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2 Highlights From Labour's Notable Employment Rights Bill

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So, it is finally here then — Labour's Employment Rights Bill delivered earlier this month, as promised, within 100 days of the government entering office. The bill is accompanied by an easily accessible "next steps" guide outlining the contents of the bill and the reforms the government will look to implement over the course of its term.

Many of the bill's most-publicized measures aim to improve the position for lower-paid members of the workforce and those on casual contracts, for example, it guarantees day-one sick pay, removal of the lower earnings limit for sick pay and a right to guaranteed hours. These changes are less likely to affect high earners and executive-level employees, and it is worth noting that reforming noncompetes appears to have fallen off the legislative agenda — at least for now.

The most significant changes are, without doubt, those to practices related to unfair dismissal, sexual harassment, collective redundancies, flexible working, fire and rehire, and collective rights. It is impossible to address all of these proposed reforms in detail in one paper — and we should expect a lengthy consultation process given that Labour will likely continue to try to keep all stakeholders happy and the consultation process is unlikely to commence before next year. Some changes, for example, those to sick pay entitlement and strengthening certain trade union laws, will probably come into force fairly soon, however.

In this article, we focus on two particular proposed reforms, both of which have been regular topics of discussion since Labour first published its plan to "Make Work Pay" and promised to bring forward legislation to implement the reforms contained in that policy document: fire and rehire, and unfair dismissal.

Fire and Rehire

Usually, employees have to agree to changes to the terms of their contracts. Fire and rehire is a tactic used to circumvent this by terminating an employee's current employment and then offering to rehire that same employee on a new contract with different — and normally less beneficial — terms.

The bill makes it automatically unfair to dismiss an employee for refusing to agree a change in terms, or to replace them with another employee on varied terms to carry out substantially the same role. It looks

as though a very limited exception may apply in cases of financial distress, but the details, and therefore what this will mean in practice, will be subject to consultation.

What we can confidently say, at this juncture, is that the bill looks to severely restrict an employer's ability to change contractual terms without employee consent. In fact, the exception seems so narrow, and potentially tricky to rely on, that many employers will likely look for a way around it, rather than try to rely on it.

One approach might involve an increasing reliance on variation clauses. Most employment contracts contain these, but they are seldom used to enforce material changes because of the associated risks. It is difficult in practice to rely on such clauses to make material changes in a way that does not undermine trust and confidence and therefore create a basis for a constructive dismissal claim.

That said, there is some case law that suggests that a clearly worded variation clause can be relied on where the changes that the employer wants to make are not beneficial to the employee, so might we perhaps see an increased reliance on such clauses to change certain contractual terms without employee consent?

Interestingly, the "next steps" guide states: "As key remedies to end this practice, we are 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 as well as what role interim relief could play in protecting workers in these situations." However, the bill doesn't include these measures.

Perhaps this is another case of "let's wait and see what comes of the extensive consultation."

Unfair Dismissal

Schedule 2 of the bill confirms the abolition of the qualifying period to make unfair dismissal a day-one right. This is of course something that the government already has the power to do by statutory instrument, and so the Labour party could have abolished the qualifying period within months of taking office, if it had wanted to. The government clearly recognizes the impact the change will have and is under pressure from both business and trade unions to get this right. This also explains why the government has said that this change will now not be introduced before the autumn of 2026.

Some commentators have pointed out that this essentially amounts to a long transition period with the effective qualifying period reducing over time — i.e., employees recruited today will qualify for unfair dismissal rights in about two years from now, employees recruited in a year's time will qualify after about one year's service, and so on — though this of course assumes that the change is implemented in this way rather than to all employment relationships commencing on or after a specific date.

Once the change is made, it seems this will be permanent. Section 108 of the Employment Rights Act 1996, which sets out the current qualifying period, will be repealed. A future government will therefore not be able to issue regulations to increase the qualifying period, but would need to introduce primary legislation in order to do so.

The new Section 108A provides that an employee cannot claim unfair dismissal unless they have actually started work. So, even once the changes come into effect, if an employee is dismissed before their first day on the job, then the employee cannot claim unfair dismissal. There are the anticipated exceptions for automatic unfair dismissal, where the reason for dismissal is something like union membership,

whistleblowing or asserting a statutory right, etc.

The probationary period provision is interesting — the bill does not use the word "probation" but rather an "initial period of employment." There is a power to introduce regulation that would allow the secretary of state to apply a different standard of reasonableness to dismissals that take place during this initial period. This includes situations where an employer gives notice during the initial period and this notice expires up to three months thereafter.

The duration of this initial period of employment is not set out in the bill — that is something for the secretary of state to specify in the future regulations. Some believe the government has indicated in its "next steps" guide that it currently favors a nine-month period, while others are of the view that this is merely used as an example.

Even if the dismissal does take place during the initial period, it will still be possible for the employee to claim unfair dismissal. The employer will have to show that the reason for dismissal is (1) related to the employee's conduct or capability; (2) because the employee is subject to a statutory ban — e.g., not entitled to work in the U.K. or disbarred from the profession; or (3) for "some other substantial reason" related to the employee, or SOSR.

Redundancy is not included in the list, suggesting that employees who are made redundant on day one will be able to claim unfair dismissal in the same way as any other employee, with the same test of fairness applying. On an initial review, this seemed odd, but perhaps the thinking here is that, in most cases, an employer ought to know (or foresee?) at the point of hiring someone if there could potentially be a redundancy scenario in the short term and therefore factor that in to whether or not to recruit.

Also, a dismissal for redundancy during the probationary period could still be fair, provided the usual redundancy process is followed. In other words, you would just need to treat the employee like other employees at risk of redundancy, assuming there are others, of course.

The reference to SOSR is a little different. Under the Employment Rights Act 1996, in a typical unfair dismissal claim the employer has to show that the reason for dismissal is for "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held," but with the new bill the special rules for this probationary period will apparently only apply if the reason is "related to the employee."

This suggests that a dismissal connected with a business reorganization would not be covered, but a dismissal following a breakdown in working relationship would. There is also no suggestion that the reason itself needs to be one that is "capable of justifying dismissal" — which is usually an important part of the SOSR test. It is unclear whether this was intentional, and if so, what the thinking behind it was.

Currently, the bill provides little clarity on how much easier it will be to dismiss employees during this initial period. However, the regulations introduced by the secretary of state can modify the test of reasonableness for unfair dismissal claims. This could mean a minor adjustment, such as requiring the Employment Tribunal to consider the fairness of any probation period, or a more significant change, like applying a different reasonableness test that mandates a specific procedure while presuming that a dismissal is otherwise fair.

Business will of course want to see a light-touch approach to regulation here, but there would be little

point to these reforms if the final provisions end up having the effect of reintroducing qualifying periods for unfair dismissal via the back door — and the unions will be alive to this. In the "next steps" guide, the government says:

> As a starting point, the Government is inclined to suggest [a fair procedure] should consist of holding 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). The Government will consult extensively, including on how it interacts with Acas's Code of Practice on Disciplinary and Grievance procedures.

In conclusion, while many things still need to be clarified, one thing is clear: The bill marks the start of a generational shift in U.K. employment law and, over time, will inevitably increase the scope for grievances and disputes, even with employees who have only been employed for a short time. While there is little for employers to do now, it is important — particularly for those in human resources and compliance functions — to keep an eye on developments to ensure that the business is prepared for the reforms once they become law.

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