Call for written evidence: Employment Rights Bill

This evidence is submitted by Lewis Silkin LLP in connection with the employment law implications of the Employment Rights Bill. We are a law firm with a particular specialism in employment law. We have over 279 specialist employment, immigration and data lawyers including 42 partners, based in London, Oxford, Manchester, Leeds, Cardiff, Dublin, Belfast and Hong Kong. We are ranked in the top tier of employment practices by legal directories and many of our lawyers are recognised as leading practitioners in employment law. Our clients tend to be large employers across the private sector and our evidence should be seen in that context.

Our evidence is as follows:

Family rights reform

A wider review of the legal framework will be welcomed. The shared parental leave system isn't working and large private sector employers are a step ahead of the law, even after the changes in the Bill.

1. In our experience, most large employers provide family leave entitlements which are more generous than the statutory minimums, although the focus is usually on enhanced pay rather than length of service requirements.
2. We note that the Bill does not make shared parental leave a day 1 right, and we hope this is because a wider review into shared parental leave is imminent. The shared parental leave system was groundbreaking when first introduced but it is not working. When we are asked to advise on it, this tends to be because the employer has only had the occasional request and is unfamiliar with how the system works. We find that both employers and employees regard it as unnecessarily complex and inflexible.
3. In recent years we've seen employers creating more imaginative, simpler and generous schemes which promote equal parenting, in contrast to the complex statutory framework which is based on (arguably increasingly outdated) assumptions that there will be one primary caregiver (usually the mother). For example, schemes which provide the same pay and leave for all new parents, regardless of gender or how they became a parent and without requiring other partners to curtail their leave etc. These schemes often aim to operate outside of the statutory framework but, for various legal reasons, they cannot be completely divorced from it. The statutory framework arguably acts as a blocker to the creation of more generous and simpler policies. As larger corporate employers adopt these policies, it risks creating a two-tier system.
4. Against that background, we look forward to the wider review into the whole framework of leave for new parents. With the law now falling a step behind the wishes of employers and needs of many workers, there is an opportunity to be brave and create a simpler framework which is more in step with modern caring responsibilities.

Day one unfair dismissal

Delays in the ET system are extreme. It's important that the Bill does not result in ETs being inundated with claims. A cap on compensation should be considered. Also, the Bill needs amending to allow for more scenarios to be brought in scope of the light touch procedure.

5. We understand the aims of the Bill in introducing day 1 rights not to be unfairly dismissed. As employment lawyers, we inevitably tend to see the situations where a new hire doesn't work out, rather than the situations when the recruitment is a success. In those situations, it will be important that the light touch procedure allows employers to dismiss underperforming/misbehaving employees without complexity and disproportionate risk of litigation.
6. The employment tribunal system is struggling to cope and delays in the system are becoming extreme. As we write this (in November 2024), it is normal to see final hearings listed well into 2026 and even beyond. For many employers, this is causing serious problems with witness availability and recollection of events, leading to

unmeritorious claims being settled. For employees, extreme delays mean they cannot move on or get redress. This is not justice for anyone. If the tribunal service is not going to receive more funding (and we fully acknowledge the constraints in play) then it will be critical that the light touch process does not result in the tribunal system being inundated with more claims.

