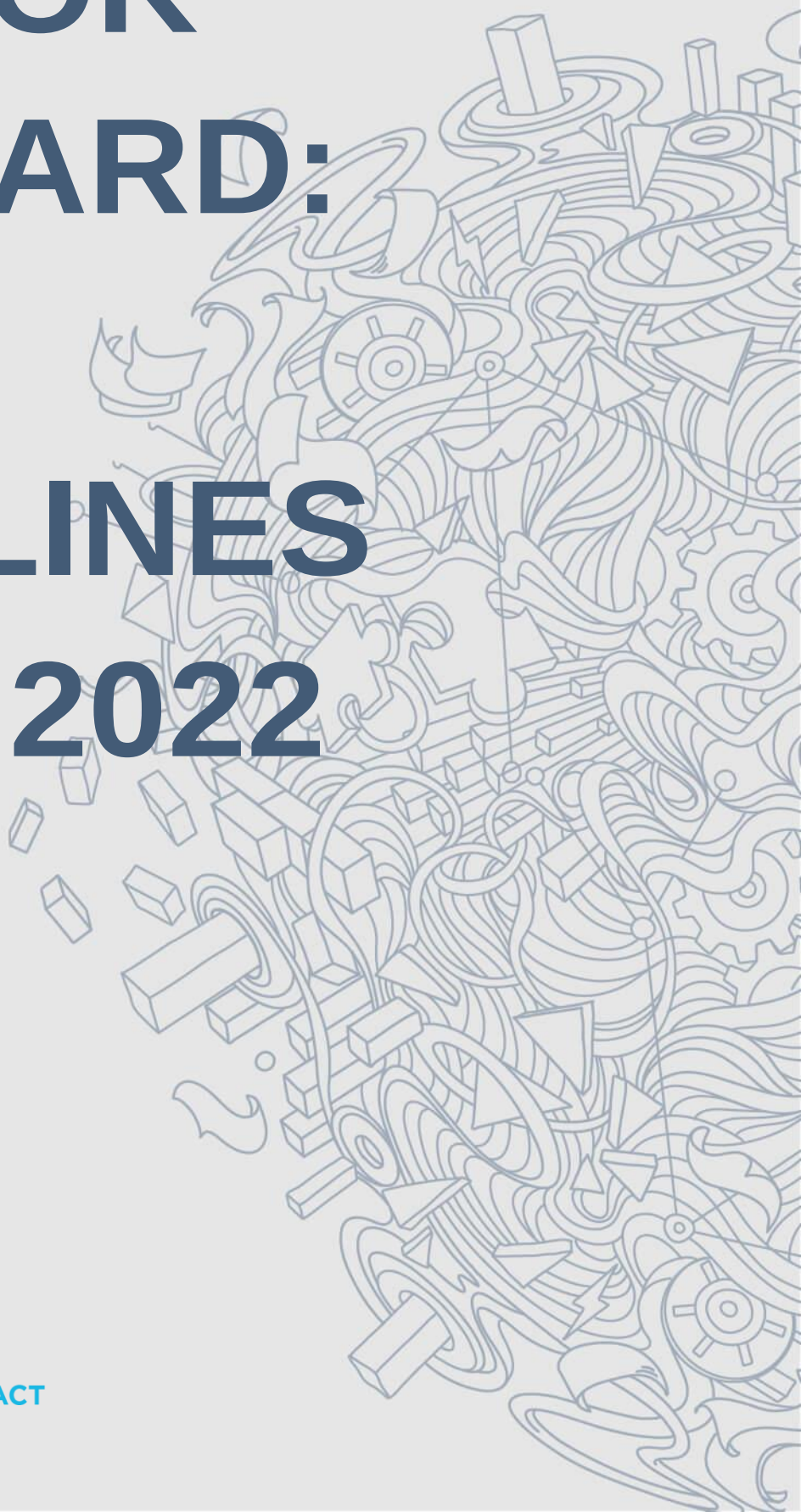
LOOKING BACK TO LOOK FORWARD: 22 HR HEADLINES FROM 2022



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As we look forward to a new year of HR and employment law in 2023 (see our article here.), it is a good opportunity to take stock of key developments from 2022. Here, we round up the top 22 HR headlines from 2022 to keep in mind as we look ahead to 2023.

1 **Agency workers**: In February 2022, the Court of Appeal held that Regulation 13 of the Agency Workers Regulations 2010 gives **agency workers a right to be informed of vacancies** in the same terms as permanent workers (but not a right to apply).[1]

2 **Holiday Pay**: In March 2022, the Court of Appeal held that workers who have taken holiday but not been paid for it because they have been wrongly categorised as self-employed are entitled to be paid on termination for all their accrued and unpaid paid holiday (taken or not) throughout their engagement.[2]

3 **Discrimination**: In April 2022, the **Vento bands increased** to: Band 1: £990-£9,900; Band 2: £9,900-£29,900 and Band 3: £29,900-£49,300.

