

# The Agenda podcast by Lewis Silkin: In-House Employment Lawyers Coffee Break

## Episode 11: The Employment Rights Bill

### Colin

Hello and welcome, it's Colin and Lucy here for your coffee break! Each month we talk you through the latest developments and practical takeaways that you need to know. And this episode promises to be the most exciting in 2024 yet because employment law Christmas has finally arrived!

### Lucy

That's right – the Employment Rights Bill is finally here! It's been quite the journey to get here. The Labour government promised to introduce this legislation within 100 days of entering government and they've just made it on day 98!

### Colin

You'll all have seen the headlines about what's coming in down the line and to cover the Bill's 158 pages in a coffee break podcast is a *little* bit of challenge but Lucy, what are our overall thoughts?

### Lucy

Well, I'm happy to give it a go. Look, you know, Colin, it's quite rushed in places, there are places where there are minor tweaks and there's obviously a bit of fudging as you look through it. The one thing I think though is for a lot of workers, particularly low paid workers, it is what Labour Billed it as – it is a generational shift in employment law. I think for in house lawyers and the companies you all support, it's probably less about those individual rights. Many of you work for businesses that already exceed statutory entitlements, so I think probably for us what's more newsworthy and what we'll try and focus on today is unfair dismissal, sexual harassment, collective redundancies and then flexible working.

### Colin

Yeah, I agree with that. I think for me, the big story here is about the timing. I've spent the last few months telling clients, you know, what they should be doing to get ready, what they should be thinking about, changing probationary periods and so on. But my message then and my message now has been to wait and see, but I think more than ever, wait and see because this has caught people somewhat by surprise. The government isn't even going to start consulting on a lot of the Bill until 2025 and they've said that most of it won't come in until 2026 and the unfair dismissal changes not until autumn 2026 at the earliest, which I think is a lot later than a lot of us were expecting to see.

### Lucy

Yeah, totally agree with that, let's dive straight in with unfair dismissal because honestly, Colin, just what a mess! I think again, the detail on this was a bit of a surprise. You know, we'd had question marks over what the government were going to do, and how they were going to balance day one unfair dismissal rights with that clear need for probationary periods for new employees. And what they've come up with is a possible 6-9-month probationary period (although that's nothing to do with the contractual probationary period, it's a sort of statutory period) and in that period, there'll be a light touch procedure. But what we don't know is what the light touch procedure is going to require. You know, there were some rumours that employers would just need to provide a letter setting out the reason for dismissal, but all the government have officially said so far is it could just be holding a meeting.

**Colin**

Yeah, and the length of the initial period - whether it's six or nine months - that's also going to be subject to further consultation, although the government have nailed their colours to the mast here and said, our preferences is nine months. And the unexpected kicker here is that as long as you give notice within the initial period - the termination date can then be up to three months after that. That means in practice that an employee could have a year's service in effect and still not be treated as preferably as someone who has two years' service today, and that's quite a row back from what we were expecting when these proposals were first announced.

**Lucy**

Yeah, it really is, it's like anyone remember when you only needed one year's service for an unfair dismissal claim? And then when you're going to terminate somebody in that initial period it has to be for one of four - and that's important - four fair reasons for dismissal because the bill as currently drafted makes it clear that a redundancy wouldn't count. So, for redundancies, restructuring, you're going to need to follow exactly the same process for everybody irrespective of whether they've got one-week service or 10 years' service.

**Colin**

And to add just a bit more fun into producing those litigation risk assessments, it's possible – again, another late surprise here - that there could be a lower compensation regime for unfair dismissals that take place in that initial period and we don't know what level that might be set at, the government is going to consult on that.

I do think they've made a bit of a mess of this. A six-month qualifying period for unfair dismissal would surely have been so much easier. Of course, we'll need to wait for all the details to be flushed out, but my immediate concerns are whether having a quick meeting and telling someone they're being dismissed in that initial period because of "capability", is that all it takes? Or can the employee challenge that and say, "well, I wasn't really a poor performer in the way that you say I was". Do you need evidence of that? And some of our listeners will, lucky for them, be too young to remember the statutory disciplinary procedures but surely, we can't be going back there and that's something the government really needs to avoid after the consultation.

**Lucy**

I know, I looked at it and thought exactly the same thing - let's really hope not. With so much unknown, I think it's really too soon to start to predict what kind of practices people are going to need to think about changing. It's going to be really interesting to see how it all interacts - how do those day one rights interact with grievances, how do they interact with sickness absence, you know, fixed term contracts like a maternity cover, and then the length of probationary periods, you know, because those don't need to be mirrored by the initial period - are we just going to see the end of a three month probationary period if that initial period is at six months or nine months?

**Colin**

I'm certainly looking forward to finding out, Lucy, although I hope it doesn't take the full two years to do so. Moving on, shall we look at the ban on zero hours contracts that Labour promised? Although, spoiler alert here, there isn't actually a ban. Instead, the government clearly hopes to reduce the number of zero hours contracts by forcing employers to offer guaranteed hours to workers on a zero hours contract or what they call a "low hours" contract. And we don't know just yet how low the hours have to be to count as low for these purposes. But the best part about this provision is that your HR team will be super busy as whilst employees can refuse the offer, you still have to keep offering them the guaranteed hours contract at the end of each reference period and we don't know how long that's going to be, but 12 weeks has been mentioned on previous occasions.

**Lucy**

Yeah, I mean, just reading these provisions is enough to give you a headache and if you start to really get into them, you end up with more questions than answers. We don't know how seasonal work will be accommodated, we don't know if the rules are going to apply to agency workers (the government have reserved themselves the right to do so). We're going to need to see all the underlying regulations just to get a sense of how any of this is going to work in practice.

