EMPLOYMENT LAW CHANGES BRIEFING

OCT 2024 ISSUE

GORDONS

EMPLOYMENT RIGHTS BILL 2024 AND OTHER MATTERS

The Labour Government promised to bring forward new employment legislation in its first 100 days. It did this last week with publication of the new Employment Rights Bill. That, together with the new obligations on employers to prevent sexual harassment at work, means that there are various matters which employers ought usefully to be considering and preparing for, even though some of the changes won't become law for many months.

The new Bill runs to 158 pages and contains 28 proposals for employment law reform. But the Bill is only the first step in the government's Make Work Pay plan, intended to modernise the UK labour market as part of its commitment to economic growth. 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'.

More than two thirds of the Bill relate to repealing the Conservative's trade union reforms, introducing a new enforcement agency which we are guessing will mean that bad employers can be pursued by a government body rather than taking the commercial risk that it's cheaper to behave badly than comply with employment legislation. 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.

SO, WHAT ARE THE BIG ONES TO WATCH AND WHAT DO YOU NEED TO DO AS EMPLOYERS?

1. DAY-ONE RIGHTS

Currently, an employee cannot claim "ordinary" unfair dismissal until they have two years of service. This two year qualifying period for protection from unfair dismissal will be removed, meaning that all employees will have a right to this protection from their first day of employment.

There is to be a consultation period on a new statutory probationary period for new employees to allow employers properly to assess an employee's suitability for a role. It is reported that the government is hoping for a nine-month probationary period, during which time a lighter-touch dismissal procedure will apply, where the reason for dismissal is related to the employee's suitability for the job. There will also be some consultation on how the probationary period should interact with the Acas Code of Practice on disciplinary and grievance procedures.

It seems that despite the probationary period, employees will have some degree of protection from the first day of employment for capability dismissals and, where employees are dismissed for a reason other than capability, such as misconduct, or redundancy, employers will have to go through a full procedure.

Autumn of 2026 at the earliest appears to be the expected implementation date.

What should you do now? Nothing is immediately required as this is not expected to come into force for two years. But in due course, much more proactive and robust monitoring of new employees' probationary periods will be needed – therefore a review and update of current probationary periods and your employment contracts moving forwards is recommended.

2. ENDING FIRE AND REHIRE

This is very significant for those expecting to have to force through contractual variations. The Employment Rights Bill will make it automatically unfair to dismiss an employee for refusing a contract variation. This is aimed at combatting the firing and rehiring of employees who refuse to accept a change to the terms and conditions of their employment.

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This is 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 and as with other automatically unfair dismissals, there will be no two year qualifying period once this comes into force.

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.

As the weekend's headlines explained, this is a key concern of the Secretary of State for Transport, Louise Haigh, given her evident loathing of those behind the P&O fire and re-hire headlines.

Fire and rehire will, however, still be permitted where the reason for the variation is to '(a) eliminate, prevent or significantly reduce, or significantly mitigate the effect of, any financial difficulties which at the time of the 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 to carry on the activities constituting the business, and (b) in all the circumstances the employer could not reasonably have avoided the need to make the variation'. In short, where the employer is in dire financial straits and about to collapse, and fire and rehire is essential for its survival.

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

What should you do now? If you don't need to change anything then, do nothing immediately, again as this is not expected to come into force for two years. However, if you are long overdue making a significant contractual change then our recommendation has to be to get on with it now!

3. COLLECTIVE REDUNDANCIES

The Bill removes the requirement for redundancies to take place 'at one establishment', meaning that redundancies across a business can be taken into account when considering collective consultation requirements and protective awards. 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.

What should you do now? There is nothing to do immediately – so watch this space.

4. ZERO HOURS CONTRACTS

Zero hours contracts will be banned if they are deemed to be 'exploitative' and workers will have the right to demand guaranteed hours if they work regular hours over a defined period, although they can choose to remain on a zero hours contract. 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.

The Bill also provides workers on a zero-hours contract both a right to reasonable notice of a shift and the right to reasonable notice of cancellation or changes to a shift. What is deemed "reasonable notice" is not yet set out in the Bill and will form part of the consultation for the new Regulations.

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The new 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: what conditions on the number or regularity of hours are required for the right to be triggered; 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, the minimum hours threshold for when these provisions will apply.

What should you do now? There is nothing to do immediately. The new rules are complex however so it may be that a switch to more agency use could be one answer.