4 **Fit Notes**: On 6 April 2022, the **law changed to allow fit notes to be issued digitally** without a wet ink signature,[3] and, since 1 July, more healthcare professionals can sign them.

5 **Witness evidence from abroad**: On 27 April 2022, the Presidents of the Employment Tribunals in England & Wales and in Scotland issued joint Presidential Guidance on taking **oral evidence by video or telephone from persons located abroad**. Parties wishing to rely on such evidence must notify the Tribunal as early as possible so that enquiries can be made of the foreign state where the person is located (through the Taking of Evidence Unit at the Foreign Commonwealth and Development Office) to ensure that appropriate permissions are in place.

6 **Unlawful inducements and collective bargaining:** In June 2022, the EAT held that an employer's imposition of a pay award, at a time when negotiations with the union were stalled, was an unlawful inducement.[4]

7 **Redundancy Consultation and Selection Criteria**: In June 2022, the EAT held that a redundancy consultation will not be meaningful if it takes place *after* the decision to apply a selection criterion that inevitably leads to a pool of one. For consultation to be genuine and meaningful it must take place at a stage where an employee can still potentially influence the outcome.

8 **Gender-critical beliefs**: After the EAT held in June 2021 that a belief that a person cannot change their sex/gender at will is capable of protection as a religious or philosophical belief under the Equality Act 2010,[5] in July 2022, the Employment Tribunal found that an employer had directly discriminated against a claimant when they decided not to offer her an employment contract nor renew her visiting fellowship because of her gender-critical tweets. Viewed objectively, the tweets were not offensive and so could not be disassociated from merely holding the beliefs themselves.[6] In a different case later that month, the EAT found that it wasn't discriminatory to cease to engage a claimant as a disabilities assessor when he refused to comply with the employer's pronoun policy (which required referring to transgender service users using their preferred pronouns) because the policy had legitimate aims (ensuring transgender service users were treated with respect and in accordance with their identities and promoting equal opportunities) and was a proportionate means of achieving those legitimate aims.[7]

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1 *Kocur v Angard Staffing Solutions Ltd [2022] CA*

2 *Smith v Pimlico Plumbers [2022] EWCA*

3 *The Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2022 (SI2022/298)*

4 *Ineos Infrastructure Grangemouth Ltd v Jones [2002] EAT*

5 *Forstater v CGD [2021] EAT*

6 *Forstater v CGD [2022] ET*

7 *Mackareth v DWP [2022] EAT*

9 **Whistleblowing:**[8] In another case in July 2022, the Court of Appeal found that an employee was not automatically unfairly dismissed after making protected disclosures, because her dismissal was for conduct reasons that were separable from the disclosures themselves.

10 **Fire and rehire:** Again in July 2022, the Court of Appeal overturned an injunction granted by the High Court to find that an employer was entitled to dismiss and offer to re-engage employees on new terms ("*fire and rehire"*) to remove pay protection it had originally referred to as 'permanent'. The union has now been granted permission to appeal to the Supreme Court, so this is a case to track in 2023.

11 **Holiday Pay: Employers can't pro rata holiday pay for part-year workers**[9]**.** Also in July, the Supreme Court held that workers or employees on permanent contracts who only work for part of the year are entitled to 5.6 weeks' paid holiday per year just like workers or employees who work all year – it should not be reduced pro rata. Subsequently, the Government launched a consultation on 12 January 2023 which proposes to replace the current 52 week reference period (during which weeks in which no remuneration is earned are ignored), with a 52 week reference period which includes weeks with no remuneration, with the aim of ensuring that holiday entitlement and pay is directly proportionate to time spent working. The consultation closes on 9 March 2023.

12 **New laws to ease the impact of strike action**: On 21 July 2022, the law changed to allow businesses to hire agency workers to cover staffing gaps caused by strike action[10] and to substantially increase the maximum damages that can be awarded against a union for unlawful strike action.[11] However, on 14 December 2022, the High Court granted permission for a judicial review of the regulations allowing businesses to hire agency workers to cover staffing gaps during strike action. The case is due to be heard in March 2023.

13 **PHI and other insurance benefits:** And finally for July 2022, the Court of Appeal upheld the EAT's decision that an employer was contractually bound by terms of a long-term sickness scheme provided by a previous employer before a TUPE transfer (even though they were no longer covered by the employer's insurance policy) because the employer hadn't clearly communicated any limitation of that entitlement to the employee.[12]

14 **Collateral Contracts and TUPE**: In September 2022, the EAT held that an employee's rights under a collateral contract to participate in the employer's share incentive plan arose "*in connection with*" his contract of employment and therefore transferred under TUPE, entitling the employee to participate in a plan of substantial equivalence following his TUPE transfer to a new employer.

