SLAUGHTER AND MAY/

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EMPLOYMENT BULLETIN

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ELECTION MANIFESTOS: EMPLOYMENT LAW PROPOSALS

The main political parties published their Election Manifestos last week. By far the most detailed proposals on employment aspects are from the **Labour Party**, which has recently published Labour's Plan to Make Work Pay – Delivering a New Deal for Working People, a revised version of its 2022 Green Paper. Their Manifesto says that they will implement the Plan to Make Work Pay (the Plan) in full, introducing legislation within 100 days, although with full consultation before legislation is passed.

Headline proposals include:

- A change in the law on **collective redundancies** so that the requirement to conduct collective consultation - where an employer proposes 20 or more redundancies within 90 days or less - would be determined by the numbers across the business rather than, as currently, at one "establishment" (generally interpreted as a workplace). For employers with multiple sites, this would inevitably mean that the duty to consult collectively would be triggered more often than at present. It is not clear if the consultation would have to be conducted across the whole business, or whether it could be via the individual sites. The Plan also mentions strengthening existing protections for workers subject to TUPE.
- **"Fire and rehire"**: there would be "effective remedies against abuse" and replacement of the statutory Code of Practice on dismissal and re-engagement. (The Code of Practice was recently introduced by the Government and will take effect from 18 July; details are in our Employment Bulletin March 2024.) The pledges in the 2022 Green Paper to make employers consult about contractual changes and to prevent workers being dismissed for failing to agree a worse contract are not referred to in the Plan.
- Introduction of "basic" **day one rights**; specifically, no qualifying periods for protection against unfair dismissal, sick pay and leave, and parental leave. The Plan goes on to say, "*This will not prevent fair dismissal, which includes dismissal for reasons of capability, conduct or redundancy, or probationary periods with fair and transparent rules and processes.*" This change might be made early on, given that it would be relatively straightforward to legislate. It seems likely to make employers even more cautious about recruitment and probationary periods would assume greater significance.
- There has been a change of approach on **employee/worker status**. In place of the Green Paper proposal to create a single status of worker for all but the genuinely self-employed, the Plan refers to moving towards a single status. In the light of this, it is not clear if the day one rights would be available to workers and employees, or employees only. However, given that it is difficult for employers to be confident that an individual is a worker and not an employee, it would be safer to assume that the day one rights would apply to all staff.

- **Time limits** for employment claims would be increased to six months for all claims. This could increase the importance of historic claims in transactional due diligence exercises. There is no discussion of employment tribunal fees, on which there has been a Government consultation this year.

Other changes to watch out for if there is a Labour government include:

- There is a one-line mention of strengthening protection for **whistleblowers**. Arguably the most striking omission from the Plan is the Green Paper proposal to remove the statutory caps on unfair dismissal compensation; it appears that this has been dropped. Consequently, despite the potential removal of the two-year service qualification for unfair dismissal claims, the advantages of a successful whistleblowing dismissal or detriment claim would remain.
- "Large" firms would be required to publish and implement action plans to close their **gender pay gaps** and outsourced workers would have to be included in gender pay gap and pay ratio reporting. This would presumably apply to employers currently covered by the gender pay gap regulations (those with 250 or more employees). Ethnicity and disability pay gap reporting would become mandatory for employers with more than 250 staff.
- On **equal pay and discrimination**, the Labour Manifesto includes proposals that were not in the Plan: extending equal pay to cover race and disability, and protection from menopause discrimination (in addition to a requirement for employers with more than 250 employees to produce menopause action plans). The Plan also refers to measures "*to ensure that outsourcing of services can no longer be used by employers to avoid paying equal pay*". This would take equal pay law beyond the "single source" test for comparison and could affect the way in which discrimination claims by contract workers, such as in the Court of Appeal case discussed below, are brought in future.
- **Gig economy**: "Exploitative" zero hours contracts are to be prohibited. (It is not clear if this applies to all zero hours contracts.) All workers would have a right to have a contract reflecting hours regularly worked and reasonable notice of changes in shifts or working time, with compensation for cancelled shifts (proportionate to the notice given). Labour has not said how this would interact with the Workers (Predictable Terms and Conditions) Act 2023. The Act, which gives a right to request a more predictable working pattern, was expected to come into force this September, but its status is uncertain following the dissolution of Parliament.
- **Flexible working** would be "*the default from day one for all workers, except where it is not reasonably feasible*". Again, more detail is needed on whether this means that there would still be only a right to request (rather than a right to) flexible working.
- Employees would be able to "collectively raise **grievances** with ACAS" about conduct at work. It is thought that this may simply mean that the ACAS Code of Practice on Disciplinary and Grievance Procedures, which currently applies to individual grievances only, would cover collective grievances.
- There will be extensive changes to **trade union** legislation, including simplifying the process for applying for statutory recognition, giving trade unions a right of access to workplaces for recruitment and organisation, and allowing trade unions for those in the gig economy.
- Workers would have a **right to switch off**. The Plan refers to following models in place in Ireland or Belgium, where employers and workers agree workplace policies on the right not to be contacted by their employer.