7. The key question is what is going to be litigable. What will it take for an employer to "show" the reason for the dismissal of an underperforming/misbehaving employee, and to what extent can this be challenged? What will the procedure involve, and will employees be able to claim compensation for minor procedural errors and technical breaches (as we saw with the unsuccessful statutory dispute resolution process which was repealed in April 2009). Will this prompt a new wave of no-win/no-fee services?
8. We note that the government is proposing to consult on a new compensation regime for dismissals during the initial period. We think the Bill should be amended to introduce a cap on the compensation that can be awarded, e.g. one month's pay (whether this is capped or not would need to be decided). Many large employers would choose to pay this in preference to lengthy tribunal proceedings and, while this might be a blunter form of justice for employers and employees, it could at least mitigate the impact on the tribunal system.
9. The Bill assumes that capability, conduct, breach of an enactment and SOSR "related to the employee" are the only types of reason that would justify a light touch procedure. SOSR that is unrelated to the employee (and redundancy) are deemed out of scope. Dismissals outside of the light touch procedure would therefore include:
    a. The expiry of a short-term seasonal contract at its planned end date.
    b. The ending of a maternity cover contract (deemed SOSR under section 106 of the Employment Rights Act but not one which relates to the employee personally).
    c. Dismissal because the employee has not met a reasonable and legitimate condition of employment which falls short of being required by an Act of Parliament (e.g. third-party security clearance where the problem is with the third party rather than the employee personally).
10. In those examples, there will be no light touch procedure option, a full process is required, the dismissal will be challengeable as unfair, and the employer faces lengthy tribunal litigation. In our view, those examples warrant the light touch rather than full-blown procedure.
11. There must be a serious risk that other examples (warranting the light touch procedure) have not been flushed out, because the Bill has been drafted before full consultation has taken place. We suggest that the Secretary of State be given additional powers to add other reasons for dismissal to the list of those that qualify for the light touch procedure if such reasons emerge during consultation. This would avoid such reasons having to be artificially shoehorned into the category of reasons that "relate to the employee" when they really do not.
12. Finally, and on a more positive note, we sometimes see employees making extremely weak whistleblowing and discrimination claims when they really want to challenge the fairness of their dismissal but lack the qualifying service needed to do so. These types of claims then tend to be listed for longer hearings in front of a full tribunal panel. One upside of the measures in the Bill could be that we see a reduction in these types of claims.

Collective redundancies

The Bill will have operational consequences that may not have been intended and will exacerbate the problems associated with existing areas of legal uncertainty. This measure needs more thought. There are other ways to address the *Woolworths* case.

13. The removal of the "establishment" test will improve legal certainty, in that it is currently hard to advise on what an establishment actually means in some cases. It would also avoid a repeat of the *Woolworths* case (where employees in smaller stores were not covered by the protective award for lack of collective consultation).

14. While the *Woolworths* example involved a single, central mass redundancy exercise, we often see employers regularly making smaller batches of redundancies for different local reasons. The impact of the Bill on this (typical) scenario needs to be addressed. For example, if an employer plans 5 redundancies in Team A, 10 redundancies in Team B and 10 redundancies in team C, all at different "establishments":

    a. What if the batches of redundancies arise at different times in the same 90-day window? Whether an employer must look backwards as well as forwards when counting redundancies is a grey area at the moment. Section 188(3) of TULRCA provides that earlier numbers are disregarded if "consultation" has already begun but it is not clear what kind of consultation counts for this purpose. The ECJ decision in *Marclean* adds further uncertainty. If earlier redundancies "count" then there are practical problems with going back and consulting over them. For example, if the Team C redundancies tip the employer into collective consultation obligations, must it go back and consult collectively in relation with Teams A and B? What if Team A has already left and the Team B redundancies are far advanced? It will be a missed opportunity if the Bill fails to clear up this uncertainty and, most importantly, the removal of the establishment test makes the problem worse for multisite employers who will almost inevitably have successive batches of redundancies at different times and locations for often unrelated reasons. Employers would welcome section 188(3) being amended to clarify that an employer does not need to go back and collectively consult over redundancies where any kind of consultation has already begun.

    b. How should a collective consultation processes run if batches of redundancies are unconnected, have different drivers and are at different locations? What if Team A are in Cornwall, Team B are in Dover and Team C are in Newcastle, the employees do very different kinds of work and the redundancies have a completely different underlying rationale? Must the consultation process be merged to any extent? Must the reps be brought together for joint meetings? In our example, employee reps for Team A are going to have little or no interest in the situation with Team B and Team C. It would be helpful if the Bill provided explicitly that there is no need for a single, joint consultation exercise in all cases, so long as each group is appropriately consulted separately.

    c. For the largest employers, the aggregating of unconnected successive batches of redundancies across sites could put them into a near constant cycle of collective consultation. For an employer of 10,000 people, the 20 proposed redundancies trigger is 0. 2% of their population. Aside from the operational impact on employers, trade union reps are going to find their time being taken up with travelling up and down the country to be involved in continual consultation exercises.

    d. There will also need to be a system for dealing with constantly evolving numbers when filing Form HR1.Given that the original purpose of Form HR1 was to provide advance warning to local Jobcentre Plus and other local service providers, we question whether there's any ongoing purpose to this form.

15. We should add that, although the Bill would remove the need to consider whether redundancies are taking place at one establishment, it will still be necessary to ask if they are taking place at one employer. Groups where employees are employed by local legal entities will be in a different legal position compared to groups with a single employing entity, which is arguably unfair.

