for or obtained a Gender Recognition Certificate, which is the document that confirms the change of a person's legal sex.*
>
> *'For example, a person who was born female and decides to spend the rest of their life as a man, and a person who was born male and has been living as a woman for some time and obtained a Gender Recognition Certificate, both have the protected characteristic of gender reassignment.'*

The forms of unlawful discrimination cover direct discrimination, indirect discrimination, harassment, and victimisation.

So, a trans man or trans woman who is treated less favourably because of gender reassignment may have a direct discrimination claim. There is a difficulty here, though, and that relates to the question of the correct comparator. The law gives trans people the right not to be discriminated against because of gender reassignment but does not spell out who their

comparator should be. The Supreme Court's judgment says that the correct comparator for a trans woman is 'likely' to be a biological man without the protected characteristic of gender reassignment (and vice-versa). Direct gender reassignment discrimination claims about exclusion from same-sex facilities may now be more difficult, if the correct comparator is someone with the same biological sex.

A trans man could, however, bring a harassment claim if they were subjected to unwanted conduct related to their gender reassignment which had the purpose or effect of violating their dignity, or created an intimidating, hostile, degrading, humiliating, or offensive environment for them. Harassment claims do not require any comparator.

Indirect discrimination claims are also possibly easier to formulate. A trans man could bring an indirect discrimination claim if their employer operated a PCP which placed a trans man (and trans men as a group) at a disadvantage. In such a case, the employer would need to justify the PCP.

Access to workplace facilities

The provision of services by employers to employees are not covered by the same rules applicable to 'service providers' — see above — which generally allow single-sex facilities to be delineated based on biological sex (applying *For Women Scotland*) where separate provision is justified. Employers are, under the Equality Act at least, required to guard against all forms of 'employment' discrimination (as set out above) in the provision of workplace facilities. This involves balancing the often conflicting characteristics of biological sex and gender reassignment.

What employers do have is a separate legal provision — the Workplace (Health, Safety and Welfare) Regulations 1992, which require the provision of certain facilities on a single-sex basis. The requirements are:

- That 'sanitary conveniences' (i.e., toilets) must be separated for men and for women, except where they are contained in separate, lockable rooms;
- That washing facilities — where the washing extends beyond the arms, forearms and face — must also be sex-segregated, unless in separate lockable rooms and intended for the use of one person at a time;
- That changing facilities must be provided or used separately by men and by women, 'where necessary for reasons of propriety'.

'Sex', 'men', and 'women' are not defined in the Regulations. We therefore do not know, definitively, that the requirement for single-sex facilities delineates along the lines of *biological sex*. However, it is likely that it will. The EHRC's interim statement re-enforces this: 'In workplaces, it is compulsory to provide sufficient single-sex toilets, as well as sufficient single-sex changing and washing facilities where these facilities are needed.'

So workplaces must provide separate facilities for (likely biological) men and women, unless the facilities are contained in separate, lockable, rooms. Offering mixed-sex facilities would not comply with these requirements; offering genuinely gender-neutral spaces which are available in separate, lockable, rooms, would.

If an employer *only* offers single-sex facilities on the basis of biological sex the following risks arise:

- Harassment claims from trans employees on the basis that requiring them to use facilities based on their biological sex is unwanted conduct which has an intimidating, hostile, or degrading effect.
- Indirect discrimination claims from trans employees on the basis that a policy of only providing facilities on the basis of biological sex places trans employees at a disadvantage compared with others (subject to employer justification).
- Potentially direct discrimination claims from trans employees, although note above in terms of the comparator issue here.
- Harassment claims from non-trans employees who may find using single-sex services alongside a person who has the appearance of the opposite gender intimidating or hostile.

If an employer offers single-sex facilities on a biological sex basis and requires trans employees to use a separate accessible toilet, this risks:

- Discrimination claims by disabled employees who find that they no longer have clear and ready access to accessible facilities as they are required to share them with a wider group of employees.
- Claims — potentially of harassment and indirect discrimination — by trans employees who would potentially be 'outed' by virtue of the visibility of being seen to be using an accessible toilet.

Offering gender-neutral toilet facilities in addition to single sex facilities — with such provision being offered separately to any accessible toilet for disabled staff — gives rise to a much lower risk of any discrimination issues. This is especially so should trans employees be asked to use the gender-neutral facilities to avoid sex-related harassment issues. The reasoning here would be to prevent claims from those who may otherwise find themselves sharing toilet facilities with a trans employee who presents as the opposite sex but is using facilities aligned with their biological sex — precisely as required following *For Women Scotland*.

In a nutshell, the 'facilities' issue is far more nuanced and complicated

for employers than it is for service providers. This seems to have been underestimated by both the Supreme Court and, to date, the EHRC.

Gender pay gap reporting

The requirement for large employers to report gender pay gap data on an annual basis does not come direct from the Equality Act. It is instead covered by separate regulations — the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 — albeit ones which do stem from the Act (more on that below).

As we know, the Supreme Court's ruling in *For Women Scotland* concerned the Act's definition of 'sex' and 'woman'. The gov.uk guidance on gender pay gap reporting currently states:

> *'It is important for you to be sensitive to how an employee identifies their gender. The gender pay gap regulations do not define the terms "men" and "women".*
>
> *You should not single out employees and question them about their gender. To reduce the risk of this, try to use information employees have already provided, such as in HR or payroll records.*
>
> *If this information is unavailable or unreliable, find a way to allow employees to confirm or update their gender. For example, invite them to check their recorded gender and update it if needed.*
>
> *If an employee does not self-identify as either gender, you can exclude them from your calculations.'*

It remains to be seen if this guidance will be updated in light of *For Women Scotland*. The fact that Equality Act is the enabling legislation for the 2017 Regulations means that it probably will. Regulations passed under an enabling Act are generally bound to follow the definitions used in that Act.

This would mean that pay gap reporting models would need revising and reorganising to capture data based on biological sex. It may also mean that a comparison of year-on-year data will lead to anomalous results. For example, this would be the case where someone who had previously identified as, say, female had had their data included in the figure for women but now, following *For Women Scotland*, have to have their data included for men as they are, biologically, a man. Both payroll and HR need to be ready for this but may want to wait for further EHRC guidance before committing to any reporting changes.

Equal pay

Equal pay claims arise on the basis that men and women should receive the same pay for the same job, 'like work', or 'work of equivalent value'. A claimant must compare their position with a comparator of the opposite sex.

