

SHOOSMITHS

Employment Rights Bill

Adam Lambert - Partner, Emma Morgan - Partner and Simon Fennell - Partner

Overview

- Bill was introduced into Parliament on 10 October 2024
- Marks the first phase of the government delivering the Plan to Make Work Pay
- Brings forward 28 employment law reforms
- Clear need for Regulations or Codes of Practice to set out the detail
- Policy paper ‘Next Steps to Make Work Pay’ sets out plans for future consultations and reforms
- Two years of consultations and drafts ahead

Unfair dismissal

- Removal of the two-year qualifying period for UD – but not until Autumn 2026
- Light touch dismissal process during an initial period of employment (9 months?)
- Employer will still need to show fair reason for dismissal and that certain procedural steps were taken prior to dismissal in initial period
- Reason for dismissal in initial period likely to be limited to conduct / performance / statutory ban or SOSR (where related to the employee) – so redundancy dismissals would require a fair reason and full consultation process from day one to avoid UD claim
- Consultation and Regulations to follow on how the initial period of employment will work

Unfair dismissal

Action:

- Assess the impact this may have on your workforce – how many dismissals do you have in the first two years? First nine months? How many are redundancies?
- Monitor the progress of the Bill in respect of probation periods and how you can align to the light touch rules

What we might see:

- Redundancies over the next two years
- Reduction in recruitment with an impact on diversity and inclusion
- Borderline redundancy v. performance dismissals being labelled as performance
- Tighter use of probation periods with no benefit given to doubt
- Tribunal system overwhelmed?

Collective consultation

- Removal of one establishment requirement
- 20+ proposed redundancies anywhere (within 90 days) will trigger collective consultation
- Not yet clear when this change will take effect
- Remember the rules apply to the broader definition of redundancies
- Consultation has been published to consider:
 - the role of interim relief (for this and fire/re-hire dismissals)
 - increasing or removing the maximum protective award that can be made if an employer found not to have followed the collective consultation process

Collective consultation

Action:

- Assess the impact this may have had on your business in recent years and any restructuring in the pipeline
- Consider having a standing body of elected representatives if the rules may be triggered frequently

What we might see:

- Redundancies brought forward to 'beat' the new rules
- An increase in the use of fixed term contracts (with caution)
- Different sites using different group company employers

Fire and re-hire / fire and re-place

- Dismissal for seeking to, or a refusal to agree to, vary a contract will be automatically unfair unless:
 - the reason to vary is due to financial difficulties which affect employer's ability to continue as a going concern or
 - where the variation cannot be reasonably avoided
- A dismissal will also be unfair if the employer replaces the employee with another person who is willing to accept the varied terms
- High bar – changes to improve efficiency won't come within the exception
- Even if exception applies, tribunal still has to determine fairness of the dismissal (will depend on consultation, alternatives considered, what offered in return etc.)
- Government consultation due on the exception
- Note the triggering of the collective consultation rules

Harassment

- Duty on employers to take **all** reasonable steps to prevent sexual harassment
- The Bill also introduces a duty on employers to take all reasonable steps to prevent harassment of staff by third parties to avoid liability for those acts
- Allegations of sexual harassment to be a protected disclosure under the whistleblowing legislation
- Further regulations will be needed setting out the reasonable steps in respect of sexual harassment

Action

- These provisions build on the new duty to take reasonable steps to prevent sexual harassment coming in from 26 October 2024. Employers who comply with this new duty will be in a good position when the extended duty is introduced

Equality

- Regulations will be made to prevent dismissals (other than for redundancy) during pregnancy or after a protected period (likely 6 months) of maternity, adoption or shared parental leave
- Requirement for employers to develop and publish equality action plans showing steps taken re gender equality – i.e. gender pay gap action plan and menopause support
- Requirement to offer employees working on outsourced public contracts terms and conditions no less favourable to those who have transferred from the public sector
- Regulations to be made to identify the providers / employers of contract workers in gender pay gap reports
- Future plans to require larger companies to publish information on their ethnicity and disability pay gaps

Family leave

- Qualifying periods for parental leave and paternity leave removed
- Provision to allow paternity leave to be taken after Shared Parental Leave
- A new right to one week's bereavement leave from day one where a dependent dies
 - definition of dependent likely to follow emergency leave definition
- Further regulations will be required

Action

- Identify which policies these changes will impact and prepare to update them. Ensure that payroll is kept up to date with developments