16. There would be other ways to avoid a repeat of what happened in the *Woolworths* case. For example, retaining the establishment test but introducing a requirement for collective consultation if either 20 or more redundancies are proposed at that establishment or (as an additional new trigger) if more than a specified percentage of employees at that establishment are being made redundant. Or removing the establishment test for centrally-planned redundancy exercises but retaining a more local test for unconnected, locally-planned redundancies. In addition (and irrespective of whether any other amendments are made) we suggest that the Bill be amended to allow more flexible workforce agreements to be negotiated by trade union and other worker reps at a local level.

17. Finally, the courts have ruled that the test for the jurisdictional scope of collective redundancy consultation rules depends on the location of the establishment and its connection to the UK. If the establishment test is removed, it

would be helpful if the Bill provided more certainty on the territorial extent of collective consultation rules and in particular whether (as we would expect) they are limited to redundancies in the UK.

Guaranteed hours and shift scheduling

The details will be crucial but the measures are significant and potentially costly. An opt-out should be considered.

18. We recognise the aim the Bill is to shift the balance of control towards workers in arrangements that provide little certainty or predictability about working hours. Although details remain to be clarified in regulations, the basic structure of the Bill is that the obligation to make an offer will be repeatedly triggered until the worker no longer qualifies for the right. This will be a significant undertaking for employers who will need to keep track of cycles of individual reference periods, track hours worked, deal with responses to offers (or any lack of response), response deadlines and issuing amended contracts.

19. As the government's risk assessment of this part of the Bill acknowledges, zero-hour contracts are predominantly used in sectors where customer demand is highly variable. Despite this, the provisions that aim to enable employers to cater to peaks and troughs in labour needs are complex and uncertain. Employers must "reasonably" consider that one of several time-limiting events apply. The scope of these events is unclear. It's also unclear how the regime will apply where a "peak" in work is only expected to last for a very short time (e.g. if a hospitality employer expects a busy upcoming weekend). Wider exceptions, under which an employer would not be required to make any offer which would replicate a labour peak (whether a limited term or not), might be more straightforward. The Bill also doesn't account for when a "peak" in work has already passed and there is unlikely to be enough work available to fulfil any offer.

20. Offering guaranteed hours may see employers overstaffed, particularly as the default position is that the guaranteed hours offer will constitute a permanent contractual variation. Aside from the additional costs, there will be legal risks associated with making redundancies where overstaffing results from the guaranteed hours regime – because it will be automatically unfair to dismiss when the principal reason is a request for guaranteed hours.

21. The Bill also fails to address the question of whether/when a guaranteed hours offer would involve a change in the individual's employment status (from worker to employee) and the implications of this (potentially very significant for employers given the expansion in unfair dismissal rights).

22. Although the policy reasons for providing a right to "have" guaranteed hours, rather than a right to "request" are clear, the contrast between these two positions could be more nuanced. In our view, the Bill should be amended to allow employees who are happy with their working arrangement to opt out of getting repeated unwanted guaranteed hours offers. Some of our clients have created low-hour, flexible roles for people such as students, people with caring responsibilities or specific disabilities who genuinely welcome the flexibility of their current contract and who are not interested in being offered guaranteed hours. An opt-out could be made subject to providing employees with information about the guaranteed hours system, and reminders of the right to opt in to the system at a later date if they want to do so. However, it would avoid the need to invest in creating an offer that will inevitably be rejected, something which would arguably be a fruitless and costly exercise.

23. Moving to the provisions on shift scheduling, it is difficult to assess the impact without knowing the minimum notice to be given or when payment will be triggered. There are circumstances when an employer has no choice but to make a request or cancel a shift on short notice, for example if a colleague calls in sick (which could be a more frequent occurrence with the SSP changes) or if there are matters outside the employer's control (such as local floods/riots). Payment for unworked, cancelled shifts will be an additional cost for employers when there is also a downturn in business.

Fire and rehire

The measures prioritise contractual terms over jobs. The focus could be narrowed to reduced pay and benefits, and the definition of "the business" needs more thought.

24. The Bill seeks to prevent employers from making contractual changes unless they are in extreme financial distress. Notwithstanding the situations which caused the media headlines, in our experience of advising large employers, the process termed 'fire and rehire' is rarely undertaken lightly.

