LITTLETON

The Employment Rights Bill 2024 – Start Legislating. Details to Follow.

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INTRODUCTION

The Labour government committed to 'introducing legislation within 100 days' to implement its proposals to reform employment law. The Employment Rights Bill, introduced on the last available Parliamentary day before this deadline, seeks to implement that promise.

Much of the Bill consists of enabling provisions, with the key details to be worked out in secondary legislation that the Secretary of State for Business and Trade will, or may, introduce at a later date. The Bill itself is unlikely to enter into law until the middle of 2025. And many of the rights will not come into force until further regulations are made by the Secretary of State – currently said to be no earlier than 2026, with unfair dismissal reforms to be implemented 'no sooner than autumn 2026'.

It seems fair to view this as the opening stage of the Government's proposals for reforms to employment law. The Government has indicated that it intends to consult on various matters that are set out in the Bill, and its own press release announcing the legislation is notable for the number of quotes from stakeholders about the necessity of further consultation. Further changes are likely both as the Bill works its way through the Commons and Lords, with other provisions being refined during the progress from primary to secondary legislation. A significant number of other manifesto commitments on employment law have also been deferred to further legislation at a later date.

Our aim is therefore not to provide an exhaustive summary of every way in which the Government proposes to reform employment law, but to identify the key changes proposed in the legislation and the direction of travel.

DISMISSAL

Unfair Dismissal – A "Day One" Right

One of the most eye-catching proposals (to employment lawyers) made before the election was to turn the protection against unfair dismissal into a "basic day one right". The Bill would follow through on that proposal by repealing section 108 of the Employment Rights Act 1996 ("ERA"), which requires employees bringing claims of 'ordinary' unfair dismissal to have at least two years' continuous service. What is less clear is what will come next.

Schedule 2 introduces the concept of an 'initial period of employment' during which dismissals may not be subject to the requirements of procedural and substantive fairness under section 98(4) ERA, provided that the reason for dismissal falls within familiar categories such as capability, conduct, or some other substantial reason. However, the details of this alternative regime – including whether and how it would differ from the requirements of section 98(4), and the length of the "initial period" – are to be the subject of regulations made by the Secretary of State. Current reports in the media suggest that the period under discussion is between six and nine months, which would be a meaningful change in and of itself. What remains unclear is what rights employees will actually enjoy on day one.

The Bill does make clear that the right to claim unfair dismissal will not ordinarily apply to employees who are yet to start work, with some exceptions for various categories of automatically unfair dismissal. What is striking is an additional exception where the reason or principal reason for dismissal "is, or relates to, the employee's political opinions or affiliation." The scope and meaning of "political opinions" in this context will no doubt be the subject of significant discussion in due course.

Fire and Rehire

Another key feature of the Bill is a section aimed at combatting the firing and rehiring of employees who refuse to accept a change to the terms and conditions of their employment. This is a done by way of a new category of automatically unfair dismissal that would – in its current form – amount to a major change in the law.

The Bill provides that a dismissal will be unfair if the reason (or principal reason) was that the employer sought, and the employee refused, a variation to the contract of employment. Perhaps more significantly, a dismissal will also be unfair if the employer replaces the employee with another person carrying out substantially the same duties who is willing to accept the varied terms.

An employer would be able to escape a finding of unfair dismissal in very narrow circumstances. It would need to show that the reason for the variation was to eliminate, prevent, significantly reduce or mitigate 'financial difficulties which at the time of dismissal were affecting, or were likely in the immediate future to affect the employer's ability to carry on the business as a going concern or otherwise carry on the activities constituting the business', and in all the circumstances the employer could not reasonably have avoided the need to make the variation. If those hurdles are overcome, whether the dismissal was fair or unfair would be determined according to a number of prescribed factors and any regulations made by the Secretary of State.

The use of language such as 'going concern' suggests a particularly high threshold, close to liquidation or other insolvency procedures.

The Bill as it stands would dramatically curtail an employer's ability to impose changes to the terms and conditions of employees. What is striking is that the hurdles to doing so would be significantly greater than dismissing employees altogether by reason of redundancy or reorganisation.

Collective Redundancies

The Bill also expands the scope of obligations relating to collective redundancies. At present, the duties to consult representatives and notify the Secretary of State regarding collective redundancies are triggered by a certain number of redundancies at

one establishment. The reference to a single establishment will be omitted, meaning that redundancies held simultaneously in different locations can be caught by the collective redundancy provisions.

EQUALITY

Harassment

The Bill proposes extending the duty (not yet in force) upon employers to take "reasonable steps" to prevent the sexual harassment of employees to a duty to take 'all reasonable steps'. It also provides for regulations specifying the "reasonable steps" required, such as carrying out assessments of a specified description, publishing plans or policies, and taking steps relating to the handling of complaints and reporting of sexual harassment. Such regulations may be welcomed by employers seeking clarity about their obligations.

