

Employment Update

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What are we covering today?

Part 1:

Key recent UK employment law updates

Part 2:

Key recent UK case law developments

Part 3:

Horizon scanning – what does the future hold?

Part 4:

Regulatory expectations in relation to culture, diversity and inclusion



Part 1:

Key recent UK employment law updates

4 April 2021	Gender pay gap reports deadline - enforcement action for failure to report begins 5 October 2021
6 April 2021	Changes to formula for post-employment notice pay (PENP)
April 2021	New rates for statutory payments
6 April 2021	Off-payroll working rules in force
30 June 2021	Deadline for applications under EU Settlement Scheme
19 July 2021	'Work from home where you can' guidance ends
30 September 2021	Coronavirus Job Retention Scheme ends
September 2021	Covid-19 response autumn and winter plan 2021

Covid-19: Flexible and agile working

- Government guidance on working from home lifted from 19 July
- Re-assessing a flexible working culture in a post-Covid world – is flexible working the new normal?
- Implementing an Agile Working Policy
- Managing individual flexible working requests
- Change terms and conditions? Update section 1 statement - change in place of work



The return to work - law firms

Prefer to spend on average 2.1 days a week working remotely

63% are requesting flexible working arrangements

15% want to move to part-time work

What lawyers say now ...

Less than 1 in 10 wants to return to working regular hours 5 days a week in the office

Part two: Key recent UK case law developments



Covid-19



Discrimination



Unfair
dismissal



Racial harassment

Kubilius v Kent Foods Ltd

Covid-19: Refusal to wear mask

- In an environment where masks are required, usually failure to wear one is likely to be a refusal to follow the employer's reasonable instruction
- Highlights the importance of having clear rules on health and safety and separately about the behaviour expected of employees



Accattatis v Fortuna Group

Covid-19: Concerns about using public transport and attending work

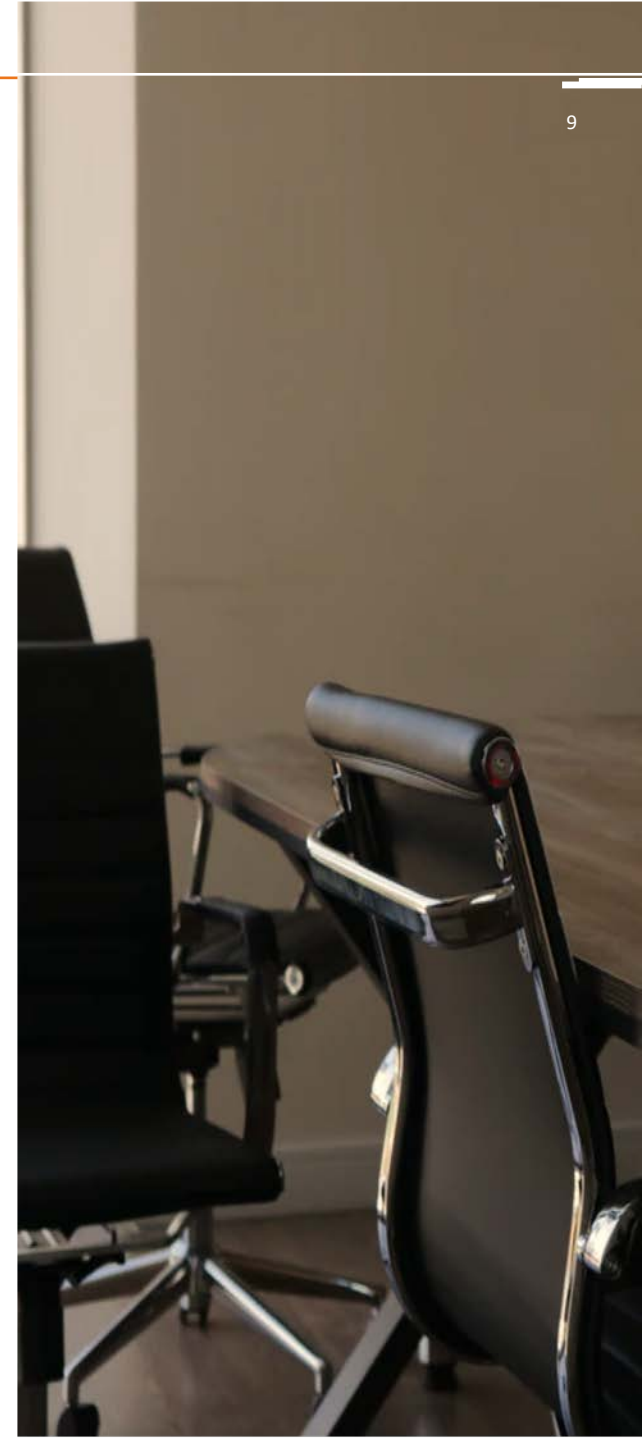
- Employees are granted protection from dismissal where there are legitimate health and safety concerns and they take **appropriate steps** to protect themselves from a situation which they reasonably believe poses “**serious and imminent danger**” - regardless of length of service
- The pandemic may not on its own justify a refusal to attend work if employers have tried to accommodate employee concerns and reduce transmission risk
- Listen to the employee’s concerns and try to find a compromise if possible
- If the job can’t be done from home, consider allowing the employee to take holiday, unpaid leave or furlough