The Supreme Court's decision means the comparator for a trans woman (a biological man) in an equal pay claim would be someone of the opposite biological sex: a biological woman. A trans woman will not have the right to bring an equal pay claim on the basis that they are paid less than a biological man. They could, however, potentially instead bring a direct sex discrimination claim about pay, based on the perception that they are female.

Other considerations

Among other considerations arising from the decision are:

- Where an employer has a general occupational requirement for the person holding a role to be a particular sex, they will be able to lawfully exclude trans people with that acquired gender, even where they hold a GRC.
- Where an employer takes positive action aimed at supporting those of a particular sex, these measures will apply based on biological sex. Positive action aimed at recruiting more women will not apply to trans women, whether or not they hold a GRC. Within the context of *For Women Scotland* itself, appointing a trans woman with a GRC would not count as the appointment of a woman. It would not therefore count towards achieving the goal of women holding 50% of non-executive roles.

COMMON ISSUES ARISING...

Q: *We have a trans man who is very masculine in presentation. Many staff members do not know that this individual is a biological woman. We are a workplace, but not open to the public. Other than one accessible toilet — which just about serves the needs of our disabled employees — we only have single-sex toilet facilities.*

A: Taking a practical approach is needed here, and this employee should be approached individually. If you only have one accessible toilet and are concerned about inadequate provision for disabled employees, you may decide it would not be appropriate to ask the trans employee to use it. If you require them to use the women's toilet, you risk claims of harassment related to sex from female users. It could also amount to indirect discrimination against the trans man because it would be a PCP of providing single-sex facilities along biological sex lines. This places a trans person at a substantial disadvantage as they cannot use the facilities without feeling uncomfortable. The employer would need to justify the exclusion.

Perhaps this should be a situation where you 'take a view'. If the workforce is largely unaware of the employee's trans status, you could continue 'as you were' for now and wait to be challenged. You would need to explain this to the employee and make it clear that, if challenged, the position may change and you may ask them to use the accessible toilet or some other provision.

Q: *We have single sex changing rooms at work and one 'accessible changing room'. Can we ask trans employees to use this? It could lead to queues at busy times.*

A: If this leaves trans employees required to use limited accessible facilities (which tend to be gender neutral), then both they and disabled employees may still complain. It is likely to be inappropriate (and may give rise to claims) to require trans employees to use a single 'accessible' changing space rather than facilities genuinely regarded as gender neutral; this also limits provision for disabled employees. There is currently no guidance on what employers should do if they do not have any gender-neutral facilities. This is often the case for changing facilities, where there is no clear practical solution.

Q: *We only offer mixed-sex toilet facilities. No issue there, surely? They are all cubicles rather than separate lockable rooms.*

Unfortunately, there are several issues with this. The 1992 Regulations make it clear that single-sex facilities must be provided in the workplace. Gender neutral facilities must be in separate, lockable, rooms in order to constitute an acceptable alternative. Yours aren't. In terms of the implications, there a risk of…

- A potentially unlimited fine for breach of the Regulations
- Claims of indirect sex discrimination by biological women pointing to a disadvantage associated with a requirement to use mixed-sex facilities.
- Claims of harassment related to sex by biological males or females who find the environment of a mixed-sex space to be hostile or intimidating for any reason.

You need to make changes. You either need to offer single-sex facilities in addition to your current mixed-sex ones or you need to add facilities in separate, lockable, rooms alongside your current facilities. The second option here may be preferable if you have the space as genuinely gender-neutral facilities are not open to legal challenge on the basis of either sex or gender reassignment.

Q: *We have single-sex toilets and gender-neutral toilets but let employees with a GRC use the facilities which correspond to their certificated sex. They are not required to use the gender-neutral facilities or those of their biological sex. Is this OK?*

A: It is no longer permissible to draw the dividing line with single sex facilities by anything other than biological sex. The old approach of allowing individuals to change facilities to accord with their trans identity is not consistent with the law and the position you have outlined needs revising.

You say you have gender-neutral toilets available for use: you may need to clarify that trans employees should use these. This should be done sensitively as requiring trans people to use facilities matching their birth sex (or even to move to a gender-neutral facility) could effectively 'out' them, creating privacy concerns and potential distress. Some individuals are openly trans, while others live by their acquired sex with their birth sex known only to very few.

PRACTICAL TIPS

Behind all the legal technicalities here, HR professionals are working with real people who must be supported. Here are some practical tips:

1. **Audit your workplace.** Each workplace will have different pinch-points. It might help to break your assessment down into different areas:

   a. Are you under an obligation to report gender pay gap data? The annual reporting date is 30 March for public sector and 4 April for large private sector organisations. This means there is now time to take stock of systems and work out if anything needs tweaking. Consider having two parallel data sets: one delineated based on the gender which the employee has aligned themselves with, and one based on biological gender.

   b. Are you currently running any sex-based positive action initiatives? If so, consider whether the targets need to be altered to make it clear they relate to biological sex.

   c. Do you offer both single-sex and gender-neutral facilities? What is the scope for altering the workplace layout to accommodate more options? Will you be asking trans employees to use accessible facilities and, if so, do you have sufficient available to meet the needs of disabled employees?

   d. Do you as a service provider offer single-sex facilities that are also made available to your employees? If so, provided you have gone through the process of considering whether a service-provision exemption applies and whether your position is justified, it may be difficult for employees to claim the provision of the service on this basis is discriminatory.

   e. Review policies and identify if any may need updating. You may want to wait until you have updated EHRC guidance at hand before doing this, but any provisions reflecting the previously understood position — that, for example, a trans woman with a GRC is a woman under the Equality Act — should now be updated.

2. Engage with your workforce. Dignity and respect must be front and centre of any HR response. This situation is one where HR need to appear as 'human' as possible. Admit that the position is unclear and that successful navigation is going to involve detailed consideration of possibly conflicting rights and concerns. Explain what the ruling is and any practical changes you are making in response. Ask employees about their concerns and work collaboratively to find workable solutions.
3. Make sure communication regarding use of facilities is clear so every employee knows what they can — and can't — access. If you have gender neutral facilities as well as single-sex facilities, make it clear these are available for use by *all* employees and do not indicate trans status.
4. Make sure your employees' privacy is respected. Trans status is special category personal data and must be handled appropriately. You cannot require employees to disclose their GRC status.
5. Keep a paper trail of all of your considerations so the logic behind any decisions is clear. This could help any justification defence if your position is ever challenged.
6. Treat each employee as an individual and recognise that some may be struggling with the implications of the Supreme Court's decision. React with empathy.

