SLAUGHTER AND MAY/

FIRST LOOK: THE EMPLOYMENT RIGHTS BILL 2024

GOVERNANCE & SUSTAINABILITY
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The government yesterday (10 October 2024) introduced **The Employment Rights Bill 2024 (the 'Bill')** into Parliament. In doing so, it met its deadline to introduce legislation within the first 100 days of government, to implement key pledges from its **Plan to Make Work Pay (the 'Plan')**.

The Bill brings forward 28 individual employment reforms, from introducing day one rights and greater protection against harassment, to tighter regulation of fire and rehire and zero-hours contracts. In some cases the Bill contains detailed provisions, but in many others it simply provides ministers with the power to make regulations. This will allow the detail of certain proposals to be fleshed out following consultation.

We have set out below an overview of the Bill's key provisions and our initial thoughts on them.

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DAY ONE RIGHTS

This is one area where the Bill has largely delivered on what the Plan had promised, and what had been widely trailed in the press.

The Bill will repeal the current two-year qualifying period for unfair dismissal. It also introduces a power for ministers to make regulations governing dismissal during "an initial period of employment". In its press release accompanying the Bill, the government committed to consult on this new statutory probation period, which is intended to allow for "*a proper assessment of an employee's suitability to a role*".

The Bill also removes the qualifying periods for unpaid parental leave and statutory paternity leave, and repeals the restriction on taking paternity leave after a

period of shared parental leave. It also removes the three-day waiting period and lower earnings threshold for statutory sick pay ('SSP').

Our view

The big unanswered question at this stage is what the provisions governing probation will look like. How closely will this mirror the typical contractual provisions currently used for probation? The government's stated preference is for a maximum nine-month period of probation, and for the employer to be required to hold a meeting with the employee to explain the concerns about their performance (at which the employee could choose to be accompanied by a trade union representative or a colleague) before deciding to dismiss.

Employers will prefer a light touch approach to regulation here, but employee representatives will be keen to ensure that the probation provisions do not amount to reintroducing qualifying periods for unfair dismissal via the back door.

It is unclear why the government chose not to extend day one protection to other rights. The two-year qualifying period for statutory redundancy pay and time off to seek alternative employment on redundancy, the 26-week qualifying period for shared parental leave, and the 26-week qualifying period for time off for study or training, are all unaffected by the Bill.

FLEXIBLE WORKING

This may be the most significant departure from what was promised in the Plan. It committed to "*make flexible working the default from day-one for all workers, with employers required to accommodate this as far as is reasonable*".

What the Bill actually does is retain the current right to request mechanism. The employer can then only refuse the request if it considers that one of the existing statutory grounds for refusal applies, and it is reasonable for the employer to refuse the request on that basis.

The only difference therefore is that the "reasonableness" criterion not only applies to the manner in which the employer considers the request (as currently); it will also apply to the reason for refusing the request.

In an additional procedural step, if the employer refuses the request, it needs to state both the reason for the refusal and why it has determined that it is reasonable to refuse on that basis.

Our view

This aspect of the Plan generated much media debate over the summer, with critics suggesting that a universal right to work flexibly could stifle productivity and discourage hiring, and supporters claiming the opposite.

Far from introducing a right to work flexibly, the Bill in fact does little to change the current position on requests for flexible working.

INDUSTRIAL RELATIONS

In this respect the Bill delivers very much what was expected from the Plan. The Bill will repeal the restrictions introduced by the previous government on the process for trade union recognition, and strike action. It will go further by introducing electronic balloting, a new right of access for trade unions to workplaces, and a new requirement on employers to notify their workers of their right to join a trade union. It also introduces protection for employees against suffering detrimental treatment for taking strike action, filling a longstanding loophole in the legislation.

Our view

These were widely expected reforms, and may be among the first to be implemented. Employers that are not currently unionised should prepare for a potential approach; those who are unionised will need to revisit their arrangements in light of the new protections.

FIRE AND REHIRE

The Plan promised to "*end the scourges of 'Fire and Rehire' and 'Fire and Replace' by reforming the law to provide effective remedies and replacing the previous Government's inadequate statutory code*."

The Bill has elected to tackle fire and rehire via changes to the unfair dismissal legislation. It is unclear at this stage what may happen to the statutory Code of Practice, which came into force in July this year.