Rodgers v Leeds Laster Cutting Ltd

Covid-19: Refusal to come into work

- Health and safety reasons relating to Covid could be relevant to giving employees protection from dismissal, but each case must be considered on its facts and merits
- In determining whether the employee reasonably believed they were in **serious and imminent danger**, contemporary government guidance will be relevant
- By continually updating health and safety measures in line with government guidance, employers will be committed to protecting employees and making reasonable attempts to lower the risk of infection



Montanaro v Lansafe Ltd

Covid-19: Failure to attend work

- In contrast to *Rodgers*, this employee was willing to continue working (albeit remotely) and had not refused to attend
- There was also evidence that the respondent's clients had agreed to remote working so there were no real barriers for the employee to perform his duties remotely
- If an employee becomes stranded overseas and expresses concern for their health and safety, employers should take a considered approach
- The government guidance at the time will be relevant albeit not determinative
- Have clear rules and procedures in place for annual leave and remote working, and make employees aware



Prosser v Community Gateway Association Ltd

*Maternity discrimination: Exclusion from the
workplace*

- Employer completed a formal risk assessment, the government guidance was unclear and the employer's motive was to protect the employee and her unborn baby
- Tribunal found treatment was not unfavourable and commended the employer for their actions including paying her more than her contractual entitlement



Forstater v Centre for Global Development

A belief that it is impossible to change sex is a philosophical belief

- The EAT did not say that those with gender-critical beliefs can “misgender” trans persons with impunity
- This judgment doesn’t mean trans persons don’t have protection against discrimination and harassment
- As the latest in a line of cases considering whether a person’s beliefs constitute protected philosophical beliefs, it is very clear that every case is assessed on its facts and there is no blanket approach



Page v NHS Trust Development Authority

Religious belief and acceptable behaviour in the workplace

- Court of Appeal decision shows the important distinction between a person's religious beliefs and the manner in which they are expressed
- Provided employers conduct a fair investigation and disciplinary process, they may take action where employees express their beliefs in an inappropriate manner



Dobson v North Cumbria Integrated Care NHS Foundation Trust

Why the “childcare disparity” faced by women is still relevant to flexible working requests

- Because of their childcare responsibilities women are less likely than men to be able to accommodate certain working patterns
- While men do now bear a greater proportion of child caring responsibilities than decades ago, the position is still far from equal - but societal norms and expectations do change over time and are not set in stone
- The childcare disparity does not inevitably lead to the conclusion that any form of flexible working puts or would put women at a particular disadvantage but it should not be ignored