Flexible working

- Employees already have the right to request flexible working from day one
- The Bill seeks to make flexible working the default position for all employees
- Any refusal of a request has to be reasonable
- Employer must state their grounds for refusing and explain in writing why it is reasonable for them to refuse the request on those grounds
- Likely to require more objective evidence to be provided to support the refusal
- Detail of approach required to be developed through consultation and further regulations
- Again, the timescale for this coming into force is not yet known

Action

- Train your managers to get into the habit of detailing the grounds for refusing any requests

Zero hours contracts

- Covers those on zero hours contracts and workers with a low number of guaranteed hours who regularly work more than those hours
 - NB: means employers cannot avoid these requirements by having workers on a contract guaranteeing minimum but low number of hours
 - low hours definition will be subject of consultation
- Employer must make guaranteed hours offer to worker after the end of a set period
 - this will involve either varying the zero hours contract or giving a new contract
- Employer also has to give a worker reasonable notice of cancellation of or change to a shift
- Employer must pay a specified amount to a worker each time the employer cancels, moves or curtails at short notice a shift
- These measures will also be adapted and applied to agency workers

Zero hours contracts

- The Workers (Predictable Terms and Conditions) Act 2023 is repealed
- Exclusivity terms will be unenforceable
- Will be the ability for workers to stay on zero hours contracts if they want to
- No expectation to guarantee hours where work is genuinely temporary
- Won't impact those on full-time contracts who occasionally work overtime
- Consultation published on application of these measures to agency workers
- Consultation on definitions, length of reference period (likely 12 weeks), terms to be offered and review periods promised
- Further regulations will then be made to bring these provisions into force

Action

- Identify who across your workforce could be caught by these provisions

Trade unions

- Significant changes to TU rights
- Employers required to provide a written statement confirming employee's right to join a trade union
- TU's to be able to request an 'access to workplace agreement' from employers to provide access for them to meet members, recruit new members, support a member or facilitate collective bargaining
- Changing the triggers for statutory recognition to make it easier to achieve
- Simplifying industrial action ballots
- Reversing the burden of proof on time off for union duties
- Protection from detriment for participating in lawful strike action
- Minimum service levels repealed
- Changes likely to come into force sooner rather than later – initial consultation published with more

to follow

Other changes

- Statutory Sick Pay
 - removal of the waiting period (so it is payable from first day of sickness)
 - removal of the lower earnings limit
 - weekly rate to be the lower of £116.75 or a prescribed percentage of employee's average weekly earnings – level of that % is currently subject to consultation but suggested 60% or 80%
- Tips
 - before producing a written policy, employers need to consult with TU or elected reps
 - employers must review (in consultation) that policy every 3 years
 - employers must make a summary of views expressed in consultation available to workers
- Establishment of a Fair Work Agency to bring together existing enforcement functions e.g. on NMW, SSP, holiday pay

Next steps

- Right to switch off via a statutory code of practice
- Equality (Race and Disability) Bill
 - making it mandatory for large employers to report ethnicity and disability pay gap
 - extending equal pay rights to protect workers suffering discrimination on the basis of race or disability
 - ensuring that outsourcing of services can no longer be used to avoid paying equal pay
 - implementing a Regulatory Enforcement Unit for equal pay
- Consultation on moving towards a single status of worker
- Reviews into the parental leave and carers leave systems
- Call for evidence to examine TUPE regulations and process
- Consultation with Acas on enabling employees to collectively raise grievances about conduct at work

Timetable

- Bill currently passing through Parliament
- Targeted consultations published which may result in amendments to the Bill
 - percentage replacement rate for those earning less than the current SSP rate
 - preventing abuse of rules on collective consultation and fire & re-hire
 - application of zero hours contracts provisions to agency workers
 - proposals to modernise and update trade union laws
- Once Bill receives Royal Assent, implementing regulations and codes of practice will be needed to bring the provisions into force
- Consultations on these regulations and codes of practice due to start in 2025
- Likely majority of reforms will take effect no earlier than 2026
- Reforms of unfair dismissal will take effect no sooner than Autumn 2026

Actions recap

- Assess the impact this may have on your workforce – how many dismissals do you have in the first two years? First nine months? How many are redundancies?
- Monitor the progress of the Bill in respect of probation periods and how you can align to the light touch rules
- Assess the impact this may have had on your business in recent years and any restructuring in the pipeline
- Consider having a standing body of elected representatives if the rules may be triggered frequently
- Comply with the new duty to take reasonable steps to prevent sexual harassment of workers to be a good position when the extended duty is introduced
- Identify which policies changes to family leave will impact and prepare to update them. Ensure that payroll is kept up to date with developments
- Train your managers to get into the habit of detailing the grounds for refusing any flexible working requests
- Identify who across your workforce could be caught by the zero hours provisions

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WHAT
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