Q&A ASK THE EMPLOYMENT LAW EXPERTS

Q:

I recently got a new role and have been asked to perform an HR audit. I've never done one before and there's no record of my predecessor having performed one. How do I go about the process and what sort of things should I look for?

A:

An HR audit is a review (often annual) of your policies, procedures and employment contracts. There's no legal requirement to carry out an audit or any set methodology. However, it's an opportunity to check your documentation and processes are up to date with changes to the law, the latest lessons from the employment tribunals, new guidance and current good practice. It can also help you identify ways to make your HR procedures more efficient and cost effective, and confirm they align with organisational values and objectives.

You can't do everything at once. We've suggested five areas to look at, but your starting point should be to uncover any legal non-compliance. You can tick off any outstanding areas in future years. Create an action plan, with timescales, and prioritise tackling the biggest risks and those changes that will make the biggest impact.

ARE YOUR DOCUMENTATION AND PROCESSES LEGALLY COMPLIANT?

These are some questions to ask yourself:

- Do template employment contracts, employee policies and things like template letters comply with current UK law? To take a recent example, is there a neonatal care leave policy? (If not, there's one available in the HR Inner Circle members' Vault.)
- Has the company communicated any legal changes to staff and managers?
- In practice, does the company comply with employment laws? Key areas to look at would include the national minimum wage, paid and unpaid leave, working time and rest breaks, and pensions auto-enrolment. You could check records of grievances and informal complaints to help assess this.
- Do employees and workers receive the prescribed information about their terms and conditions no later than Day 1 of employment?

TIP

The Equality and Human Rights Commission's technical guidance on sexual harassment and harassment at work recommends that you review your anti-harassment policies annually. So make

sure you look at these and diarise another review for a year's time. Check too when anti-harassment training was last carried out and review the content and delivery method: if training is stale or ineffective, you won't be able to rely on the 'all reasonable steps' defence.

IS YOUR DOCUMENTATION IN ORDER?

Good record keeping is crucial to help you avoid disputes and rebut any employment tribunal claims. These are some points to check during your audit:

- Is there a signed contract on file for every staff member?
- Where appropriate, have individuals signed revised terms and conditions? For example, are employees who have been promoted subject to appropriate restrictive covenants? Are employees who work from home subject to confidentiality rules or banned from doing second jobs during the hours they're meant to be working for you? Do contracts reflect any agreed flexible working arrangements?
- Have individuals signed a 48-hour week opt-out where appropriate (including if they have a second job)?
- Is there a valid right-to-work check on file for every staff member and an effective system to monitor any visa expiry dates?
- Have terms and conditions been harmonised if legally permissible?
- Has everyone confirmed in writing that they've read the company's employee policies?
- Are HR records GDPR compliant? Are they secure and up to date and are they deleted when HR no longer needs them? Do you retain them long enough to comply with statutory retention periods (for example, under tax and health and safety rules) and to be able to defend the business from legal claims?

ARE POLICIES AND PROCEDURES FIT FOR PURPOSE?

It's not enough that your policies, contracts, procedures, forms and so on are legally compliant. They also need to be easy to understand and to access and to reflect current working practices at the company. These are some questions to think about:

- Is the company's HR documentation easy to read, concise and unambiguous?
- Are clearly worded standard forms and template letters available for managers and HR to use?
- Do policies reflect the company's culture and values and is the tone not too stiff and formal?
- Are there any inconsistencies between different documents?
- Is the language used inclusive? For example, does the paternity leave policy avoid assuming that those taking the leave will be male?
- Are there any complaints on file that point to a policy or process being unclear, complex, unfair, or poorly communicated?
- Can everyone access the policies? Think about people who work remotely or are on long-term leave and whether anyone may not have access to the internet or a physical location where the policies are kept.
- Are managers and staff trained in your policies, and do they follow them in practice?

You might seek managers' and employees' views on how easy company policies are to understand and use and whether they can suggest improvements. Ask managers if they've had to deal with repeated non-compliance with a particular requirement. If so, you should consider whether to clarify the policy or remove or amend the requirement. Or have they had to deal with any situations not covered by the company's policies? These can't cover every eventuality, but you may identify a gap it's important to fill. You may discover unwritten practices have developed, in which case you'll need to think whether to crack down on them or formally incorporate them into your policies.

TIP

If you want to make changes or introduce any additional policies, you should consult employees on these.

DO PAY OR BENEFITS NEED TO CHANGE?

An HR audit is a good opportunity to assess the pay, benefits, leave entitlements and so on that the business is offering compared to its competitors. Look too at data from exit interviews, employee satisfaction surveys and so on (see the next section) to assess how attractive your offering is.

Alternatively, certain benefits may have become less appealing to employees or too expensive for the business. If you identify anything that might be removed or changed, now is the time to consult staff before the Government's ban on varying terms and conditions without consent takes effect.

WHAT IS YOUR DATA TELLING YOU?

To help you identify potential improvements to your HR and management processes and working conditions, you could review data

such as:

- The company's absence rate
- Employee turnover
- How often the disciplinary and grievance procedures have been used or tribunal claims pursued
- The company's diversity statistics
- How long it takes to hire a new employee
- Overtime costs
- Productivity figures
- Employee satisfaction survey results
- Comments in exit interviews or on websites like Glassdoor.

CAN YOU IMPROVE SPECIFIC HR FUNCTIONS?

You might want to pick out one or two HR processes or practices and assess legal compliance and scope for improvement. These are some ideas that have the added benefit of helping you to prepare for the Employment Rights Bill:

Probationary procedure

With Day 1 unfair dismissal rights approaching, this would be a really useful area to home in on. Things to ask yourself might include:

- Is there an effective, consistent, and impartial performance management system in place during probation?
- Are managers trained in your probationary procedures?
- Are employees on probation managed in line with the company's requirements? For example, are managers setting clear expectations, addressing any concerns promptly and providing enough training and support? Are they holding probationary reviews on time and keeping a clear paper trail?
- Are employees passing their probation only for the business to have second thoughts?
- Is it worth trialling a longer probationary period (say six instead of three months) in preparation for the expected nine-month initial period of employment?

Holiday pay and entitlement

It's easy to slip up when calculating holiday pay so this is another good area to focus on. Mirroring the national minimum wage enforcement regime, the proposed Fair Work Agency will be able to impose significant penalties for underpaid holiday so the consequences of any mistakes could soon be much more severe.