25. The Plan to Make Work Pay refers to the practice being used to achieve agreement to "lower pay and reduced terms and conditions". The measures in the Bill go further than this because they apply to any contractual change whatsoever. They mean that, for example, an employer would not be able to make changes to a contractual disciplinary procedure which is no longer suitable, nor could it adjust employee working hours (while maintaining the same number of hours) to keep pace with modern store opening/shopping times. The Bill essentially seeks to fossilise contractual terms, no matter how long ago they were agreed or how appropriate they are in the modern world of work.

26. As employees generally enjoy no contractual right to a pay rise, employers facing a real and substantial need to change terms are likely to make pay rises and promotions conditional on employees agreeing to the change. A two-tier workforce may therefore develop, along with employee disgruntlement at work, as employers could still hire new employees on revised terms, whilst legacy employees who refuse consent to a variation become increasingly less well paid in real terms. In extreme cases, employers might end up making significant redundancies. If the activity in question can't be carried out under different terms, the employer may decide simply not to carry it out at all. Even employees who would prefer to keep their job on revised terms than face unemployment would then legally need to be dismissed.

27. The test around the employer's ability to carry on "the business" as a going concern is uncertain. Does this mean the employer's entire business? What if the employer has many businesses? Does this mean that profitable parts of the business must essentially fund an unprofitable part?

28. In our view, the Bill should be amended to apply only to a variation to the employee's pay or benefits and to introduce a clearer and narrower definition of "the business".

Harassment

It is too soon to introduce employer liability for third party harassment. There must be a proper debate about what employers are expected to do to control third party harassment before liability is imposed.

29. The extension of employer liability for harassment by third parties is very significant. The previously repealed law on third party harassment only made an employer liable if it had happened on two previous occasions, and the employer failed to prevent it from happening again. The proposed law makes an employer liable the first time it happens.

30. It is very difficult for employers in many sectors to control the behaviour of third parties towards their staff, particularly where this involves dealing with members of the public – for example, retail and hospitality, health care, sporting events. An employer can often take action to exclude a third party from commercial premises/interactions after an incident has happened but under the proposed new law this would not prevent the employer from still being liable for the original incident. This is a lot wider than the previous law.

31. Unlike with employees, an employer often cannot take key steps with third parties such as training and implementing policies. They may have no prior relationship with a third party, and no way of knowing in advance that a particular person may behave inappropriately.

32. In our view, it is premature to introduce this extension. The new anticipatory duty to prevent sexual harassment has only just been introduced and needs time to bed in. Parliament should be prepared to debate and set out what specific steps an employer is expected to take to prevent members of the public from harassing staff before

passing legislating to make employers liable for it. As the Bill stands, there will be regulations about steps to prevent sexual harassment but no regulations addressing other forms of harassment. In practice, this means that difficult and sensitive questions (for example about members of the public not using correct pronouns) will not be a matter for parliament nor even government, but will be left for guidance or tribunal litigation. With the best will in the world, guidance is often fudged and caselaw will take years to emerge given the delays in the system. In our view, the EHRC should publish guidance for employers now, and the workability and impact of that guidance should be tested before an extension is enacted.

Fair Work Agency

To avoid a two-tier legal system, investment in simplifying the law is needed.

33. We understand from the factsheet and impact assessment that the Agency is likely to gain powers to impose penalties in respect of unpaid holiday pay. In our experience, holiday pay is an exceptionally complex area of law and was only made more so by the changes put in place in January this year. While some employers no doubt do flout the rules (and should face sanctions) in our experience many are simply struggling to understand what compliance actually looks like. The national minimum wage rules are also very complex and have become increasingly outdated. One of the problems with state enforcement of complex laws is that it involves enforcement officers who are not legally qualified or trained taking judgment calls on difficult legal questions. Employers may have expert legal advice which differs from the view taken by the enforcement officer, but the employer will be highly disincentivised from challenging the officer's view as this will result in the highest level of penalty being imposed on the employer while litigation ensues. In practice, a two-tier legal system emerges – the actual law on the one hand and the enforcement officer's interpretation of the law on the other.

34. If state enforcement is going to be a workable and accepted approach, then in our view there must be proper investment in clarifying, simplifying and modernising the law. This is true for both minimum wage and holiday pay.

Lewis Silkin LLP

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