The Bill also includes a new category of protected disclosure in respect of sexual harassment within the meaning of the Equality Act 2010 ("EqA"). It is unclear how far this would extend protection in practice, given that a disclosure of sexual harassment is already covered by both:

- the existing protection of disclosures tending to show the breach of a legal obligation under whistleblowing legislation; and
- such disclosures may already amount to a protected act under section 27 EqA, an easier claim to prove given that it does not require a reasonable belief that the disclosure is in the public interest.

Far more significant is a reversal of the position regarding third party harassment under the EqA. The Bill prohibits an employer from permitting a third party to harass an employee during the course of their employment. An employer will be taken to have permitted the harassment if it fails to take all reasonable steps to prevent the third party from doing so. What will amount to a reasonable step in respect of third parties – as compared to employees, over whom the employer has a degree of control – remains to be seen.

Equality Audits

The Bill also envisions (but does not require) the passing of regulations that oblige employers to develop and publish equality action plans. These plans would show the steps taken related to gender equality, including addressing the gender pay gap and supporting employees going through menopause. Details of the content, form and manner of the plans are left to future regulations. However, the Bill excludes employers with fewer than 250 employees and public authorities, and provides that employers cannot be required to publish the information more than once a year.

GUARANTEED HOURS AND OTHER TERMS AND CONDITIONS OF WORK

Zero-Hours Contracts and Guaranteed Hours

One of the flagship policies of the Bill is the government's stated aim to end 'exploitative zero hours contracts'. They seek to achieve this through inserting complex statutory provisions into Part 2A of the ERA.

Those provisions require employers of workers on zero-hours (or low-hours) contracts to offer those workers a contract, or vary their existing contract, to guarantee them a minimum number of hours that reflect the amount of work they have carried out in any given reference period (originally floated as 12 weeks, but the length is in fact to be set by secondary legislation). Workers are then entitled to accept or refuse such offer, and, seemingly, if it is rejected, the employer must continue to make fresh offers at the end of every reference period.

The Bill also permits the Secretary of State to make regulations requiring that the offer not only guarantees the same number of hours as in the reference period, but also the same days and times or working pattern as in the reference period.

These offers cannot be any less favourable than the worker's existing terms in other respects, save in circumscribed circumstances where the worker had more than one set of terms in the reference period. If the employer seeks to rely on these exceptions, they are required to give a notice to the worker to this effect, also explaining how the proposed terms and conditions 'constitute a proportionate means of achieving a legitimate aim.'
On its face, these provisions allow zero-hours worker to lock in the greatest number of hours worked in any given reference period and turn them into a guaranteed entitlement to such hours (and, potentially, the specific scheduling of such hours) without any significant downside. This would be a powerful disincentive to the use of zero-hours contracts, but there are some important carve outs:

1. The right is only triggered where the hours worked in the reference period satisfy certain conditions as to 'number, regularity or otherwise,' which are left to be specified in secondary legislation;
2. Employers can, in certain circumstances, limit the offer of guaranteed hours to a particular period, but only where it is reasonable to do so, and the burden appears to be on the employer to show this. Employers can only show that a limited-term contract is reasonable if:
   (a) The worker is only needed to perform a specific task;
   (b) The worker is only needed until a particular event; or
   (c) The employer reasonably considers that there is only a temporary need for the worker to do work (with the potential for such need to be further qualified by secondary legislation).
3. The obligation is also not triggered if the employee has resigned (other than through constructive dismissal) or has been fairly dismissed (or is serving notice in relation to such resignation or fair dismissal).

The provisions extend not only to zero-hours contracts, but also low-hours contracts where employers undertake to provide a (low) number of hours of work (to be specified in further legislation), so that employers cannot avoid the requirement by engaging workers on, for example, one-hour contracts.

If the guaranteed hours provisions are not complied with, workers can bring claims in the Employment Tribunal. Whilst the remedies include a declaration and compensation (capped by a number of weeks' pay yet to be decided), there is no power to order an employer to make an offer of guaranteed hours or impose such terms on the parties.

These provisions set out a framework which could make zero-hours contracts unattractive for businesses, given the risk of workers being able to convert them into guaranteed-hours contracts with limited flexibility, particularly at a time when they may have had a particularly busy reference period. However, the true effect of these provisions will depend on key details which are not set out in the Bill, such as:

1. What conditions on the number or regularity of hours are required for the right to be triggered;
2. The cap on compensation, which may be the difference between businesses seeing such claims as the cost of engaging workers on a zero-hours basis, or genuinely adjusting their practices in response to the legislation; and
3. The minimum hours threshold for when these provisions will apply, which will need to be carefully calibrated to strike a balance between anti-avoidance measures and genuinely part time workers taking overtime.