Heskett v Secretary of State for Justice

How reducing staff costs could have age discrimination implications

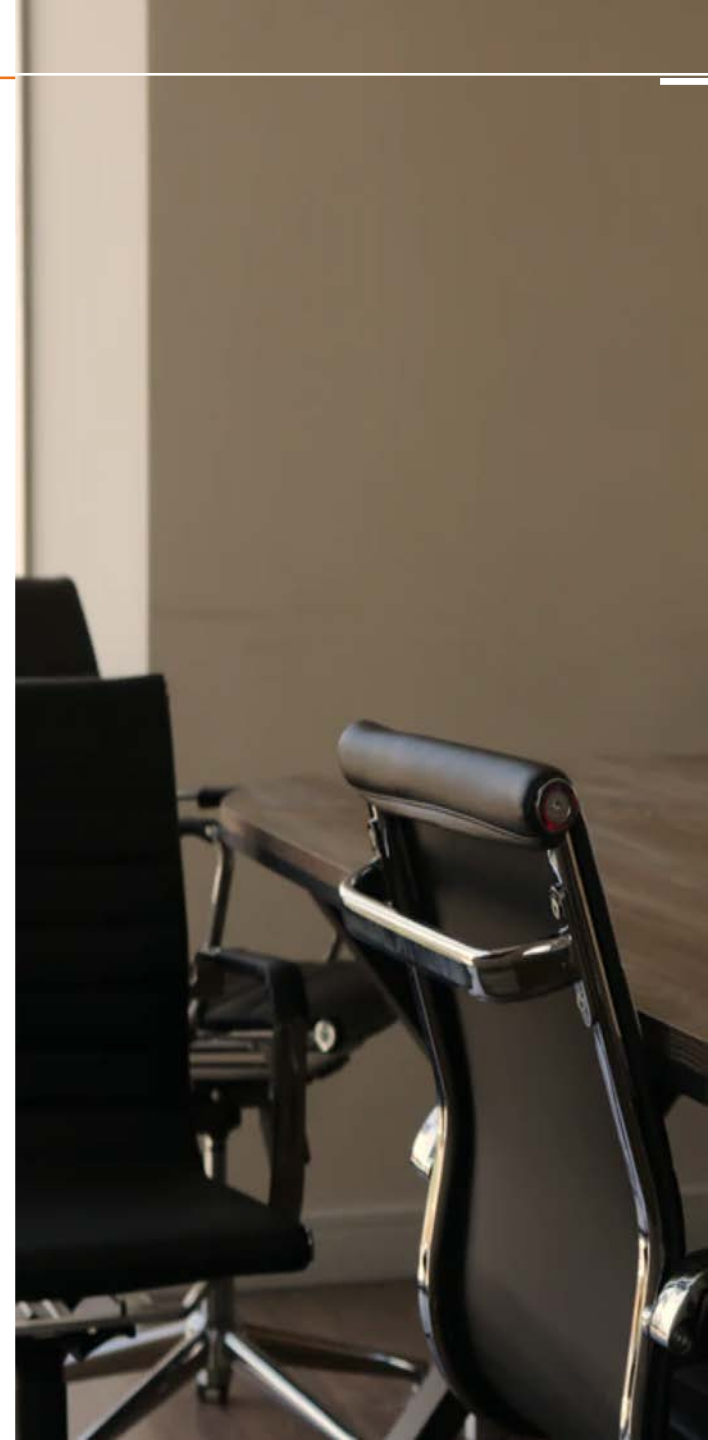
- A distinction can be drawn between an employer that is merely trying to save costs and one that needs to reduce staffing costs to "live within its means"
- Where employers rely on a real need to reduce staff costs, they must show that the measures taken are a proportionate means of achieving that aim
- It may be easier to show proportionality where the cost reduction measures are temporary



Follows v Nationwide Building Society

Indirect associative discrimination: Carer's request to continue working from home is rejected

- A non-disabled employee may bring a claim for indirect disability discrimination if they suffer a particular disadvantage because of their association with a disabled person
- Where employers are requiring their employees to return to the office after home working during the pandemic, they should consider the need for this requirement carefully



Bayfield v Wunderman Thompson (UK) Limited

Dismissals to improve gender pay gap

- This case serves as a reminder that discrimination in any form is unlawful
- In addition to using “general positive action” perfectly lawfully to assist under-represented groups overcome disadvantages in the workplace, there are a number of diversity initiatives that employers can use to ensure that their recruitment and promotion processes are free from bias.