The Bill introduces a new ground of automatically unfair dismissal, where the sole or principal reason for the dismissal is that (a) the employer sought to vary the employee's contract of employment; and (b) the employee did not agree to the variation.

Protection will also apply where the sole or principal reason for the dismissal is to enable the employer to employ another person, or re-engage the same employee, under a varied employment contract to carry out substantially the same duties as the employee carried out before being dismissed.

There will be a limited defence, if the employer can show that the reason for the variation was "*to 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 in all the circumstances the employer could not reasonably have avoided the need to make the variation.*" The Bill also includes a list of factors to be considered when determining this.

Our view

This is a significant change. It moves away from the existing law, whereby employers simply need to show a good business reason necessitating the change to terms, to avoid unfair dismissal liability. The Bill's provisions do not reflect the reality that employers may need to resort to fire and rehire for reasons which are not purely driven by the financial situation of the business, for instance to comply with new law or regulations. These provisions are likely to be contested by employers in consultation.

The government has also committed to consult on lifting the cap of the protective award if an employer is found to not have properly followed the collective redundancy process during fire and rehire exercises, as well as what role interim relief could play in protecting workers in these situations.

COLLECTIVE REDUNDANCIES

As promised in the Plan, the Bill removes the "at one establishment" criterion from the trigger for collective redundancy consultation in section 188 TULR(C)A 1992, and the related government notification under section 193.

The Bill also makes specific provision for government notifications under section 194 in relation to redundancies affecting ships' crew. These are intended to address some of the concerns arising from the P&O mass firings several years ago.

Our view

This amendment will increase the instances when collective consultation may be required, but should also avoid some of the uncertainty which can arise in practice surrounding what an "establishment" is for these purposes.

PROTECTION FROM HARASSMENT

A new proactive employer duty to take reasonable steps to prevent sexual harassment of their employees is already due to come into effect at the end of this month.

As expected, the Bill will further expand this duty by requiring employers to take "all" reasonable steps to prevent employees from being sexually harassed at work. This reflects the original formulation of the proactive duty, before it was watered down during parliamentary debates.

The Bill also reintroduces employer liability for harassment by third parties. Unlike the previous formulation, repealed in 2013, the new provisions do not require at least two instances of harassment, of which the employer is aware, before it can be fixed with liability.

The Bill will also introduce the ability to make regulations to outline what may constitute "reasonable steps" for the purposes of both the proactive duty and third-party harassment. These are currently set out in guidance from the Equality and Human Rights Commission.

Finally, a complaint that sexual harassment has occurred or is likely to occur is explicitly included as one of the disclosures which may qualify for protection under the whistleblowing legislation.

Our view

The reintroduction of liability for third party harassment will significantly up the ante on employers, not least because the Bill will make it directly enforceable by individuals (rather than simply by the EHRC). The amendment in relation to sexual harassment protected disclosures is somewhat curious, since complaints of sexual harassment are already caught by the existing legislation on protected disclosures, but the amendment perhaps makes the protection more prominent.

FAMILY FRIENDLY AND EQUALITY PROVISIONS

In April this year, protections for parents facing redundancy were extended. The priority for offers of suitable alternative employment now exists for an extended 'protected period'; from when a woman tells her employer she is pregnant, until 18 months after the expected week of childbirth. Employees are also protected: (i) during the course of adoption leave and for 18 months from the day the child is placed with the employee for adoption; and (ii) during the course of shared parental leave and, if the employee has taken at least six weeks of continuous shared parental leave,

for 18 months following the birth / adoption of the child.

The Bill essentially allows ministers to make regulations about dismissals during or after the 'protected period' of pregnancy. Similar provision is also made for regulations to make related changes for employees during the protected period relating to adoption and shared parental leave.

The Bill also allows ministers to make regulations requiring large employers (with 250 or more employees) to create action plans on addressing gender pay gaps and supporting employees through the menopause.

Regulations may also extend gender pay gap reporting to cover not just an organisation's employees, but also its contract workers.

Finally, the Bill also extends the existing right to parental bereavement leave to a more general right to bereavement leave. Details of eligibility will be set out in regulations.

Our view

Enhanced protection for mothers returning to work was a key part of the Plan. It promised to "*make it unlawful to dismiss a woman who has had a baby for six months after her return to work, except in specific circumstances*." The Bill does not much advance the position, since the detail of the dismissal protection will be set out in regulations; however, it does leave open how long after a return to work the protection could apply for. It is interesting to see however that equivalent protections may be extended to other parents during the protected periods related to other types of family leave.

