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NEWSLETTER

JULY 2024

EMPLOYMENT BULLETIN

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EMPLOYMENT RIGHTS BILL

The King's Speech 2024, delivered on 17 July 2024, confirms that an Employment Rights Bill will be published within the new Government's first 100 days. Although there is little detail at this stage, the Bill is intended to start the process of implementing some of the policies set out in the Labour Party's Plan to Make Work Pay and in its Election Manifesto, including:

- Making **protection from unfair dismissal**, as well as parental leave and sick pay, day one rights for "all workers". Employers will continue to be able to operate probationary periods to assess new hires.

  Rights to protection from unfair dismissal and parental leave currently apply to employees only, so it seems likely that the Bill will change this so that they apply, from day one, to workers as well as to employees. It also seems probable that there will be a limit on the length of probationary periods during which the protection from unfair dismissal would not apply.

- **Dismissal and re-engagement:** ending "fire and rehire" and "fire and replace" by providing effective remedies and replacing the existing statutory Code of Practice on dismissal and re-engagement.

  The current Code of Practice on dismissal and re-engagement, which came into force on 18 July, applies where an employer is considering making changes to employees' contracts of employment and envisages that, if the employees or their representatives do not agree to the changes, it might opt for dismissal and re-engagement (or engagement of new employees) on the new terms. (For details of the Code, please see our Employment Bulletin March 2024.) The Code does not apply where the prospect of dismissal and re-engagement of employees was raised by the employer with the employees and/or their representatives before 18 July. During Parliamentary debates, the Labour Party indicated the areas it would look to change; in particular, sanctions for non-compliance, stricter requirements on the provision of information by the employer, and more prescriptive guidance on the consultation process.

- Banning "exploitative" **zero-hour contracts**, ensuring workers have a right to a contract that reflects the number of hours they regularly work and that all workers get reasonable notice of any changes in shift with proportionate compensation for any shifts cancelled or curtailed.

- Making the right to **flexible working** a day one right for all workers, with employers required to accommodate this "as far as is reasonable".

- Making it **unlawful to dismiss** a woman who has had a baby for six months after her return to work, except in "specific circumstances" (not defined).

- Updating **trade union legislation**, removing restrictions on trade union activity (including minimum service levels) and "*ensuring industrial relations are based around good faith negotiation and bargaining*". The process of statutory recognition

will be simplified and there will be a regulated route to allow workers and union members to have a reasonable right to access a union in the workplace.

- **Statutory Sick Pay:** removing the lower earnings limit and the waiting period.

In addition to the measures in the Employment Rights Bill, the background briefing notes to the Bill say that the Government will remove the age bands for the **National Minimum Wage**.

The notes also mention briefly a second employment law Bill – the **Equality (Race and Disability) Bill**, giving the right to equal pay for ethnic minorities and disabled people and introducing mandatory ethnicity and disability pay reporting for larger employers (those with 250+ employees). No further details - crucially, how ethnicity and disability would be categorised - are provided.

The measures in the Employment Bill cover only about half of the pre-Election pledges; notable omissions (for the moment) are the proposals to change the law on collective redundancies - so that the requirement to conduct collective consultation would be determined by the numbers across the business rather than in the workplace - and to increase time limits for employment claims. We can expect more developments in the coming months, therefore. The implications for employers of the broad range of proposals are discussed by Philippa O'Malley and Clare Fletcher from our Employment Team in this podcast: A Labour Government – will it 'Make Work Pay'?

MEANINGFUL CONSULTATION REQUIRED BEFORE DECIDING ON REDUNDANCY POOL

Summary: The Employment Appeal Tribunal (EAT) found that a redundancy dismissal of an employee placed in a pool of one was unfair because consultation had not taken place before the employer decided on the selection pool (*Valimulla v Al-Khair Foundation*).

Key practice point: This decision is the latest in a series of cases where the EAT has regarded the absence of proper consultation at a formative stage, when the employee may be able to influence the decision, as indicative of an unfair redundancy process, resulting in a finding of unfair dismissal. We discussed in our Employment Bulletin January 2024 the EAT's decision in *Haycocks v ADP RPO UK Ltd* (now on appeal) that a dismissal for redundancy was unfair because workforce consultation had not taken place at a stage when the employee had adequate information and time to respond. Employers must consider the redundancy selection pool and, where a single employee is at risk of redundancy, reflect and consult on whether the pool should be expanded to cover employees at other locations. Depending on the facts, geographical locations may be of less significance now than when many of the previous cases on redundancy selection were decided.

Collective consultation may be triggered more frequently in future if the new Government implements its Manifesto pledge to make the requirement to conduct collective consultation determined by the numbers across the business rather than at one workplace.

Facts: The claimant worked as a fundraising liaison officer, based in North West England. Three other employees performed the same or similar roles in different geographic locations. During the pandemic he was dismissed as redundant as part of a nationwide redundancy process. For the purposes of redundancy selection, he was placed in a pool of one. The Employment Tribunal found that his dismissal was fair, accepting the employer's case that his role was unique.