Allay v Gehlen

Why an employer lost a racial harassment claim despite having trained staff in workplace behaviour

- Consideration must be given to the nature of the equality and diversity training and the extent to which it is likely to be effective
- Equality and diversity training should be carried out regularly



Fallahi v TWI Limited

Unfair dismissal - capability

- In capability cases, tribunals will look at the circumstances of the dismissal as a whole and consider whether the reasons to dismiss were reasonable - and should only re-evaluate the merits of a final warning if it was “manifestly inappropriate”
- With poor performance, a fair dismissal process will normally involve giving more than one warning before dismissal and in most cases it will only be reasonable to move straight to a final written warning where it is sufficiently serious



Part three:

Horizon scanning – what does the future hold?

Keep an eye out for...

TBC	Reform of post termination non-compete clauses
TBC	Sexual harassment – new legal duty
TBC	Extended pregnancy and maternity discrimination protection
TBC	Extended ‘family friendly’ protections
TBC	Flexible working as the default position
5 April 2022	Change to right to work requirements for newly recruited EU nationals

Reform of post termination non-compete clauses

- The government has **consulted** on measures to reform post termination non-compete clauses in employment contracts
- Proposals range from: **banning** them altogether, to requiring employers to **compensate employees** for the duration of the clause (similar to the position in Germany, France and Italy)

Sexual harassment – new legal duty

- The government has published **response to consultation** on workplace sexual harassment:
 - New duty for employers to prevent sexual harassment and third-party harassment in the workplace
 - To consider **extending time limit** for discrimination/ equality claims to 6 months
 - New statutory **Code of Practice**

Extended pregnancy and maternity discrimination protection

- July 2019 – Government announcement - in due course it will:
 - Extend redundancy protection for new mothers from **the date they notify their employer of their pregnancy** until **six months** after returning from **maternity leave**
 - Extend redundancy protection during **adoption leave** and for **six months** after return
 - Extend redundancy protection during **shared parental leave**

Further family friendly protections

- Neonatal care leave and pay of up to 12 weeks for parents of babies requiring neonatal care (in addition to maternity and paternity leave)
- A week's leave for unpaid carers per year for employees
- Making flexible working the default unless an employer has a good reason not to
- Also, potential new duty to publish family related leave and pay and flexible working policies (for employers with 250+ employees)

Other developments to be aware of:

- New guidance on tackling loneliness among workers
- Long Covid – Acas guide

Part four:

Regulatory expectations in relation to culture, diversity and inclusion for HR professionals in law firms

The SRA Principles

You act:

1. in a way that upholds the constitutional principle of the rule of law, and the proper administration of justice
2. in a way that upholds public trust and confidence in the solicitors' profession and in legal services provided by authorised persons
3. with independence
4. with honesty
5. with integrity
6. in a way that encourages equality, diversity and inclusion
7. in the best interests of each client

SRA Code of Conduct for Firms

- “... aim to create and maintain the right culture and environment for the delivery of competent and ethical legal services”
- 1.1 Maintaining trust and acting fairly:
“You **do not unfairly discriminate** by allowing your personal views to affect your professional relationships and the way in which you provide your services”
- SRA Guidance Note on Equality, Diversity and Inclusion



Reporting diversity statistics to the SRA

- Reporting to the SRA on the firm's diversity data:
 - Regulatory requirement
 - Collect, report and publish data on the diversity make up of the workforce every two years
 - Covers eight characteristics/ diversity strands
 - Deadline for most recent reports to SRA - August 2021
 - Latest SRA published diversity data - as at Summer 2019

SRA diversity statistics in law firms (1)

Characteristics/ Diversity strands		% of solicitors in law firms*	% of working population*
Gender	Female	49%	47%
	Male	51%	53%
Transgender	Transgender	2%	1%
Ethnicity	Asian	15%	7%
	Black	3%	3%
	Mixed race	2%	1%
	Other	1%	3%
	White	79%	86%
Age	25 to 34	31%	23%
	34 to 44	29%	21%
	45 to 54	22%	23%
	55 to 64	13%	16%
	65 and over	5%	8%