Some points worth checking include:

- Does the company provide paid holiday at the worker's 'normal' rate? If it only does this for the first four weeks of holiday, do your annual leave policy or employees' contracts explain that after this you only offer basic pay?
- Do workers' payslips clearly set out any amounts paid for rolled-up holiday pay?
- Does your policy warn staff when they need to use their entitlement by? And is there a system for managers to track how much leave team members are taking and to remind them to take any unused allowance?
- Has the business correctly identified who is and isn't an irregular-hours worker and is the correct holiday entitlement and pay calculation methodology being used? If it isn't already happening, would it be easier to roll up holiday pay where permitted?

Recruitment

Day 1 unfair dismissal rights will make it harder to dismiss new hires who don't pass muster. So you might consider if the business can do more to select the right person for the job in the first place while complying with equality and immigration laws. An audit of your hiring processes might focus on these areas:

- Are job descriptions and forms up to date and clearly drafted?
- Are there enough high-quality applicants?
- Does a diverse range of applicants respond to job ads, giving you a wider pool to choose from?
- Are hiring managers trained in impartial selection and does HR provide standardised, unbiased, interview questions?
- Before the person begins work, does the business carry out the correct right-to-work checks, obtain references and carry out other necessary and reasonable background checks?

TIP

Unsurprisingly given the rules have changed repeatedly since the pandemic and Brexit, a recent Home Office survey highlighted significant confusion over right-to-work checks. For example, two in five medium and large employers (and three in five micro and small employers) wrongly thought a driving licence could be accepted for a check. There was also uncertainty about how long to retain right-to-work records. Reviewing your company's guidance for those who carry out checks and auditing a selection of records will help you root out any issues.

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Explore the Toolkits in the HR Inner Circle Vault

members.hrinnercircle.co.uk/toolkits

ASK THE PSYCHOLOGIST

By Louise Atkinson
HCPC Registered Counselling Psychologist

Q:

At a recent leadership training event, a couple of new managers raised concerns that they were struggling with 'imposter syndrome'. Can you advise on how staff should be supported to understand and overcome this?

A:

Imposter syndrome is very common but affects people to varying degrees. These new managers who have mentioned imposter syndrome have quite likely just been promoted to a leadership position. They will have worked hard for the role and have recently moved into their new posts. While they may appear superficially confident, they might actually be thinking the following sorts of things:

> 'They're going to realise I am not actually qualified for this.'
>
> 'I only got this job because they needed someone quickly, not because I'm the right person.'
>
> 'What if my team realises that I'm not as experienced as I seem?'

Imposter syndrome is a psychological pattern of thinking that can mean that an individual who experiences success in the workplace puts this down to luck, timing, or the help of others. They may feel that they do not really deserve their achievements.

Often, individuals with imposter syndrome say that they feel that they have tricked others into thinking they are more competent than they actually are. Therefore, they have a constant fear that one day, someone will discover the truth about them.

For someone experiencing imposter syndrome, every achievement can feel like a moment of tension, and praise can come with an uncomfortable feeling. An individual may frequently compare their achievements with those of colleagues, feeling like others are more skilled. They may feel very isolated or lonely in their position, believing that no one else shares these feelings of doubt. They may also be reluctant to ask for help for fear that it could expose their incompetence.

What are the key features of imposter syndrome in the workplace? It might appear as:

- Perfectionism
- Overworking
- Obvious self-doubt
- Avoidance of recognition.

It becomes a problem for employees and organisations when it starts to impact on staff wellbeing and performance, undermining confidence, job satisfaction, and relationships in the workplace. It may also stifle opportunities for innovation and growth.

WHAT CAN BE DONE TO HELP?

- **Safe spaces for open conversations:** These need to allow for discussion of self-doubt and should be about learning from mistakes rather than avoiding failure.

- **Role modelling:** Encourage leaders to talk about their own challenges and difficulties, to set the tone for safe discussions
- **Workshops, meetings or training:** Organise events on the subject of mental health and imposter syndrome. Consider integrating resilience-building into training programmes to help employees adapt to setbacks with confidence.
- **Constructive feedback:** Managers should offer this one-to-one, focusing on team specific sessions that acknowledge achievements and growth.
- **Mentoring or coaching arrangements:** Senior staff can provide significant guidance, reassurance, and validation, and these partnerships can help demystify leadership roles. Peer coaching or support can similarly allow individuals to share challenges and solutions.
- **Signpost to mental health resources:** Offer external support where relevant, including employee assistance programmes or counselling services.

Further information:

Mind: www.mind.org.uk

Impostor Syndrome Institute: www.impostorsyndrome.com

Action Mental Health: www.amh.org.uk/identifying-imposter-syndrome-in-the-workplace

Louise Atkinson of Psychology Associates is a Health and Care Professions Council-registered counselling psychologist who specialises in using integrative and relational approaches. She has particular experience of supporting adults with complex difficulties in a range of NHS and voluntary settings.

THE HR HUDDLE

WFH OVERSEAS, POLICE INVESTIGATIONS, AND CONTRACT CHANGES

In April's huddle, members discussed a range of topics, including overseas employment, police investigations, terms and conditions changes, collective consultations, and TUPE.

The discussion began with a question on overseas employment regulations. A member's client had an employee who was looking to work remotely from overseas for a set period. Before the employee left the UK, the member wanted to make sure their checklist covered all eventualities. She understood that the employee needed to have a right to work in their destination country, but was unsure how long they had to be working there before they needed to abide by local employment regulations. She was also concerned about sick pay, which currency to use to pay the employee, and whether they would need to consider a certificate of adequacy for GDPR if the country was outside the EU. She asked the huddle where would be best to start when covering all necessary documentation.

One member, who had a background in international recruitment, drew her attention to the 183-day rule. She said that you can normally work somewhere for about 183 days, or six months, before you start to come under the radar of another country's jurisdiction. At that point, you start potentially having to apply for residency and for tax. She suggested getting the employee a certificate for reciprocal social security if they were a UK national working in mainland Europe. This would allow them to be exempt from having to register in the new country. She also suggested paying the employee in GBP, as long as it was all documented. Following this, a few questions arose regarding whether the move was due to a secondment, or whether it was just a short-term move. The employee was moving due to their partner being seconded. They would be staying in the country and working from home for three to four months maximum. In this case, one member raised concerns over immigration rules. The employee was fully employed in the UK, and as far as was understood, had said they had the capacity to work from the country in question (as well as their partner).