Decision: The claimant's appeal was allowed. The Tribunal had not considered whether the process and decision making was fair and reasonable. The Tribunal should have considered whether the employer had genuinely applied their mind to the pool and whether the chosen pool came within the range of reasonable approaches open to a reasonable employer. The Tribunal had not found that the reason for the redundancy arose from a reduction in the need for the specific work to be done at a particular location; it appeared to have accepted that the role was unique, notwithstanding the evidence that other employees performed the same role, albeit at other geographical locations.

In addition, the dismissal was procedurally unfair because there was a lack of meaningful consultation. Consultation was carried out after the key decision - the identification of the pool of one - had been made. To be meaningful it had to take place at a time where it could potentially make a difference, and in such a way that responses to a proposal were considered and reflected upon, prior to a decision being made. The employer should have set out a provisional proposal (along with the rationale), provided an opportunity for feedback, and considered the response with an open mind, reflecting on whether it altered the initial proposal.

GUIDANCE ON NEW DUTY TO PREVENT SEXUAL HARASSMENT IN THE WORKPLACE

The Equality and Human Rights Commission (EHRC) has published a short consultation (closing on 6 August) on a draft update of its 2020 technical guidance on workplace harassment to take into account of the Worker Protection (Amendment of Equality Act 2010) Act 2023 which will come into force on 26 October 2024. The Worker Protection Act introduces a new duty on employers to take "reasonable steps" to prevent sexual harassment of employees in the course of their employment. Employers are already potentially liable for discrimination (including sexual harassment) by employees in the course of their employment, unless the employer can show they have taken all reasonable steps to prevent it, but the Act introduces a proactive duty to prevent sexual harassment.

Although the guidance is currently non-statutory and therefore does not have to be taken into account by tribunals, the EHRC has said it will update its statutory Employment Code in due course to reflect the new duty.

The draft guidance refers to the new duty as "preventative" – employers should anticipate scenarios when its workers may be subject to sexual harassment in the course of employment and take action to prevent it. If an employer fails to take reasonable steps to comply with the preventative duty, there are consequences:

- First, the EHRC has the power to take enforcement action against the employer.
- Secondly, if an individual succeeds in a claim for sexual harassment and is awarded compensation, the Employment Tribunal must consider whether the employer has complied with the preventative duty. If it considers the preventative duty has been breached, it can increase compensation by up to 25%. However, an individual cannot bring a claim for a breach of the preventative duty alone.

As originally drafted, the Bill that became the Worker Protection Act included a specific clause imposing liability on employers for **harassment by third parties**. The provision was removed during the Bill's passage through Parliament. The Labour Party indicated at the time that it would reinstate liability for harassment by third parties and the notes to the King's Speech, while not confirming this, mention that a quarter of reported sexual harassment in England and Wales takes place at work. In any event, EHRC's view is that the preventative duty includes a duty to take reasonable steps to prevent sexual harassment by third parties (and the wording in the Worker Protection Act is wide enough to cover it).

The examples in the guidance illustrate the need for all employers, and particularly those in businesses with a high level of contact with customers and members of the public, to consider carefully what they can do to minimise the risk of third party harassment. One hypothetical scenario outlines the reasonable steps a theatre company would be required to take to comply:

- Adopt a zero tolerance policy to third party sexual harassment, communicate that policy to staff and encourage them to report any instances of third party harassment.
- Develop a protocol for dealing with reports.
- Inform self-employed consultants of the policy when they contract to work with the company, advise audiences when they book tickets, and display notices in the public and private areas of the theatre.
- Staff training would have been a reasonable step had the employer in the scenario not had a limited budget: what constitutes "reasonable steps" will vary, depending on factors such as the employer's size, the sector it operates in, the working environment and its resources.

RENEWAL OF FIXED-TERM CONTRACT BEYOND FOUR YEARS WAS JUSTIFIED

Summary: The Employment Appeal Tribunal (EAT) confirmed that the continued employment of a locum consultant surgeon under a fixed-term contract (FTC) beyond four years was justified on objective grounds (*Lobo v University College London Hospitals NHS Foundation Trust*).

Key practice point: This decision highlights the need for employers to ensure they have documented business reasons for the use of successive FTCs extending beyond four years. As is often the case with NHS employers, there were factors in play relating to clinical needs which might not be as persuasive in the private sector.

The use of FTCs may increase with day one unfair dismissal rights under the Employment Bill, although it should be noted that the expiry of an FTC is a "dismissal" for employment law purposes and employers will need a fair reason for allowing an FTC to expire, in order to avoid an unfair dismissal claim.

Background: Under Regulation 8 of the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, an employee employed continuously under an FTC or a series of FTCs for a continuous period of four years or more may be declared a permanent employee if the use of an FTC is not justified on objective grounds at the time it was last renewed (or, where it has not been renewed, when it was entered into).

Facts: The claimant had been employed by the Trust as a locum consultant breast surgeon under a series of FTCs. The Trust decided that it would appoint a substantive consultant and ringfenced the post for the claimant. She attended an interview but was not successful in her application. She applied for a declaration that she had become a permanent employee under Regulation 8 because she had been continuously employed under FTCs for four years or more. The Employment Tribunal found that there were significant differences between the claimant's locum role and the permanent post (in particular, the permanent role included additional responsibilities) and that continued employment on an FTC was justified. The claimant appealed.

