



# Employment Conference Southampton Football Club 13 March 2019





# Agenda

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- Clive Dobbin – Partner  
Managing ill health & getting the most from OH
  - Jane Biddlecombe – Associate  
Employing EU nationals after Brexit
  - David Roath – Partner  
Case Law update
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# Managing ill health & getting the most from OH

Clive Dobbin - Partner





# Managing ill health

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- 2017 - 131.2 million days lost due to sickness
- Average - 4.1 days per employee
- Absence rate of 1.9%
  - Private sector 1.7%
  - Public sector 2.6%





# Managing ill health

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## Absence rates lowest on record

- 1993 7.2 days
  - 2017 4.1 days
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- Improving or just more 'presenteeism' ?





# Managing ill health

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## Reasons

- Minor illnesses (colds, coughs) 26%
- Musculoskeletal 21.4%
- Stress, depression, anxiety 11%

Young workers - increase in mental health conditions as reason

- Increased from 7.2% (2009) to 9.6% (2017)





# Disability discrimination

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What is a disability?

- Physical or mental impairment
- Substantial and adverse effect
- Ability to carry out normal day-to-day activities
- Long term





# Disability discrimination

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- Direct discrimination
  - Indirect discrimination
  - Harassment
  - Victimization
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- Disability arising discrimination
  - Failure to make reasonable adjustments







# Disability discrimination

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## Discrimination arising from disability

- If employer treats person unfavourably  
“because of something arising in consequence  
of B’s disability”
- And treatment not justified





# Disability discrimination

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- Duty arises where PCP puts a disabled person at a substantial disadvantage
- Duty is to take reasonable steps to avoid that disadvantage





# Disability discrimination

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Can include:

- Altering hours
- Altering/transferring duties
- Acquiring/modifying equipment





# Health and safety

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## Management of Health and Safety at Work Regulations 1999

- Employers have duties to assess the risk of stress related ill health arising from work activities

## Health and Safety at Work etc. Act 1974

- Employers have to take measure to control the risk of stress identified by assessment above
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# Managing ill health

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## Risks to you?

- Unfair dismissal
- Discrimination

## Management time

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# Medical evidence

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## Reasons

- Fitness to work
- Reasonable adjustments
- Dismissal

GP or Occupational Health?

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# Getting the most from OH

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## Timing of referral

- Mental health - sooner generally preferable
- Upcoming treatment/investigations
- Operations
- Current report





# Getting the most from OH

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- Consent
- Access to Medical Reports Act 1988
- Patient confidentiality
- Contractual term

What happens if employee refuses to give consent?







# Getting the most from OH

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## Provide sufficient information

- Role performed by employee
- Difficulties encountered
- Actions already taken





# Getting the most from OH

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- Be clear as to the reasons for referral
- Ask specific questions
- Number of questions





# Getting the most from OH

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Areas to cover in request/questions:

- Diagnosis
- Impact on work
- Prognosis
- Reasonable adjustments





# Getting the most from OH

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## Report

- Report will generally be sent to employee first
- Disability
- Recommendations

Meet with employee to discuss report & agree way forward

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# Employing EU nationals after Brexit

Jane Biddlecombe - Associate



# Agenda

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- Rights of EU nationals now
- Settled status and the EU Settlement Scheme
- What happens if there is a “no deal” Brexit?
- The future for EU nationals who want to work in the UK after 2021





# The rights of EU nationals

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- Nothing has changed yet
  - Free movement of EU nationals – right to continue living and working in the UK
  - Continues during the implementation period - 30 March 2019 to 31 December 2020
  - EU nationals wishing to remain in the UK after the end of the implementation period will need to apply for "settled status" (or "pre-settled status")
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# EU Settlement Scheme

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- Two options depending on length of residence in UK:
    - “Settled status” - lived in the UK continuously for 5 years (can stay indefinitely)
    - “Pre-settled status” - less than 5 years' continuous residence (can then apply for settled status once they reach the five year threshold)
  - Continue to have the same access as they have currently to healthcare, pensions and other benefits
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# Who must apply?