ZERO HOURS CONTRACTS

The Bill does not go so far as to 'ban' zero hours contracts. Instead, it includes fairly detailed provisions setting out a new obligation on employers to make a 'guaranteed hours offer' to qualifying workers. This will essentially require an employer to make work available to the worker for a minimum number of hours, reflecting the average of those worked over a reference period. The detail will be prescribed by regulations.

There are also provisions for workers to receive reasonable notice of a shift, or of any cancellation or changes to a shift. Workers will then be entitled to receive compensation for any shifts cancelled, moved or curtailed, the amount of that compensation to be set out in regulations.

Our view

Labour promised that these proposals would not "*prevent firms from operating flexible workforces or varying shift patterns, but will ensure a baseline level of security and predictability*." However, they certainly have the potential to reduce flexibility for businesses. The devil will be in the detail, yet to be published in regulations. Whether employers which rely on casual workers are equipped to continually monitor reference periods and make guaranteed offers in the manner envisaged by the Bill remains to be seen.

A NEW SINGLE ENFORCEMENT BODY

The Bill enacts the promise from the Plan of *"establishing a new Single Enforcement Body, also known as a Fair Work Agency, to strengthen enforcement of workplace rights."*

The new Fair Work Agency will combine the current enforcement roles of three separate bodies; HMRC (in relation to the national minimum wage), the Gangmasters and Labour Abuse Authority (in relation to labour exploitation) and the Employment Agency Standards Inspectorate (in relation to agency workers). It will also take on the powers of the Director of Labour Market Enforcement, which will be subsumed by the new Agency (for example, the ability to levy financial penalties on employers who fail to pay tribunal awards).

The Agency will have some additional jurisdictions, including in relation to SSP and holiday pay. Further jurisdictions may be added to the Agency's remit by future regulations.

Our view

The new Agency will have broad enforcement powers, which could prove more effective at tackling poor employment practices than individual employee challenges. The potential for further areas of employment law to come within the Agency's remit will also be an area to watch.

OTHER SECTOR-SPECIFIC PROVISIONS

The Bill contains specific provisions relating to the outsourcing of public sector services. Regulations will be able to prescribe outsourcing contract provisions to prevent less favourable treatment for the outsourced workers.

The Bill provides for the establishment of an Adult Social Care Negotiating Body, with the aim of establishing a Fair Pay Agreement in the adult social care sector. The government has said that, following implementation and review of these arrangements, it

will assess "*how and to what extent such agreements could benefit other sectors*".

Finally, the Bill contains provisions reinstating the School Support Staff Negotiating Body, to establish national terms and conditions, career progression routes, and fair pay rates.

WHAT ISN'T INCLUDED

Alongside the Bill, the government has also published a Next Steps document. This outlines other reforms from the Plan to Make Work Pay that the government will look to implement in the future. These include:

- A Right to Switch Off, preventing employees from being contacted out of hours, except in exceptional circumstances. The government intends to introduce a statutory Code of Practice in due course.
- The Equality (Race and Disability) Bill, which will extend pay gap reporting to ethnicity and disability for employers with more than 250 staff, extend equal pay rights to workers suffering discrimination on the basis of race or disability, and ensure that outsourcing of services can no longer be used by employers to avoid paying equal pay
- A move towards a single status of worker and transition towards a simpler two-part framework for employment status.
- Reviews into the parental leave and carers leave systems.

NEXT STEPS

The Bill is scheduled for its second reading on 21 October 2024. It will need to progress through both Houses of Parliament, and could face multiple amendments along the way. Much of the detail has been left to secondary legislation and Codes of Practice, which will be the subject of further consultation.

Some of the changes could be done relatively quickly and straightforwardly. They include:

- Day one rights (although the new statutory probation provisions will take longer)
- Sick pay changes
- Repeal of anti-trade union legislation
- Flexible working changes

Others are more complicated and may take longer, such as:

- Zero hours contract changes
- Fire and rehire changes
- Right of access of unions to workplaces
- Collective bargaining in the care sector

The government has made it clear that it may be autumn 2026 before the first of these changes comes into effect. This should mean that businesses have time to both input into the detail of those changes via the various consultations (which will begin in 2025), and by starting to consider what changes they may need to their employment structures, policies and processes to accommodate these changes.

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