Decision: The appeal was rejected. The Trust had established objective justification for continuing to employ the claimant on an FTC.

The Trust had a legitimate aim - providing a safe, efficient, and fully functioning service - and it was appropriate and necessary to engage the claimant on an FTC because (among other things):

- There was a clear need to recruit a permanent substantive consultant which, under the NHS regulations for the appointment of consultants, entailed a rigorous selection procedure. The Trust was entitled to seek the best person for the job through the prescribed process.
- It was appropriate and necessary to use an FTC for a locum to meet the needs of patients pending the appointment of the substantive consultant.
- The use of an FTC had been the subject of mutual consultation and the Trust's position that the claimant's contractual position was not permanent had been clear throughout.

The EAT commented that had the locum and substantive roles been the same it might have been difficult for the Trust to justify the decision to maintain the claimant on an FTC while recruiting to the permanent post. However, the Tribunal had accepted the evidence that roles were genuinely different.

HORIZON SCANNING

What key developments in employment should be on your radar?

1 July 2024	For TUPE transfers on or after 1 July, small employers, and all employers where a transfer of fewer than 10 employees is proposed, can consult directly with employees if there are no employee representatives
18 July 2024	Statutory Code of Practice on Dismissal and Re-engagement in force, where the prospect of dismissal and re-engagement is raised with employees/reps on or after 18 July
September 2024	Workers (Predictable Terms and Conditions) Act 2023 expected to come into force: right to request a more predictable working pattern
1 October 2024	Employment (Allocation of Tips) Act 2023 and statutory Code of Practice expected to come into force: obligations on employers to deal with tips, gratuities and service charges, including having a written policy and tipping records

By mid-October 2024	Employment Rights Bill to implement proposals in the Plan to Make Work Pay that require primary legislation, including on day one rights; dismissal and re-engagement; zero hours contracts; flexible working; trade union legislation; and protection from dismissal for mothers. Introduction of Draft Equality (Race and Disability) Bill, to provide full rights to equal pay for ethnic minorities and disabled people and to introduce mandatory ethnicity and disability pay reporting for larger employers, to be confirmed
26 October 2024	Worker Protection (Amendment of Equality Act 2010) Act 2023 in force: duty to take reasonable steps to prevent sexual harassment of employees
2025	Economic Crime and Corporate Transparency Act 2023: failure to prevent fraud offence for large organisations expected to be in force
April 2025	Neonatal Care (Leave and Pay) Act 2023 expected to come into force: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care
Uncertain	• Three-month limit on non-compete clauses in employment and worker contracts proposed by previous Government • Regulations to bring Victims and Prisoners Act 2024 into force: NDAs that prevent certain disclosures by victims of crime to be unenforceable

We are also expecting important case law developments in the following key areas during the coming months:

Contracts of employment: *Secretary of State v Public and Commercial Services Union* (Supreme Court: whether a trade union can enforce a contractual right to check-off arrangements); *Ryanair DAC v Lutz* (Court of Appeal: whether pilot contracted through intermediary was an agency worker)

Discrimination / equal pay: *Rollet v British Airways* (EAT: whether the Equality Act 2010 protects against indirect associative discrimination); *Bailey v Stonewall Equity Limited* (EAT: whether a campaigning group had instructed, caused or induced religion or belief discrimination by the employer); *Randall v Trent College Ltd* (EAT: whether worker's treatment was belief discrimination or was treatment because of objectionable manifestation of belief); *Higgs v Farmor's School* (Court of Appeal: whether dismissal was because of the manifestation of protected beliefs, or a justified objection to the manner of manifestation); *Thomas v Surrey and Borders Partnership NHS Foundation Trust* (EAT: whether English nationalism was protected as a philosophical belief)

Employment status: *HMRC v Professional Game Match Officials Ltd* (Supreme Court: whether referees were employees for tax purposes)

Industrial action: *Jiwanji v East Coast Main Line Company Ltd* (EAT: whether a pay offer directly to staff during collective negotiations was an unlawful inducement); *Morais v Ryanair DAC* (Court of Appeal: whether statutory protection from detriment connected with trade union activities protected workers participating in industrial action)

Redundancies: *USDAW v Tesco Stores Ltd* (Supreme Court: whether implied term prevented employer from dismissing and re-engaging employees); *ADP RPO UK Ltd v Haycocks* (Court of Appeal: whether redundancy dismissal was fair in absence of workforce consultation)

Unfair dismissal: *Charalambous v National Bank of Greece* (Court of Appeal: whether a misconduct dismissal was fair when the decision to dismiss was taken by a manager who did not conduct the disciplinary hearing); *Hewston v Ofsted* (Court of Appeal: whether employee was unfairly dismissed for misconduct that he had not been forewarned would lead to summary dismissal)

Whistleblowing: *SPI Spirits (UK) Ltd v Zabelin* (Court of Appeal: whether whistleblowing detriment compensation could be capped by termination agreement).

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