5. FLEXIBLE WORKING

Currently, an employer can only refuse a flexible working application on one of the eight statutory grounds and employees can make up to two such requests in each year. Under the new proposals, an employer will still be able to refuse an application on the same eight grounds but must also be able to show that it is reasonable for them to rely on one or more of those grounds. The government had made big noises about making flexible working "the default" - but in reality, the proposed legislation just provides that the employer still just needs to state the grounds of refusing the application and explain why they consider it reasonable to refuse the application on one or more of the grounds that already exist, albeit now in the form of a "Contemporaneous Justification Notice". So, it seems the effect will be largely neutral - workers may not enjoy any greater right to work flexibly than they did previously. Furthermore, there is to be no change to the penalty for breach – it's going to remain eight weeks' pay, but the employer will need to take greater care if refusing a request.

What should you do now? There is nothing to do immediately but in due course, some commentaries are suggesting that the proposals will require much more care from employers from the very outset of a request, as the new rules appear to be sufficiently complex that many businesses are likely to want to engage lawyers or HR professionals to draft the required Contemporaneous Justification Notice, potentially driving up costs.

6. PARENTAL AND OTHER 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. Bereavement leave seems to be extended to anyone who is bereaved although the detail of the relationship that the employee must have had with the deceased isn't clear. Bereavement leave in the circumstances of losing a child will remain at two weeks, other bereavement leave is to be one week.

What should you do now? There is nothing to do immediately but you can usefully be looking at those policies which will need to be updated once the provisions of the Bill become law and start working on them now.

7. STATUTORY SICK PAY

Statutory sick pay ("SSP") will be paid from first day of sickness (it's currently three days waiting and payment from day four). Also, the lower earnings threshold for SSP will be removed. The Secretary of State will set SSP as a percentage of pay.

What should you do now? Ensure your payroll department are aware and additionally, it might be a good time to review your absence reporting policies: are they still fit for purpose? For example, do you need to be more robust about how absence is reported by employees – are they allowed to text in for example? Perhaps something more robust will be needed to prevent abuse.

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8. PROTECTION FROM THIRD PARTY HARASSMENT

The new Bill imposes direct liability on employers if they fail to take all reasonable steps to prevent harassment by third parties on their workforce. That's "all" reasonable steps, not just reasonable steps. This is very relevant to those employers who have significant customer facing workforces.

What should you do now? Have a good hard look at your organisation and existing policies now. Consider awareness levels generally and whether further training is required. Consider risk assessments. Read the next section (below) and speak to the Gordons employment team if in doubt!

9. WORKER PROTECTION (AMENDMENT OF EQUALITY ACT 2010) ACT 2023

CAs you have no doubt already heard, on 26 October 2024, the Worker Protection (Amendment of Equality Act 2010) Act 2023 comes into force, placing new, positive duties on employers in relation to prevention of sexual harassment of employees.
In essence the new rules:

- place a new duty on employers to take "reasonable steps" to prevent sexual harassment of their employees adding an additional layer to the existing prohibition on committing sexual harassment;
- the duty applies to both sexual harassment by an employee's own workers and also by third parties, such as clients and customers;
- while failure to prevent sexual harassment does not give rise to a freestanding cause of action, Employment Tribunals will have the power to uplift compensation for harassment by up to 25% where the duty is breached;
- the duty can also be enforced by the Equality and Human Rights Commission ("EHRC"), which has powers including to conduct investigations and intervene in disputes.

There is new technical guidance from the EHRC which makes it clear that the new duty is an anticipatory and proactive duty, i.e. employers cannot simply wait until an incident of sexual harassment takes place. Employers should:

- anticipate scenarios when its workers may be subject to sexual harassment in the course of employment and take action to prevent such harassment taking place; and
- where sexual harassment has taken place, take action to stop it happening again.

The new guidance sets out a process that employers should generally follow to determine and implement "reasonable steps" to prevent sexual harassment. This includes risk assessments and a raft of other measures.

What should you do now? **URGENTLY you need to review your organisation's policies – the Gordons' team can help with this.**

We can provide a range of practical steps to assist including:

- policy auditing and updates
- an updated harassment and bullying policy (fully compliant with the new duty to prevent sexual harassment)
- risk assessment tools specifically designed to aid in establishing the "reasonable steps" defence
- training and guidance for managers on handling harassment complaints also designed to establish the "reasonable steps" defence
- in-house discrimination training for employees (either in your offices or ours)

For help and assistance contact a member of the Gordons Employment Team.

Note: this summary is for general guidance only. We strongly recommend that for any specific guidance you should please contact one of the Gordons Employment Team directly.

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