15 **Retained EU Law (Revocation and Reform) Bill 2022**: On 22 September 2022, the Government presented the Retained EU Law (Revocation and Reform) Bill 2022 to Parliament. The Bill is far reaching and has huge implications for employment law in the UK (as we explain here), as it provides for the "sunsetting" of the majority of retained EU law to expire on 31 December 2023, unless otherwise preserved. The Bill also provides for the ending of the principle of the supremacy of EU law, general principles of EU law and directly effective EU rights to end on 31 December 2023. Areas such as TUPE, paid annual holiday, the 48-hour working week, part-time and fixed-term worker regulations and the agency worker regulations will all be impacted by the Bill. It is not yet known what the Government proposes in relation to these specific areas.

16 **Settlement Agreements:** In October 2022, the EAT held that a settlement agreement cannot compromise a discrimination claim that has not yet arisen.[13] For the settlement

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8 *Kong v Gulf International Bank [2022] EWCA*

9 *Harpur Trust v Brazel [2022] UKSC*

10 *Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2022*

11 *Liability of Trade Unions in Proceedings in Tort (Increase of Limits on Damages) Order 2022*

12 *Amdocs Systems Group Ltd v Langton [2022] EWCA*

13 *Bathgate v Technip Limited [2022] EAT*

agreement to compromise the particular complaint there must either be an actual complaint or circumstances where the grounds for a complaint exist.

17 **Employee data and monitoring:** Also in October 2022, as part of a project to update its Employment Practices Code, the Information Commissioner's Office (**ICO**) launched consultations on: (1) Draft guidance on monitoring employees at work (closed on 11 January 2023) to provide practical guidance about monitoring workers in compliance with data protection legislation; and (2) Draft guidance on information about workers' health (closed on 26 January 2023). Neither impose any new legal obligations but are intended to help employers understand their responsibilities through an accessible and easy-to-understand guide.

18 **Calling a Judge a Judge**: On 1 December 2022, the Lord Chief Justice and the Senior President of Tribunals announced that Employment Tribunal Judges and Judges sitting in the Employment Appeal Tribunal should be addressed in hearings as "judge" rather than "Sir" or "Madam" with immediate effect.

19 **Ban on exclusivity clauses in employment contracts extended to low-income workers[14].** On 5 December 2022, regulations extending the ban on exclusivity clauses in employment contracts to low-income workers earning no more than the lower earnings limit came into force, with the aim of allowing low-income workers the choice of multiple jobs and more flexibility over where and when they work.

20 **Disability Discrimination**: In December 2022, the EAT held that the duty to make reasonable adjustments did not arise[15] where a disabled employee refused to participate in an interview which formed part of a redundancy process where the reason for the employee's non-participation was not connected to his disability. The employee claimed that the requirement to attend the interview was a PCP that put him at a substantial disadvantage, so he should have been slotted into a role without an interview, but the EAT noted that a reasonable adjustment is not intended to give an advantage over and above removing the particular disadvantage.

21 **COT3 Agreements**: The EAT held that an employee's claim that his former employer knowingly helped another company to victimise him because he had brought a discrimination claim on the termination of his employment, did fall within the scope of the COT3 settlement agreement. The purpose of the COT3 agreement was to settle all claims the employee may have that arose directly or indirectly in connection with his employment. The victimisation claim was indirectly connected to the employee's employment and existed at the date of the settlement, so it was covered by the COT3 agreement[16].

22 **Covid-related dismissals**: Finally, on 22 December 2022, the Court of Appeal upheld an employment tribunal decision that an employee had not been automatically unfairly dismissed under section 100(1)(d) of the Employment Rights Act 1996 for leaving his workplace and refusing to return at the start of the first COVID-19 lockdown.[17] The Court of Appeal noted that, where s100(1)(d) refers to 'circumstances of danger', this danger must arise at the workplace, otherwise the question of an employee leaving would not arise. However, it does not need to *objectively* be a danger (a reasonable belief is enough even if this is mistaken).

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14 *The Exclusivity Terms for Zero Hours Workers (Unenforceability and Redress) Regulations 2022 (SI 2022/1145)*

15 *Hilaire v Luton Borough Council [2022] EAT*

16 *Arvunescu v Quick Release (Automotive) Ltd [2022] EWCA*

17 *Rodgers v Leeds Laser Cutting Ltd [2022] EWCA*

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