I think it's also worth saying that the Bill also introduces a right to reasonable notice for every shift and that would need to include the time, the day and the hours required. But again, we need to see the regulations on that to find out what is reasonable - it feels like we're saying this a lot, you need to see the regulations.

I think if you're a business that does depend on a flexible workforce, you should probably start to have a little bit of think about this, maybe doing some modelling on your numbers, your likely requirements, possibly gathering evidence about periods that you know you're going to be busy for any kind of accommodation that might be for seasonal or peak periods but it's probably too soon to start doing anything too drastic.

**Colin**

Yeah, I agree. Let's move on. Fire and rehire - we know that a ban was talked about. It's been politically unpopular ever since P&O Ferries, even though that wasn't strictly speaking a fire and rehire case, which people seem to gloss over. But the Bill makes it clear that it's in the future going to be an automatically unfair dismissal if a dismissal takes place because the employee didn't agree to a variation of their terms and conditions or because the intention is to employ another person on varied terms to do a similar role - and that is catching the P&O scenario to some degree there. And this is quite a significant development and is going to make it much harder than it is at present to change terms and conditions and potentially some quite widespread ramifications from that, which we're going to need to work through.

The government's also going to consult on proposals to lift the cap of 90 days' pay on protective awards for failure to inform and consult - specifically in the context of fire and rehire exercises, and it's also talking about the possibility of introducing interim relief.

All of these things together mean that it's going to be a brave employer who goes down the route of fire and rehire in the future, even though there are some exceptions that are built into the legislation, such as financial distress which would affect the ability of the business to carry on as a going concern but that is quite a high test to set.

**Lucy**

Yeah, it feels like a really high test that.

Changing tack a bit because I mentioned flexible working at the start and we'll move to that because as anticipated, what the Bill does is introduce a reasonableness test into flexible working but retains the eight business reasons for refusing a flexible working request. And I think potentially requiring reasonableness becomes a bit of a game changer, you know, when we're looking particularly at those companies having a bit of a wrangle at the moment about returns to the office - how many days at home, how many days in the office. But, you know, again, we're looking at something that probably is a 2026 implementation and I think importantly, there isn't a change to the penalty which will apply so that will remain the eight weeks capped pay. So, you know, for those of you that like looking at these things through the lens of financial risk, you know, on paper, if you lose a claim, it's not going to cost a huge amount of money.

You know, the hassle and the work involved in handling lots of disputes about this - I just think that none of that's going to be very much fun and it's going to involve a huge amount time. I've also been wondering a bit whether, if you're one of those employers that is looking at trying to set a new precedent around office attendance, whether you just want to get on with having that battle sooner rather than later, you know, it

would just be much easier to deal with that under the current regime before we get these changes and this concept of reasonableness.

**Colin**

Yeah, I think that goes to a wider point which is that while with the Bill generally - a lot of the time we're saying there's nothing immediately to do, nevertheless, it is worth thinking about what the future might look like. Whether that is return-to-office plans or maybe restructuring. So, take collective consultation requirements, the Bill does include what was flagged in advance, namely the removal of the "at one establishment" bit when you're calculating how many redundancies are taking place across your business. So what does that mean? It means that you're going to have to count redundancies across all of your sites, all of your workplaces. And it's not actually clear if the government's going to consult on that or whether it will just come into force via a commencement order so if restructuring in 2025 is something that's being mooted in your organisation, then do make sure you're bearing that in mind.

**Lucy**

Yeah, I think that's really good advice. The last thing I wanted to cover really quickly was sexual harassment. So hopefully everybody's been getting ready for the new duty that comes into force this month, you know you've got to take "reasonable steps" to prevent sexual harassment. But the Bill is going to change that so it's going to be needing to take all reasonable steps and we can expect to have regulations which will set out what that means - I think that part of it is potentially quite helpful to close a little bit of an uncertainty gap.

We know from speaking to you that many of you work in organisations where you already feel that the new duty will be particularly difficult to meet in your industry and that bar is just going to get higher. I think it's also really, really important to say that the Bill makes employers liable for third-party harassment – again, unless you can show you took all reasonable practical steps to prevent the harassment and that is for all types of harassment, so that's not just sexual harassment. And what that means is the steps you're taking now to address sexual harassment with any additional steps you might take, all of that will need to apply for all types of harassment when the Bill is in force.

**Colin**

And before we finish, we should probably spend a moment on the dogs that haven't barked, the things that haven't ended up in the Bill. So there's a few things that have been put out to pasture, although we do expect consultation starting from next year - that includes the much suggested right to disconnect, the reform of employment status (so the creation of the single status of worker in place of the existing worker and employee). So Labour's not making any moves in that direction at the moment. Also a wider review of the parental leave system – that's not something that's been kicked off with this Bill, although it's something that I know a lot of people will be hoping there will be some focus on before too long.

**Lucy**

Yep, and we can expect another draft Bill for consultation on ethnicity and disability pay gap reporting so unfortunately that hasn't gone away either.

**Colin**

Indeed. Well, that's all we've got time for this month but next month, we'll invite one of our collective experts onto the podcast to talk about the trade union and collective reforms. The Bill is full of them too, and while they seem rather radical on the face of it, I think there is a question to be discussed further next month about how far they will really be in practice.

**Lucy**

Thanks Colin, it's really been a whistle stop tour. We could probably do a podcast on every one of these individual reforms and we probably will do in some point over the next two years. If you'd like to spend a little

bit more time hearing about the Bill and its impact (and why wouldn't you?), do [sign up for our webinar](#) next month on 27 of November - the link for that will be in the transcript. We've got a [comprehensive dashboard](#) showing all the planned changes on our website. We'll also make sure you've got a link to that.

If you're not already part of our in-house employment lawyer's community, we always love to welcome new joiners so please do get in touch with us, we'd love you to be part of the group.