Whilst these measures may achieve the government's aims of curbing the abuse and exploitation of such contracts, the current legislation risks unintended consequences for workers:

1. For those workers who genuinely want and value zero-hours contracts (admittedly a minority in most surveys), these provisions may make employers less likely to offer them, given the risk that they can be converted into a guaranteed hours contract at any moment; and
2. Employers may be incentivised to offer fewer hours to those engaged on zero-hours contracts to limit their exposure if those workers choose to convert the contract into a guaranteed hours one.

Reasonable Notice of Shifts

The Bill requires employers to provide reasonable notice of shifts and shift changes or cancellations to workers on irregular shift patterns or under zero-hours contracts. The secondary legislation will set out minimum periods below which notice will be presumed to be unreasonable unless the employer proves otherwise.

Where shifts are cancelled, moved or curtailed at short notice, workers must be paid a specified amount in relation to such shifts (the details are again left to secondary legislation). This right is subject to complex and technical exceptions, but if an employer seeks to rely on these (as with the exceptions in the guaranteed hours provisions over less favourable terms) they must set out and explain at the time that they are doing so and why they are permitted to do so.

A Presumption in Favour of Flexible Working

The last Government made the right to flexible working a "day one" right. This Bill enhances that right by expressly setting out that in addition to the existing requirement that an employer can only refuse a request on specified grounds, such a refusal must also be reasonable.

Again, like with other provisions in the Bill, an employer who refuses a flexible working request must, at the time of rejecting it: (i) state the specific ground(s) under the legislation which it is relying on the refuse the application, and (ii) explain why it considers that it is reasonable to refuse the request on those ground(s).

Requiring Contemporaneous Justification Notices

This trend within the Bill to require contemporaneous explanations from employers seeking to rely on exceptions or refuse worker requests forces employers to engage with the legislation at an early stage; in many cases, given that such explanations will ultimately form the basis of their defence if their decisions are challenged, we suspect that many employers will seek to engage lawyers (or at least formal HR professionals) at a much earlier stage of the process to deal with such requests and explanations.

Beyond that, it is unclear how these notices will operate in practice. The matters these notices are meant to specify, such as 'proportionate means of achieving a legitimate aim' and 'reasonable', are traditionally viewed as objective tests by employment law. Consequently, employers are often permitted to justify their actions by reference to aims and arguments that they did not have in their mind at the time of making the decision under challenge. It is unclear whether these notices are meant to bind the employer to particular lines of defence, or merely provide evidence of their rationale at the time.

Either way, such requirements may have undesirable consequences: the level of detail required appears to sit somewhere between a Tribunal pleading and formal written submissions. As already identified, even if an employer is not limited to the matters set out in the notice, they appear to be sufficiently complex that many businesses are likely to want to engage lawyers or HR professionals to draft them, driving up costs. Conversely, if employers are confined to the reasons set out in the notice, businesses whose actions are lawful but not properly articulated risk being penalised. Defensive employers may seek to give long-winded pro-forma notices covering every conceivable defence that they could run.

It may be sensible for the Government to consider what the legal status of these notices is meant to be before these provisions become law. If they do not, it will have to be determined by the appellate courts.

Bereavement Leave

The Bill converts existing Parental Bereavement Leave legislation into a general entitlement to Bereavement Leave. The relations to be covered by Bereavement Leave are to be set out in secondary legislation. Where the deceased is a child, leave remains at two weeks.

In all other cases, the leave limited to one week. Where more than one person has died, the secondary legislation must entitle the bereaved employee 'to leave in respect of each person'.

Parental Leave

Parental leave and paternity leave both become day-one employment rights under the Bill, but are otherwise unaffected, save that paternity leave may now be taken in addition to and following shared parental leave.

Tips

The Employment (Allocation of Tips) Act 2023 requires that employers ensure that tips are fairly allocated, but largely left compliance to having a written policy and having regard to a Code of Practice. The Bill expands the duty by creating an obligation to consult trade union or other worker representatives before producing a written policy. That policy must then be reviewed at least every three years, with the same consultation process taking place at each review. Both the written policy and a written summary of the consultation must be made available to all workers. Given the nature of many businesses that take tips, and seemingly onerous nature of these procedural duties, it is surprising to see that there is no carve out for small organisations or a minimum number of workers affected for the obligations to bite. It will be interesting to see if that changes through the life of the Bill.