Another member added that they had faced something similar with one of their employees, but their company's insurance policy meant that they were unable to travel. Throughout this process, the member was advised that a lot of companies were not allowing employees to work in another country for any longer than 30 days due to issues caused by cyber security. It was suggested to check the company's policies, as well as to potentially think of using a VPN during an employee's travels. It was also mentioned that private health care wouldn't be covered in another country — perhaps an indication to provide the employee in question with travel insurance. With that said, it was advised to check the small print of the travel insurance as most cover individuals for up to 90 days.

Next, the discussion moved to a case that a member was involved in. She worked within the education sector, predominantly with colleges, and was dealing with a safeguarding case in which a student had made an allegation about a teacher. She explained that during an investigation in which a learner is under the age of 18, they had to notify the local authority designated safeguarding officer, just in case there are any findings suggesting something inappropriate had taken place. They had done this, suspended the teacher, and were two weeks into the investigation when they had discovered that the police had been informed (by the designated safeguarding officer), and were going to take over the investigation. The police had asked the member to stop all internal investigations, even though the investigation was already at the conclusive stage as the learner, teacher, and several witnesses had been interviewed. The member questioned whether they should stop their investigation or continue to close it as normal, particularly as some police investigations can take much longer.

One member was faced with a similar situation and suggested continuing the investigation, as she didn't think the police were able to compel anyone to stop an investigation. She said that as long as the member explained to the police that they were going to continue their investigations separately, and as long as they were willing to re-open the case if information came to light from the police investigations, it was fine to continue. The only caveat of course being if the police had made a strong argument that an internal investigation was highly likely to jeopardise their investigation. Another member was also faced with a similar situation in which they continued their internal investigation alongside the police's. With that said, she mentioned that she did stop internal investigations in another situation, but that was more a 'pause': she was allowed to continue the investigation once the police had completed theirs. The discussion ended with agreement that if the investigation went to a hearing, they would continue with the investigation. Even though the investigation may result in a dismissal, continuing would allow the member to share everything from the investigation with the police should they ask for it.

Next, a member was dealing with a client who operated a concession unit in a department store. The store was alleging a theft by a concession unit employee, but would not share its CCTV footage. They allowed a manager to view it, but they would not share it saying it was not policy for them to do so. The member questioned how she could carry out a disciplinary investigation without any evidence. One member suggested checking their GDPR policy, and the terms in place for the concession to be there. Another member suggested asking the manager who viewed the CCTV to make a detailed statement of what they had seen, including whether they were satisfied there was clear evidence of the offence taking place. It was also suggested that the department store be asked if it would be willing to share a still from the video, instead of the full clip. One member also mentioned that a subject access request could be used to obtain the CCTV footage.

The next question was around the National Insurance changes and using salary sacrifices as a way reduce the employer's payments. One member had just done this in their organisation and had moved from pension payments and net pay to a salary exchange. With that said, she was unable to do this for national minimum wage employees. There had to be a threshold below which they couldn't drop, so they offered it to all their support centre staff and all their high-level managers. One member asked how employees could opt into this. It was explained that employees were given lots of information on how much they'd get depending on what they earned. They were also given a post-assessment opt-in form. Following this, the company would then have to make a contract variation, to reflect the change in terms and conditions. It was noted that there were a few downsides, one being that the employee would have to agree to the salary sacrifice for a minimum of 12 months. This could cause problems for people applying for a mortgage, getting divorced, or following a bereavement.

Members then discussed collective consultations and the nomination of representatives. One member had just started a consultation and had sent out information about nominating reps, but didn't seem to be receiving any responses. However, they then had a late flurry of responses and had more than the required number of nominations. Because of this, the member believed that they should have moved to a full staff secret ballot. However, his colleague in HR disagreed, stating that as some nominees got more votes than others (for example one got eight votes, and another only got one), they should just go with whomever received the most votes. The member sought advice on how other members would handle the situation. Most members agreed that a secret ballot should be held as this would cover them if anyone ever questioned the fairness of the redundancy process and the collective consultations.

Next, a member asked for advice. They worked with a large population of employees who were in entry-level roles. Once they came into the company, and successfully achieved their qualification, they were automatically promoted after about three years in role and given a hefty pay rise. With this promotion, they were issued revised terms and

conditions, including an increased notice period from one month to three months. The member was now finding that these employees were refusing to sign the new terms and conditions because they didn't want the extra notice period, despite working in the promoted position and receiving the enhanced salary. With this said, the company was thinking of asking the employees to have a conversation with their people manager to confirm that they've been promoted, and to talk through the terms of the promotion. Following this, they would then issue the employee with a letter stating their new terms, without asking them to sign, in the hopes that if they did not contest the terms at the time, they would be consenting to the change.

The member wanted to know what risks may come with this, acknowledging that this may change when the new Employment Rights Bill is implemented. One member suggested incorporating a space of time for employees to sign the terms and conditions letter and stating that if the employee acted in accordance with the contract but no signature had been received by X date, then by implication the contract terms had been accepted. This would make it clear to the employees that it is a contract change and they had been involved in the decision-making process.

The discussion ended with a TUPE question. A member was told there were three employees who needed to transfer into her company, one of whom was on long-term sick absence and was being dealt with by the transferer. The member had the employee liability information and had asked for more details, but questioned how much she could find out about the nature of this employee's situation — particularly when they were planning on coming back to work — given they were to inherit this person as a member of their staff. One member said she was able to ask whatever questions she wanted as the employee wouldn't be obliged to answer them. She noted that the questions would allow the member to understand what liabilities there were and how best to manage the transfer effectively.

MANAGING THE WORKPLACE IMPACT OF WEIGHT-LOSS INJECTABLES

By Karen Jackson
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More and more people are exploring injectable products like Mounjaro and Wegovy to help them lose weight, often purchasing online rather than going through their GP. These drugs come with side-effects, some severe, and the impact is now increasingly being felt in the workplace. So how should an employer respond when employees go off sick with nausea or another side-effect? Respond as normal and manage in line with absence policy, or take another approach?

As with anything health and employment-related, there is still a need to tread with caution when it comes to disciplining staff for health-related time off. In principle, it's correct that all short-term absences are dealt with in the usual way and in accordance with the organisation's sickness absence policy. When health is involved, there is however often going to be a need to ask more questions and not to adopt an overly strict blanket approach which will more often than not land you in hot water.