SRA diversity statistics in law firms (2)

Characteristics/ Diversity strands		% of solicitors in law firms *	% of working population *
Religion and belief	Christian	49%	46%
	Hindu	3%	2%
	Jewish	3%	0.5%
	Muslim	10%	4%
	No religion	30%	45%
	Sikhism	2%	0.7%
	Other	3%	2%
Sexual orientation	Heterosexual	97%	97%
	Lesbian, gay or bisexual	3%	3%
Disability	Disabled	3%	13%
	Not disabled	96%	86%

SRA diversity statistics in law firms (3)

Characteristics/	Diversity strands	% of solicitors in law firms *	% of working population *
Social mobility	Parental occupation: professional	63%	34%
	Attendance at fee paying school	21%	7%
	Highest parental qualification: degree level	51%	19%
Caring responsibilities	For children	34%	37%
	For adults	9%	14%

*** Sources:**

- SRA: *How diverse is the legal profession?* – Diversity data Summer 2019
- ONS Annual Population Survey 2019

Access to and progress in law firms



compared to ...



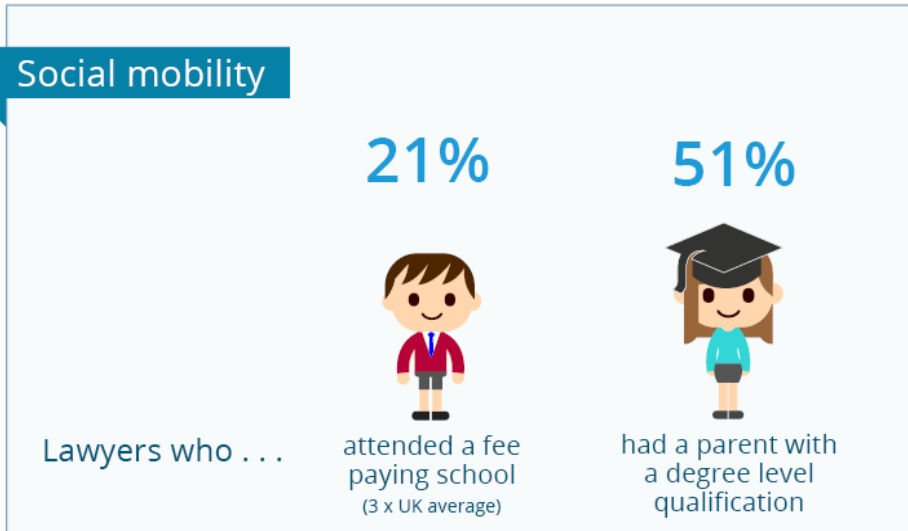
Representation of ...

Solicitors with professional parental occupation

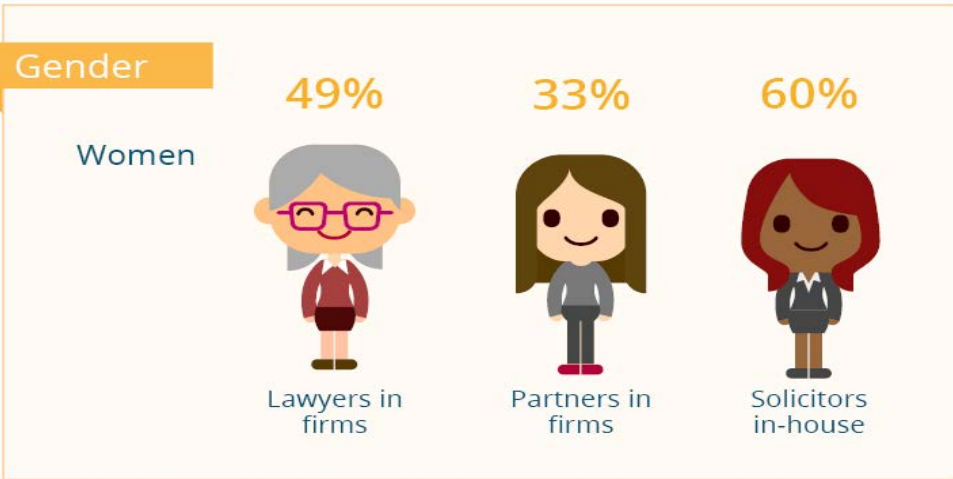
% of solicitors in law firms	% of working population
63%	34%