Statutory Sick Pay

The Bill provides for Statutory Sick Pay (SSP) to be paid from the first day of sickness absence instead of the current entitlement from day four. Further, the Bill provides for the removal of the minimum earnings threshold to become eligible for SSP, with SSP instead being set at the lower of the full amount (currently £116.75) and a specified percentage of a worker's weekly earnings (with the percentage to be determined by secondary legislation).

INDUSTRIAL RELATIONS AND THE LABOUR MARKET

Trade Union Reform

The Bill significantly strengthens the power of trades unions.

Workers will have a right to a statement of trade union rights at the same time as they are entitled to receive a section 1 statement of their terms of employment (or, presumably, an equivalent time for non-employee workers).

Unions have the right to access workplaces for the purposes of meeting, recruiting or organising workers or facilitating collective bargaining (but not to organise industrial action). Employers will be under a duty to take reasonable steps to facilitate access, and will only be permitted to refuse access entirely 'where it is reasonable in the circumstances to do so'. Disputes will be determined by the Central Arbitration Committee.

The existing statutory rights to time off for various union activities are now bolstered by duties to provide 'such accommodation or facilities as are reasonable in the circumstances' to undertake those activities, and these rights are themselves extended to Equality Representatives of recognised trades unions.

Various thresholds for trade union recognition and voting have also been lowered, including:

- Granting the Secretary of State the power to lower the threshold for compulsory trade union recognition applications from 10% of the workforce to anywhere between 2-10% of the same;
- Removing the requirement for a recognition ballot to have a turnout of at least 40% of the relevant bargaining unit in order to be valid;
- Changing the ballot requirements for industrial action to a simple majority of those who vote in it.

Where industrial action is taken, unions' freedom of action has been increased. The last government's Minimum Service Levels legislation is to be repealed. There is no longer a requirement for Unions to supervise pickets to avoid liability in tort. Workers are given statutory protection from detriment or dismissal to prevent, deter or punish a worker for taking industrial action. The blacklisting ban in section 3 of the Employment Relations Act 1999 has also been expanded.

Whilst the administrative, bureaucratic and audit trail requirements on employers are in many places expanded by this legislation, the opposite appears to be true for trades unions. Political fund contributions are switched to an "opt out" rather than "opt in" scheme (subject to unions having to inform members of this right whenever they pass a "political resolution"), and restrictions on the deduction of union subscriptions from wages in the public sector are to be revoked. The matters that a union has to set out in its annual returns have been reduced, as have the Certification Officer's powers of inspection and enforcement.

Sectoral Bargaining

Sectoral pay bargaining makes a return with the restoration of the School Support Staff Negotiating Body and a new power to create an Adult Social Care Negotiating Body.

These bodies will, when established, have the power to negotiate the terms and conditions and pay of workers in their sector (and, in the case of School Support Staff, also negotiate their training and career progression). The outcome of those negotiations can, with the power of the Secretary of State, be incorporated into the relevant workers' contracts of employment and prevail over any terms to the contrary. The legislation is bolstered by further powers to make regulations extending the enforcement powers of the National Minimum Wage Act 1998 to these provisions.

Labour Market Enforcement

Part 5 of the Bill will abolish the Gangmasters and Labour Abuse Authority and the Director of Labour Market Enforcement, instead giving the Secretary of State the duty to enforce a range of labour market legislation, enumerated in Schedule 4 of the Bill. This includes matters such as minimum wage, Tribunal penalty and modern slavery legislation. The Government will be under a statutory duty to provide labour market enforcement strategies and annual reports, in

consultation with an Advisory Board composed of an equal number of representatives from unions, employers and independent experts.

The Bill includes various investigative and enforcement powers in support of these functions, including the powers to enter premises, obtain documents and compel answers to questions. Where labour market offences are suspected or found to have taken place, non-compliance can be addressed through either requesting voluntary undertakings or applying for court orders imposing measures that prevent or reduce the risk of future non-compliance. Failure to comply with such orders will be an offence punishable by up to 2 years' imprisonment. The legislation grants the Secretary of State the power to delegate these enforcement functions to a statutory body. According to the Government's Next Steps Plan, they plan to create the "Fair Work Agency", which they hope will become a recognisable one-stop shop for enforcement of relevant labour market legislation.

EMPLOYMENT TRIBUNAL CAPACITY

This article is not the place for detailed consideration of Employment Tribunal reform. But the backlog of cases is well-known and getting worse. New rights are of questionable value if takes up to two years for a Tribunal to resolve any litigation. Businesses are more likely to take a risk on hiring someone if any challenge to their terms or termination can be resolved swiftly and affordably.

The Government's proposals are notably silent on how it intends to address this problem.

CONCLUSION

It will be some time before this Bill becomes law, let alone the subject of Tribunal litigation. However, even at this early stage, the legislation is shaping up to be the opening salvo in what may be the most significant and far-reaching changes to employment law for many years.