

**NEWSLETTER - EMPLOYMENT LAW UPDATE
MAY 2022**

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1. The ‘Living With Covid’ Plan

The government’s ‘Living with Covid-19’ plan is aimed at enabling the country to manage Covid-19 like any other respiratory illness. After two years of living with restrictions Employers seeking to deal with the virus need to consider the right approach and policy for their business.

Health and safety

The end of the legal obligation to self-isolate does not prevent Employers from having their own rules on workplace attendance. Employers still have a legal duty to take reasonable steps to protect the health and safety of their workforce. With the government’s stated intention for businesses ‘to take responsibility for implementing mitigations that are appropriate for their circumstances’, Managers need to decide what their approach to self-isolation will be. For example, requiring individuals who test positive and/or who are displaying Covid symptoms to work from home for a period of time. Employees who elect to self-isolate, could also be entitled to sick pay.

Protecting vulnerable colleagues

Consideration needs to be given to risks in relation to clinically vulnerable staff or Employees who live with clinically vulnerable people, particularly if other Covid-positive Employees attend work. In order to protect staff, Employers can encourage hybrid working for those who may require this.

Mental health

An Employer’s duties regarding health and safety requires them to consider staff mental wellbeing. The pandemic has taken a huge toll on mental health, with numerous Employees suffering from ongoing stress, anxiety, depression or other health concerns. It is important that Employers continue to acknowledge and respond to staff mental health concerns and keep an open dialogue with them about what support and adjustments they may find helpful. Employers should be mindful that certain mental impairments could constitute a disability under the Equality Act 2010 and will trigger a duty to make reasonable adjustments to an employee’s work activities or to the workplace to alleviate any disadvantage. Managers should look out for signs and support employee wellbeing, particularly if organisations are moving towards a hybrid working model.

This isn’t necessarily the end

There has been an increase in formal flexible working requests from Employees and Managers need to be aware of the Company’s procedures for dealing with these requests, as detailed in section 5 of the Staff Handbook.

2. Restrictive Covenants

Can a non-competition restrictive covenant prevent a manager from joining a competitor? Yes, held the High Court in *Law By Design Ltd v Ali*.

The Manager's non-competition clause prohibited them from being involved in any business which was in competition with the firm that she had been employed by, or where in competition with any of her Clients, in the 12 months prior to leaving her job.

When she resigned in May 2021 the Respondent sought undertakings from her in relation to these non-competition clauses, but she refused. The Respondent applied for injunctive relief.

In relation to the agreement, it was clear that the Respondent had shown themselves to have legitimate business interests to protect. The court held that it was an ‘uncomplicated conclusion’ to reach that the covenant was drawn no wider than reasonably necessary and was therefore enforceable. An injunction was granted.

3. Supermarket Worker Dismissed For Harassing Colleagues After Brain Injury Was Discriminated Against, Tribunal Rules

A shop worker who suffered a head injury was discriminated against and unfairly dismissed after he made inappropriate remarks towards his colleagues, a tribunal ruled.

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The tribunal, *Mr C Kelly v Sainsburys Supermarkets Ltd*, heard Mr Kelly had allegedly called a colleague at Sainsbury's a "whore" and "b**ch" and had groped her at work. But Kelly said he was not aware of his behaviour, which he said was a result of a head injury from a traffic accident. As a result, he was discriminated against on grounds of disability when he was sacked for sexual harassment.

Judge M Warren acknowledged the supermarket needed to act on Kelly's behaviour or risk facing a sexual harassment claim, but said the firm had knowledge of his disability caused by the accident and "chose to ignore it", and as such did not act proportionally when it dismissed him.

Sainsbury referred Kelly for specialist psychiatric advice and, in November 2011, a full neuro-cognitive assessment found some of his behaviour "may be partially accounted for as a consequence of a past head injury and associated hidden difficulties". On 17 April 2020, Sainsbury's received another complaint about Kelly's conduct from a female employee who alleged Kelly had called her "b**ch" and "whore", groped her and rubbed her shoulders. The local store manager interviewed a number of people, including Kelly, who described allegations as "petty and immature".

During the resultant disciplinary process Kelly struggled to remember many of the alleged events and, at the end of the meeting, said that he was not aware of his behaviour. Kelly was dismissed after the hearing ruled out the possibility of a final written warning because of the "risk of the incidents happening again".

The supermarket "did not appear to even consider the possible (in our view obvious) impact of Mr Kelly's injury on his behaviour", and that a proportionate approach, such as seeking an update of the medical evidence it already held on file, would have explained the effects of his head injuries and what steps could be taken to prevent behaviour.

4. New Statutory Payment Rates

From April 2022

Shared Parental Pay (ShPP)

Statutory rate of £156.66 or 90% of employee's weekly earnings if lower.

Maternity Pay (SMP)

6 weeks at 90% of average weekly earnings. Then statutory rate of £156.66 or 90% of employee's weekly earnings if lower.

Adoption Pay (SAP)

6 weeks at 90% of average weekly earnings. Then statutory rate of £156.66 or 90% of employee's weekly earnings if lower.

Paternity Pay (SPP)

Statutory rate of £156.66 or 90% of employee's weekly earnings if lower.

Parental Bereavement Pay (SPBP)

Statutory rate of £156.66 or 90% of employee's weekly earnings if lower.

From 6th April

Statutory Sick Pay

£99.35 pw for 28 weeks subject to earnings (average £120 per week)

Minimum Wage from 1 April 2022

Workers aged 23 and over (National Living Wage)	£9.50 an hour
Workers aged 21–22	£9.18 an hour
Workers aged 18–20	£6.83 an hour
Apprentices under 19, or over 19 and in first year	£4.81 an hour

Cap on Weekly Pay for Calculating Redundancy Compensation £571 per week

PROFILE

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