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- All EU citizens
  - Their non-EU family members
  - Including those with permanent residence
  - Who does not need to apply?
    - British citizens (even if dual nationals)
    - Irish citizens (can apply but do not have to)
    - Those who have indefinite leave to remain (can apply but do not have to)
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# When to apply?

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- Full scheme open to everyone from 30 March 2019 (currently still in test phase)
- Must apply by 30 June 2021 (or 31 December 2020 in the event of a “no deal” Brexit)
- Otherwise no legal right to live and work in the UK
- Applications will be free from 30 March 2019





## How does it work?

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- System designed to be simple and streamlined
- Enter personal details via the Home Office smartphone app which can be downloaded (Android with contactless technology only)
- Fill out an online form
- Email from the Home Office with its decision





# What will be checked?

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- Identity and nationality
  - Passport or national ID card uploaded digitally
- Length of residence in the UK
- Suitability requirement
  - Criminal records and security database checks





# What will they need to prove?

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- **Length of residence in the UK**
    - 5 years' continuous residence for settled status
    - Just current residence in UK if applying for pre-settled status
    - No need to show they have been working, studying or have held comprehensive health insurance
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# What will they need to prove?

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- **Length of residence in the UK**
  - Give their national insurance number - automatic check of employment and benefits records held by HMRC and DWP
  - If no data with HMRC/DWP, upload documentary evidence of continuous residence





# What about non-EU family members?

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- Spouse, civil partner, durable partner (two years), child/step-child/grandchild under 21 or dependant child/step-child over 21, dependant parent/parent-in-law/grandparent, other dependant relative
  - Apply at same time or after the EU national
  - Prove the EU national's identity and residence (not necessary if link applications or have settled status)
  - Prove their own identity, their own residence and their relationship with the EU national
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# What if there is a “no-deal” Brexit?

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- Less generous scheme
  - Cut off date for arrival in UK will be 29 March 2019, not 31 December 2020
  - Shorter deadline for applications - 31 December 2020, rather than 30 June 2021
  - Position harder for non-EU family members. Cut-off point for family members to join them in the UK will be 29 March 2022. There is no cut-off date in the event of a deal, so long as the relationship existed before 31 December 2020
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# What if there is a “no-deal” Brexit?

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- New temporary transitional system applies if EU nationals arrive after 29 March 2019
  - Stay and work for up to 3 months
  - Apply for European Temporary Leave to Remain within 3 months of arrival
  - New non-extendable 3 year visa with identity, criminality and security checks
  - New immigration system from 1 January 2021 (points based system)
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# The future for EU nationals

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- White paper published last year
- From 2021, it is proposed that EU nationals will be brought within the existing tier 2 visa system
- Companies will need to be a sponsor to employ new EU nationals coming into the UK





# The future for EU nationals

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- Amendments to the current system include:
  - Lowering the skills threshold from level 6 (degree) to level 3 (A-level)
  - Abolishing the Resident Labour Market Test
  - No monthly cap on numbers
  - Reconsidering the minimum salary threshold





# The future for EU nationals

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## Temporary Worker route (no skill or salary threshold)

- No sponsor needed
- Limited to a 12 month working visa
- Cooling off period of 12 months to prevent long term working





# Case law update

## David Roath - Partner



# Vicarious liability

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- Torts of an employee committed "in the course of employment"
- Acts of employee need to be closely connected with employment
- Connection can be broken

## **Bellman v Northampton Recruitment Limited**

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# Vicarious liability

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- What can you do?
- Defence in Equality Act claims
- Reasonable steps defence
- Must act before complaint
- Do you train managers/staff?