CREATE AN ELECTIVE TREATMENTS POLICY

In a perfect world a company's sickness policy or staff handbook would deal with the issue of what are effectively elective treatments. Many employers won't have such a policy and will have to deal with these issues on a case-by-case basis, but there is nothing stopping them from adopting a policy and setting it out in the rule book. The widespread availability of weight-loss medications could act as a catalyst for taking a close look at this and signalling to staff how it will be managed. Putting in place a clear policy will help to stem any problems down the line. No guarantees, but at least you can point to how everyone can expect to be managed.

PRESCRIBED VERSUS PURCHASED TREATMENTS

When dealing with weight loss injections, a key consideration is whether they have been prescribed by a GP or other medical practitioner to deal with an underlying health condition such as Type 2 diabetes. This changes the complexion of the issue and signals that a disability might be in play, or at the very least a long-term health condition that might equal a disability under the Equality Act 2010. It would not be difficult to establish that detriment arising from time off following weight loss jabs related to a disability could fall under s15 – 'discrimination arising from…' – and might therefore be unlawful.

Remember, though, that employers can still challenge absences if they are able to demonstrate compliance with a policy that is a proportionate means of achieving a legitimate aim. For example, where a significant number of

staff are persistently absent because of nausea due to Mounjaro, the legitimate aim might be to ensure adequate staffing and the organisation's ongoing commercial viability. Just because something is connected to disability does not automatically make it unlawful. An employer has the opportunity to justify the treatment.

NEVER MAKE ASSUMPTIONS

The tricky part about an issue like this is that sometimes you are going to have to ask delicate questions and to probe a bit deeper. This is why clear open dialogue is vital. If you make assumptions this is more likely to lead you down the wrong path. There are very few cases on elective surgery, but in *Fry v Russell Williams Textiles Ltd* an employer who assumed that cosmetic surgery was not for medical reasons ended up with an unfair dismissal finding against them. This is only a first instance employment tribunal decision and so is not binding law, but it is indicative of the approach tribunals might take.

Ordinarily policies will provide that annual leave be used for elective surgery because the employee has an alternative option to taking sick leave: they are absent from work because they have chosen to have a treatment. There is hardly any case law in this area, but we can expect to see this in the employment tribunals before too long and hopefully get a clearer steer from the judges.

WHAT ABOUT PAY?

Employers can dictate their own terms around what will and will not be paid when it comes to contractual sick pay, and a policy can specify that employees who take time off for elective or cosmetic surgery are not eligible for contractual sick pay. But then again, think of a situation such as reconstruction after an accident: is this really elective? What about breast reconstruction after cancer treatment? What about gender reassignment surgery? There is an argument that this is required treatment and not elective at all. Questions must be asked, delicately and supporting evidence gathered.

If you are not going to provide sick pay for elective surgeries, is your policy going to stipulate that recovery periods are also ineligible? And how long would this cover in terms of time off? None of this is easy. There is no definitive case law on the issue so common sense will have to prevail. For now.

Solicitor Karen Jackson is CEO of didlaw, a law firm specialising in disability discrimination and health-related issues at work. She is a Chambers & Partners and Legal 500 ranked employment specialist and litigates in the employment tribunals. Didlaw is listed as a Times Top Law Firm 2024.

TIME TO PUT EVERYONE ON A PIP!

by Suzanne Lucas
evilhrlady.org

Why does this valuable tool have such a bad reputation? Look, I know everyone (except me) hates performance improvement plans, but they can be a great way to make your employees' lives and work better — if approached correctly.

Managers perceive them as busywork — something they have to do just so they can fire someone. Employees feel being put on a PIP is akin to being told they have 90 days left to live. And HR is often left frustrated with the results. As HR executive Anna Tavis recently told the Wall Street Journal, 'I spent 15 good years on Wall Street and other places. It's a cover up. It's window dressing. None of these performance improvement plans lead to improving performance.'

If you're writing a PIP with the goal (stated or unstated) of terminating the employee and the PIP is just a way to get to that point, then it makes perfect sense they won't improve. The manager isn't offering the right support and the employee doesn't try, because the employee has already decided they'll fail.

But that's not always the case. And if none of your PIPs actually result in improved performance, there is something wrong with how you're writing them.

I'd like to see the dreaded PIP change and be used as an actual tool to improve — but I'd also like to see them used more often. Here's why.

WHAT A GOOD PIP LOOKS LIKE

Traditionally, managers place employees on PIPs when conversations alone aren't enough to improve performance. A well-written PIP has the following characteristics:

- Clear, measurable goals
- A schedule of regular follow-ups with the supervisor
- A clear timeline for each goal.

In this way, the employee knows precisely what they need to do to be successful. And at the end of the 30-60-90-day timeline outlined in the PIP, they should know precisely where they stand.

WHAT A BAD PIP LOOKS LIKE

Bad PIPs can look like any number of things — after all, there's an endless variety of ways to mess things up — but they often share the following characteristics:

- Goals are unclear
- Goals are subjective (e.g., 'Do a better job on your reports') rather than objective (e.g., 'Finish your reports on time and with 90%-plus accuracy')
- Managers fail to conduct regular follow-ups
- There is confusion over the timeline.

If your PIPs look like this, it's no wonder people fail.

WHY EVERYONE SHOULD BE ON A PIP

Suppose you had never heard of a PIP before reading this article, think about what would happen if you came into a staff meeting and said: 'Hey everyone, I have this great idea to improve everyone's performance! I'd like to sit down with each one of you and work together to write out your goals and objectives for the upcoming year. That way, there will be no confusion about what you need to do to receive a high rating.'

People would love it! No more confusion. Clear standards. Timelines for everything. Sure, you need flexibility, because things change. But it would make the office a better place.

Theoretically, a lot of companies do something with an annual performance review and goal-setting for the new year. But these reviews tend to lack the exactness of a good PIP. And often, the performance review that managers write in December bears little relationship to the goals set in January.

The Wall Street Journal identified this lack of reviews, and presumably goals, as part of the reason so many employees are struggling now: 'Many companies abandoned performance reviews or lowered hiring standards during the frenzied pandemic years — only to end up now with staff poorly-equipped for their roles.'

If you lower hiring standards, don't give feedback, and don't set clear goals, it's no wonder that employee performance has suffered.

YES, YOU SHOULD FIRE SOME EMPLOYEES

I'm no Pollyanna when it comes to employee performance. There are plenty of people who really should just be let go. But I am also a firm believer that just about anyone can learn to do just about anything if you give them training and support.