There are some areas where Labour says comparatively little. In particular, there is no mention of their previous proposal (in the Green Paper) to extend statutory maternity and paternity leave, although they do commit to a review of parental leave within the first year of government. By contrast, the **Liberal Democrats'** Manifesto includes extensive proposals on **family leave**, including making all parental pay and leave day-one rights, increasing statutory payments and introducing an extra "use-it-or-lose-it" month for fathers and partners, paid at 90% of earnings with a cap for high earners. Large employers would be required to publish their parental leave and pay policies. The other major plank of the Liberal Democrats' Manifesto, which has received much press coverage, is on **disability and caring**. Proposals include making caring and care experience protected characteristics under the Equality Act 2010, with employers having a duty to make

reasonable adjustments; and giving all those with a disability the right to work from home, unless there are significant business reasons why it is not possible.

On the gig economy, the Liberal Democrats' proposals include shifting the burden of proof in tribunal claims on employment status to the employer and setting a 20% higher minimum wage for those on zero-hour contracts at times of normal demand, to compensate for the uncertainty of fluctuating hours of work. One other proposal to note is for workers in listed companies with more than 250 employees to have a **right to request shares**, to be held in trust for the benefit of employees. The proposal does not expand on employers' duties in responding to requests.

The **Conservative Party** Manifesto includes previously trailed proposals such as a reduction in employee National Insurance to 6% by April 2027, with the main rate of self-employed NI abolished entirely by the end of the next Parliament. There is also a commitment to revise the fit note process. The Manifesto says that 94% of fit notes are currently being signed off as "not fit for work" (the other categories are "fit for work" or "may be fit for work with some adjustments"). The aim would be to move the responsibility for issuing fit notes away from GPs towards specialist work and health professionals.

DISCRIMINATION CLAIM PRECLUDED BY PREVIOUS SETTLEMENT AGREEMENT

Summary: The Employment Appeal Tribunal (EAT) has decided that a disability discrimination claim was precluded by a settlement agreement entered into nine years previously. Following a decision of the Court of Session in Scotland, the EAT confirmed that future claims could be validly compromised even if unknown by the employee at the time the agreement was concluded. Section 147 of the Equality Act 2010, which allows employment discrimination claims to be compromised by way of a settlement agreement that "relates to the particular complaint", was satisfied. It did not matter that, unlike in the Court of Session case, it was not a settlement agreement on termination (*Clifford v IBM United Kingdom Ltd*).

Key practice point: The Court of Session's decision in *Bathgate v Technip Singapore Pte Ltd* - that Section 147 did not prevent the settlement of future claims unknown to the employee at the time the agreement was concluded, so long as the wording was sufficiently particularised - was not binding on English tribunals but, as expected, has been followed by the EAT. Of more significance is the fact that, unlike *Bathgate*, this case involved an agreement entered into during employment, rather than on termination of employment. It had been envisaged that a different approach might be taken where employment continues, given the greater likelihood of future claims arising. However, the EAT was clear that the approach was the same: there is nothing in Section 147 that prevents the settlement of future claims provided appropriately clear language is employed, referring to the generic description and/or the relevant section of the statute.

Facts: In 2012 the claimant pursued a grievance relating to various matters including the failure to transfer him to the employer's Disability Plan. Under the terms of a compromise agreement (now known as a settlement agreement), the employer agreed that the claimant would move to the Disability Plan and receive disability salary payments and the claimant waived the right to bring various specified claims, including disability discrimination claims, "*whether or not they were or could be in the contemplation of*" the parties at the date of the agreement. In 2022, the claimant brought disability discrimination claims arising from the fact that since his transfer to the Disability Plan, he had not had annual salary reviews and the level of payments he received had not been increased. The Employment Tribunal struck out the claims on the basis that they were precluded by the settlement agreement. The claimant appealed.

Decision: The EAT rejected the appeal. The material facts and circumstances were indistinguishable from *Bathgate*; both cases concerned future claims that had not arisen at the time when the settlement agreement was signed. The fact that the employment relationship in *Bathgate* had come to an end, whereas the relationship between the parties continued in this case, made no difference. The purpose of Section 147(3) was to prevent an employer from being able to use a blanket waiver whereby an employee could sign away their rights without appreciating the significance of what they were doing. The Court of Appeal in *Hinton v University of London* decided that this required that the claims to be covered by the agreement must be identified by a generic description (such as "unfair dismissal") or by reference to the section of the statute giving rise to the claim.

The EAT also noted that it was clear from the Court of Appeal's recent decision in *Arvunescu v Quick Release (Automotive) Ltd* that future claims could be settled by means of a COT3 agreement and there was no basis for drawing a distinction between settlement agreements and COT3s for these purposes.

VOLUNTEER COULD BE WORKER IN RELATION TO REMUNERATED ACTIVITIES

Summary: The Employment Appeal Tribunal (EAT) decided that a volunteer who attended activities in respect of which he was entitled to remuneration was a worker (*Groom v Maritime and Coastguard Agency*).