# Unfair dismissal

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Conduct dismissals - it's all about "reasonable"

- Honest and **reasonable** belief in guilt of employee
- **Reasonable** investigation
- Act **reasonably** in dismissing (including procedurally)
- Band of **reasonable** responses







# Unfair dismissal

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## Ball v First Essex Buses Limited

- Employer closed mind to employee's case/evidence
- Consideration of employee's evidence important
- Carry out further enquiries where necessary
- Follow procedures carefully





# Variation in contract

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Requirements for a valid variation of contract:

- Certainty
- Consent
- Consideration





# Variation in contract

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- Evidence of consent?
- Signed contract is best
- What if contract not signed?
- Can agreement be inferred from conduct?
- What if no consideration?





# Variation in contract

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## Tenon FM v Cawley

- New contract not signed
- Not possible to infer acceptance to post termination covenants
- No consideration given on change of contract
- Note: consideration might be promotion





# Whistleblowing claims

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## 1. Detriment claim

Worker has the right not to be subjected to detriment on the ground that they have made a protected disclosure

## 2. Dismissal claim

Employee will have a claim for automatically unfair dismissal if they are dismissed for the **sole or principal reason** that they have made a protected disclosure

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# Whistleblowing claims

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- Detriment claims easier to succeed with than dismissal claims
  - Material influence
- Employee cannot bring a detriment claim against their employer where the detriment in question amounts to dismissal





# Whistleblowing claims

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- Can an employee sue the individual who dismissed him/her?
- Can this be brought as a detriment claim?
- Advantage for claimant

## Timis v Osipov





# Holiday carry over

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- What if an employee does not take all of their holiday?
  - Is it lost?
  - Does it carry over?
- Is "use it or lose it" lawful?
- Regulation 13(9)(a) WTR







# Holiday carry over

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- Annual leave cannot be lost automatically
- Unless employer can show that it has enabled the worker to exercise their entitlement, particularly through the provision of sufficient information
- Burden is on employer
- Another carry-over exception arguably

## Max-Planck v Shimizu

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# Holiday pay

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- Purpose of annual leave
- What happens when a worker dies?
- Is accrued holiday paid out to the estate?

**Wuppertal v Bauer and Willmeroth Broßonn.**





# Employment status

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- Do you engage "self-employed" "independent" contractors?
- Risks:-
  - Workers (Uber, Pimlico plumbers etc)
  - Employees

## Herriot v Exmoor Ales Limited





# Employment status

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- Herriot invoiced through partnership
- VAT added
- No written contract

But:

- Exclusivity agreement
- Mutuality of obligation
- High level of control





# Disability discrimination

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A person (P) has a disability if:

- P has a physical or mental impairment, and
- The impairment has a **substantial** and **long-term** adverse effect on P's ability to carry out normal day-to-day activities





# Long term?

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An impairment will have a long-term effect only if:

- It has lasted at least 12 months; or
- The period for which it lasts is **likely** to be 12 months; or
- It is **likely** to last for the rest of the life of the person affected





# Long term and substantial?

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## **Nissa v Waverley Education Foundation**

- Likely to last means "it could well happen"
- Also considered the issue of "substantial"





# Disability discrimination

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## Disability discrimination under Equality Act 2010

- Direct
  - Indirect
  - Arising from
  - Reasonable adjustments
  - Harassment
  - Victimisation
- 







# Disability discrimination

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- Requirement for knowledge by employer?
- No liability for:
  - Arising from
  - Reasonable adjustments
- Unless employer knew **or should have known** about the employee's disability





# Reasonable adjustments

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- When does duty to make reasonable adjustments apply?
- When does the employer have "knowledge" for the purpose of adjustments?

## Lamb v The Garrard Academy





# Suspension and constructive dismissal

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- When can employer suspend an employee?
- Is suspension a neutral act?
- Can suspension be a breach of the implied term of mutual trust and confidence?

## **Agoreyo v London Borough of Lambeth**





# Suspension and constructive dismissal

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- Correct legal test is whether employer has reasonable and proper cause to suspend
- No requirement for “necessity”
- No ruling as to whether suspension is neutral act
- Knee jerk/unreasonable suspensions can still be breach of implied term
- Consider carefully why need to suspend





Most ambitious claim of the year  
award goes to.....

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Any questions?



Thank you for attending