Take time to set your employees up for improved performance this year. Write up plans. Work with them to make them realistic goals, and follow up regularly. It's probably best not to call it a PIP because they will assume you want to terminate them. Just make it a higher-quality performance review and goal-setting session.

If you do, you'll find that your year will go much more smoothly.

You'll find a raft of templates in the HR Inner Circle Vault to assist with performance management practice. Included are a suite of letters for each stage of the process, a flowchart giving a useful overview, a template PIP, and a form for use at performance review meetings.

BEWARE THE WATCHDOG:
TIME TO THINK ABOUT COMPETITION LAW

By David Regan
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HR professionals may not be used to thinking about competition law, but, increasingly, they need to be aware of when it can impact on the employment relationship. In particular, a recent infringement decision and £4 million in fines issued by the Competition and Markets Authority shows the potentially serious consequences of anti-competitive practices by employers.

There are three main types of anti-competitive behaviours in labour markets which the CMA has made clear it will crack down on:

- No-poaching agreements, where businesses agree not to approach or hire each other's employees.
- Wage-fixing agreements, where businesses agree to fix employees' pay or other benefits.
- Information sharing, where sensitive information about terms and conditions offered to employees is shared between businesses.

Anti-competitive behaviour is unlawful because it prevents a free market. In the context of the employment relationship, anti-competitive behaviour prevents employees from negotiating and moving jobs, and so reduces employee pay, terms and choice.

Breaches of competition law are investigated and enforced by the CMA, which has the power to fine businesses up to 10% of their annual worldwide turnover. There can also be individual liability resulting in personal fines, director disqualification orders, and even criminal liability.

RECENT CMA ACTION

Historically the CMA has largely stayed away from the labour market and employment, but things have begun to change over the last couple of years. In 2023, the CMA published clear advice for employers on how to avoid anti-competitive behaviour, and in its 2024/25 annual plan it expressly referred to UK labour markets as an important area of focus. Alongside these developments, the CMA has been demonstrating a willingness to back up its statements by conducting two long-running investigations into freelance and employed workers in the broadcast industry, which have now concluded.

The outcome of the investigations was that, on 21 March 2025, the CMA issued an infringement decision to five companies involved in the production and broadcasting of sports content.

The specific breach(es) were that the companies had disclosed and exchanged competitively-sensitive information on rates of pay for freelance workers. There were 15 infringements in total, with the CMA also finding in two-thirds of the cases that the objectives included co-ordination on pay. Importantly, the CMA concluded that the infringements were 'by object', meaning that it was not necessary to consider the effects of the practices on the market.

The outcome was a set of fines totalling over £4 million. Although the level of fines was not insignificant, it is worth noting that they could have been much higher, as the companies involved took advantage of the CMA's leniency policy to secure reductions. One of the five companies involved turned whistleblower and reported its own involvement to the CMA, thus receiving 100% immunity from any fine. Others received varying reductions for co-operating with the investigation, accepting they had breached competition law, and settling with the CMA.

A second investigation into non-sports television broadcasting was again based on sharing of competitively sensitive information about rates of pay and terms and conditions for both freelancers and employees. This has now been closed as it is no longer an 'administrative priority'.

However, this is not the end of the story and the CMA continues to look at employment practices: for example, there is currently an ongoing investigation into reciprocal

arrangements relating to the hiring or recruitment of staff involved in the supply of fragrances.

IMPLICATIONS FOR MARKETING SECTOR

Many clients in the advertising and marketing sectors use freelance resources. Similarly, there is significant movement of staff between different companies and groups in the sector, which can in some cases lead to information on freelancers being shared between those different entities. While there is nothing wrong with there being a generally known 'market rate' for different levels of freelance resource, the key takeaway for sectors which commonly use freelancers is that you must not share details which are competitively sensitive.

It is important to be aware that both formal and informal information sharing may fall foul of the rules — indeed the CMA guidance expressly notes that not all illegal agreements or practices are in writing, and they might take the form of informal practices. As such, even informal discussions or complaints between businesses about the cost of freelancers could impact free market movement and, as a result, may attract CMA interest. Any breach is likely to be cracked down upon firmly.

Examples might include formal and informal non-poaching agreements, sharing of freelancer or employee rates, and potentially also agreements on alignment of covenants (such as fixed lengths of non-compete and non-poaching covenants that all businesses in a particular market agree to comply with).

FUTURE DEVELOPMENTS

The CMA has demonstrated a willingness to become more and more involved in the employment sector. As such, it is an area of state enforcement that employers need to be aware of, alongside the new Fair Work Agency which will unify various existing agencies and begin to enforce holiday and sick pay rights.

There are some things businesses can do to minimise the risk of CMA attention, including providing recruitment staff with training on competition law and how it applies in the recruitment context, and ensuring solid internal reporting processes are in place and staff know how to use them.

The CMA's new focus aligns with global developments aimed at increasing competition in the labour market. For example, the EU Competition Commissioner has confirmed that anti-competitive conduct in labour markets will be investigated, including no-poach agreements and wage fixing, and a recent Belgian Competition Authority decision led to fines totalling €47m for competitors who were found guilty of a variety of anti-competitive practices.

An EU policy brief on this topic was published last year, and concludes that 'the harm stemming from this kind of labour market agreement should not be taken lightly'. There is also a general governmental view that increased free market competition increases GDP, which contrasts with the common business position that it is necessary to protect your own assets in order to generate profit.

The CMA has said that it will publish new guidance in the coming months on how employers can avoid becoming involved in anti-competitive behaviour in labour markets. In the meantime, employers should remember that they must set freelancer (and other) rates independently of each other, should not share commercially sensitive information with competitors, and should ensure that those within the organisation who are responsible for hiring staff understand their obligations under competition law.

Choosing for 'best fit' not discriminatory

In *Kalina v Digitas LBI Ltd*, two applicants were interviewed for a role, with the successful candidate chosen, in large part, because she was considered to be the 'best fit' for the team. The interviewer noted that she had 'vibed' with her at interview.

The unsuccessful candidate alleged at the employment tribunal that this was discriminatory on grounds of race and disability. Allegations included that she was not appointed:

- Because, as a Russian, her personality did not confirm with British workplace norms, which she saw as swearing, being outgoing, and going to the pub.
- Because of her disability of anxiety and depression (or for a reason related to it: her difficulties with social interaction).