Key practice point: This appears to be the first reported EAT case that has found that a volunteer is a worker (and therefore entitled to certain employment rights). The decision shows that describing a person as a volunteer or intern will not necessarily mean that the individual will not have employment rights; each relationship will be determined on its own facts. Clearly it was significant that there were activities for which remuneration (other than reimbursement of expenses) was payable.

Facts: The claimant was a volunteer coastal rescue officer for the Maritime and Coastguard Agency. He made a claim for refusal to permit accompaniment by a trade union representative at a disciplinary hearing. He would only have the right to accompaniment if he was a "limb (b) worker" as defined in Section 230 of the Employment Rights Act 1996. The Employment Tribunal decided that he was not a limb (b) worker because there was no contract between the parties. The claimant appealed.

Decision: The appeal was allowed and the EAT substituted a decision that the claimant was a worker when he attended activities in respect of which he was entitled to remuneration. A contract for the provision of services came into existence when the claimant provided services at an activity for which there had been a promise of remuneration.

The EAT rejected the Agency's contention that a volunteer relationship was outside the scope of Section 230. Each case turned on analysis of the particular arrangements between the parties, either written or derived from the evidence. The fact that the parties described the relationship as voluntary might have indicated that the parties' intention was that there would be no contract between them, but it was not conclusive. In this case, the documents created a clear right to remuneration in respect of most activities, and it was irrelevant that the claimant had to submit a claim for payment and that many volunteers in practice did not do so.

CONTRACT WORKERS HAD NO DISCRIMINATION CLAIM AGAINST END USER

Summary: The Court of Appeal, overturning a decision of the Employment Appeal Tribunal (EAT), held that contract workers supplied by a third-party contractor to work for an end-user could not make a discrimination claim against the end-user. The claim, based on the fact that the contract workers were paid less than the directly employed workforce, did not fall within the scope of Section 41 of the Equality Act 2010, which prohibits discrimination by a principal against contract workers, because it related to the remuneration payable under their contracts with the contractor and had nothing directly to do with their relationship with the end-user (*Boohene v Royal Parks Ltd*).

Key practice point: The EAT's decision, that Section 41 was engaged because the end-user had effectively dictated the terms on which the contract workers were to carry out the work, was unexpected. The Court of Appeal's reversal of that decision explicitly recognises the practical and commercial aspects of outsourcing. However, as discussed in the item on Election Manifestos above, if in government the Labour Party would put in place measures "*to ensure that outsourcing of services can no longer be used by employers to avoid paying equal pay*".

Facts: The claimants were employees of a contractor working on an outsourced maintenance contract for the Royal Parks. Royal Parks had committed to ensuring that the minimum pay of its own employees would not fall below the London Living Wage (LLW) but did not require the contractor to pay its employees the LLW. The claimants brought indirect race discrimination claims against Royal Parks in respect of their treatment as compared to direct employees, based on the unequal impact on workers from a black or minority ethnic background, who were more likely to be in outsourced roles. The EAT held that the complaints fell within Section 41 because, by selecting a contractor that did not pay the LLW, Royal Parks had effectively dictated the terms on which the contract workers were to carry out the work.

Decision: The Court of Appeal allowed Royal Parks' appeal. The claimants could not have a claim against Royal Parks under Section 41 because the alleged discrimination related to the remuneration payable under their employment contracts and had nothing directly to do with the principal-worker relationship between Royal Parks and the claimants. A claim could only be made against the contractor as their employer.

The Court of Appeal went on to say that it did not agree that Royal Parks had dictated the terms of the contracts. There was no finding that it positively prohibited the contractor from paying the LLW. It simply reflected the commercial reality in every contracting-out situation that what a supplier can afford to pay its workers depends on the overall contract price.

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, will be able to consult directly with employees if there are no employee representatives
4 July 2024	General Election
18 July 2024	Statutory Code of Practice on Dismissal and Re-engagement in force
September 2024	Workers (Predictable Terms and Conditions) Act 2023 was expected to come into force: right to request a more predictable working pattern
October 2024	Worker Protection (Amendment of Equality Act 2010) Act 2023 was expected to come into force: duty to take reasonable steps to prevent sexual harassment of employees
October 2024	Employment (Allocation of Tips) Act 2023 and statutory Code of Practice was expected to come into force: obligations on employers to deal with tips, gratuities and service charges, including having a written policy and tipping records
April 2025	Neonatal Care (Leave and Pay) Act 2023 was expected to come into force: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care
2025	Failure to prevent fraud offence for large organisations, under the Economic Crime and Corporate Transparency Act 2023, expected to be in force
Uncertain	• Proposed three-month limit on non-compete clauses in employment and worker contracts • Regulations to bring the Victims and Prisoners Act 2024 into force: NDAs that prevent certain disclosures by victims of criminal conduct 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 a pilot contracted through an 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); *Clayson v Ministry of Justice* (EAT: whether workers were treated less favourably on grounds of part-time status in relation to new pension arrangements)

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 the 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 a termination agreement).

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