Solicitors of state school educated partners

Firms with 6-9 partners	Firms with 50+ partners
69%	52%

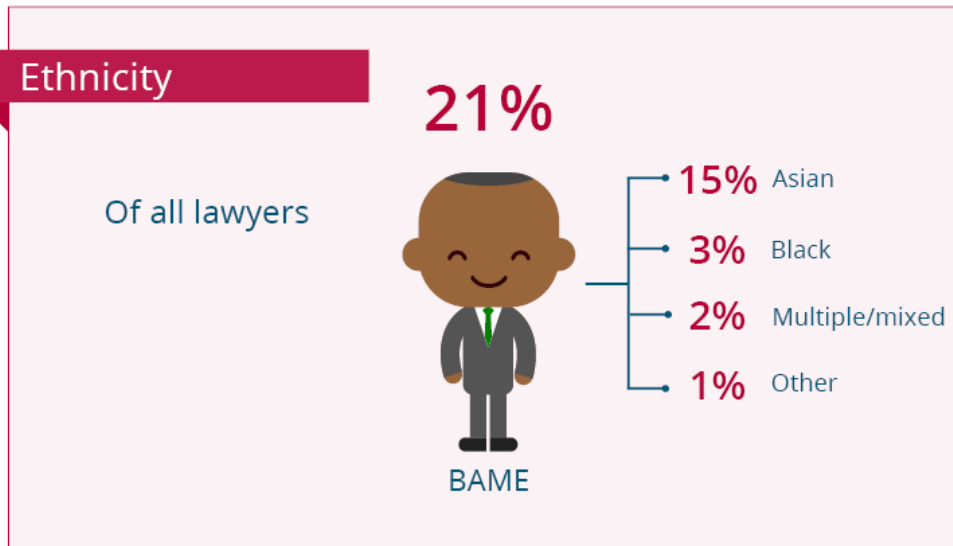


Under-representation at senior level & in large firms



Representation of ... Women partners in firms by size

Firms with 2-5 partners	Firms with 50+ partners
35%	29%



BAME partners in firms by size

Firms with 2-5 partners	Firms with 50+ partners
26%	8%

Future-gazing

- Social mobility
- Pay gap reporting
- **E**nvironment **S**ocial & **G**overnance



HR “Eco” Audit

How HR & employees can work together to help achieve their organisation's climate targets

Climate change is the most pressing issue of our time - and now is referred to by some as our “last, best chance to make a difference”. The future will see employers under ever increasing pressure to reduce their carbon footprint and reach Net Zero emissions targets.

We have pioneered an innovative HR “Eco” Audit to help employers drive climate change initiatives through greater collaboration with their employees to embed a climate conscious culture across all aspects of the employment relationship and thereby the very fabric of their organisations.

Areas addressed by the HR “Eco” Audit include:

- C-Suite Mission Statement and Communications
- Sustainability policy
- All other employment orientated policies (including disciplinary, grievance and whistleblowing policies)
- Obligations in contractual documents (including the employment contract and settlement agreement)
- Employee Incentives and benefits including investments in sustainable pension funds
- Recruitment and employee retention
- Flexible working and sustainable commuting
- Training
- Sustainability Champions
- Campaigns
- Workplace Culture

Why complete the HR “Eco” Audit?

- Give you a snapshot of where your organisation currently is
- Set you apart from your competitors
- Help you to mitigate reputational risk
- Enhance hiring potential (in turn, reducing departures)
- Provide you with the tools to pioneer real change, allowing you to get ahead of the game

Our commitment

We will partner with you to help you achieve your sustainability targets by looking at ways our work with you can maximise sustainability.

For more information contact:
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Charlie Urquhart, charles.urquhart@clydeco.com
or your usual contact at Clyde & Co.

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