The tribunal dismissed all her claims and – importantly – recognised that 'team fit' was often a key factor in recruitment processes. While acknowledging that caution should be exercised because of the discrimination risk, it did not follow that selecting from two good candidates based on who was the better 'team fit' would be discriminatory.

MEET THE TEAM

Jennie Hargrove
Chief Operating Officer

As Chief Operating Officer, Jennie oversees all aspects of the HR Inner Circle and ensures members have a world-class experience. Jennie loves interacting with the members and hosts the regular Q&A sessions as well as Coffee & Caselaw.

Megan McDonald
Community and Operations Manager

Meg is the friendly face you'll see chairing our member huddles. She'll help you with all your questions about the HR Inner Circle. She manages production of the audio seminars and the member update emails.

megan.mcdonald@hrinnercircle.co.uk

Lyndsay Bradley
Client Relationship Manager

Lyndsay plays a pivotal role in cultivating relationships with new and existing members. She is dedicated to helping members make the most of the benefits and support of our thriving community.

lyndsay.bradley@hrinnercircle.co.uk

Samantha Duggan
Client Relationship Advisor

Sam works alongside Lyndsay to build relationships with new and existing members. She is committed to ensuring members fully benefit from, and feel supported by, our thriving community.

samantha.duggan@hrinnercircle.co.uk

Jo Pye
Accounts and Credit Control

Jo is responsible for everything to do with money. She has always been better working with numbers so gets a buzz from keeping the accounts side of the business in order.

Fran Read
Legal Writer

Fran is a qualified employment lawyer with 20 years' experience. She produces much of the HR Inner Circle's legal content making sure everything is written in clear simple language for ease of use.

Tincuta Collett
Designer

Tincuta does all the design work for the HR Inner Circle, her primary role being designing the layout of the Inner Circular magazine each month. She likes that each team member and contributor can add their own personal touch and how it really puts the 'human' in HR.

Eugenie Verney
Publishing Manager

Eugenie edits the monthly Inner Circular magazine for members. She loves combining her journalist's skills and her passion for employment law (she has an LLM in the subject) to make sure the Inner Circular is always a great read.

Hannah Tungazara
Web Designer

Hannah is our web designer with more than eight years of experience. She builds, maintains, and troubleshoots web pages for the HR Inner Circle. When not in front of the computer, she loves to travel and go for long walks.

Laura Sam
Audio Editor

Laura edits the audio seminars each month. Her favourite hobbies are travelling, spending time outdoors, and music making. She's been fascinated by music since she was very little and now gets to do it professionally.

Martin Belascuain
Administrator

Martin makes sure all our website content is uploaded quickly so that members have immediate online access to resources. In his previous life, he was a digital marketing supervisor for an online casino. Working for the HR Inner Circle is a great opportunity to apply his techie skills.

JOIN THE HR INNER CIRCLE TODAY

WWW.HRINNERCIRCLE.CO.UK

For a free demonstration of what membership of the HR Inner Circle has to offer, or to access some sample resources, get in touch with Lyndsay or Samantha, who will be happy to help!

lyndsay.bradley@hrinnercircle.co.uk | 0333 090 8401
samantha.duggan@hrinnercircle.co.uk | 0333 090 8966

HR PROFESSIONAL OF THE MONTH

ADELE THATCHER

UK Head of Operations
Pramex International

What was your first HR role? And did you have a different career first?

My first exposure to HR was in an accountancy firm where I managed contracts, payroll, leave, and various ad hoc HR queries. I was responsible for both internal HR matters and advising clients on employment-related issues. Balancing financial and people management aspects gave me a strong foundation in compliance, operations, and the complexities of workforce management

What aspect of your role do you enjoy the most?

I enjoy building efficient systems that empower people to perform at their best. Seeing a well-structured team thrive is incredibly rewarding.

And what aspect do you enjoy the least?

Chasing people to follow processes they've already agreed to. It's amazing how selective memory kicks in when deadlines approach!

Do you think your role will change over the next five years? If so, in what key ways?

Of course! Technology will continue to reshape HR, from automation in payroll and compliance to AI-driven recruitment. I also see a greater focus on employee wellbeing, particularly in high-pressure industries like accountancy.

If you could create an Adele's Law, what would it set out to achieve?

Parental leave should be rebalanced – because career progression shouldn't depend on gender. Adele's Law would enhance paternity leave – extending its duration and improving pay – to enable fathers to take on a greater caregiving role from the start. By rebalancing parental responsibilities, it would remove the default expectation that mothers must pause their careers while fathers return to work. This shift would empower women to continue their careers if they wish, support genuine workplace equality, and normalise shared parenting as the foundation of a modern workforce.

What's the weirdest HR problem you've ever had to tackle?

A team member who refused to use the company CRM because they didn't like the colour scheme. They genuinely believed it was affecting their productivity. (Spoiler: It wasn't.)

Whose brain would you most like to pick if you could spend a whole day with them?

Apart from Daniel Barnett, of course! Baroness Karren Brady: her no-nonsense leadership, business acumen, and ability to drive organisational success while championing women in the workplace make her an ideal person to learn from. Her experience balancing commercial growth with strong people management would offer incredible insights.

If you weren't in HR, what would do instead?

If I weren't in HR, I'd be an historic property restorer, bringing neglected buildings back to life. Given my background in finance and people management, it would allow me to apply my strategic and operational skills while exploring the artistic and historical aspects of the built environment.

What would you say to someone thinking of joining the HR Inner Circle?

Joining the HR Inner Circle gives you access to a wealth of expertise, practical insights, and a community of professionals who truly understand the challenges of HR. It's a space where you can get real-world advice, stay ahead of legal and regulatory changes, and find solutions to complex workplace issues. But it's not all serious – it's also a no-judgment zone where light-hearted humour is encouraged. Those moments where you'd usually roll your eyes? You'll quickly realise you're not the only one. It's a supportive network with expertise across all levels and fields, making HR feel a little less lonely.

Secret talent:
Packing the car for a road trip like a game of Tetris — everything fits, and nothing rattles.

Favourite box-set:
The Good Wife

Favourite book:
Any Jack Reacher book

Favourite film:
Bridget Jones's Diary

Favourite website:
booking.com

ADHD UK

We're donating Adele's membership fee for November to ADHD UK. Adele says: 'ADHD is an invisible disability. It affects many people silently in the workplace, and should be better recognised and understood by HR professionals.'
adhduk.co.uk