

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

Episode 8: General Election Special - Labour proposals

Tarun

Hello and welcome to the June edition of the Employment Lawyers Coffee Break podcast with Lucy and me, Tarun. As regular listeners will know, and as an introduction for our new joiners, every month the team at LS talk you through the latest developments and practical takeaways that you need to know as in-house employment counsel in roughly the amount of time it takes for you to make and enjoy a quick coffee.

Lucy

Yes, thanks, Tarun and welcome everyone. Our easy run into the summer holidays has been ruined by the announcement that we're going to the polls on the 4th of July, so we thought we'd dedicate our June podcast to what's in store for employment lawyers if Labour win the election.

Tarun

Now you are very careful to say 'if' Labour win of course, but one look at the polls would suggest that we could all well be waking up to a Labour government on the 5th of July. And certainly, a poll I recently saw online collated by The Lawyer magazine, suggested that most lawyers are currently planning to give their vote to the Labour Party, so I think this is time well spent.

Lucy

Absolutely, and a more tongue-in-cheek poll I saw suggested that all private practice employment lawyers should be voting for Labour! But given the shock timing of the election, maybe we should start with what's going to be done with all the new employment law that we thought was going to be coming this year because there was quite a lot of that.

Tarun

Yeah, I think that's right. Even before you get to the potentially seismic changes that are planned by the Labour party, this year looked set to be a pretty busy year in the world of employment law anyway. So, a few things that made it through parliament's washup session last month that we can be certain of include things like the new statutory code of practice on fire and rehire, which is coming into force on the 18th of July. Secondly, the code of practice on tips, which has been approved and which will come into force in October. Thirdly, the Worker Protection Act creating a new duty to prevent sexual harassment is on the statute books already and will come into force in October. And finally, we've got a private members bill to allow bereaved dads to take leave where the mother sadly dies in childbirth. Have I missed anything on that list, Lucy?

Lucy

Nothing substantial. The one thing that's on my list that I thought it was worth flagging is the Workers (Predictable Terms and Conditions) Act because that's already on the statute books as of last September but the thing we've been waiting for is the accompanying regulations to essentially bring it into effect. So what we've got is just a skeleton act and it is a little bit unclear what's going to happen with that. I wonder whether it might be used by Labour, possibly as a sort of framework but probably if that happened there would be some strengthening of it. So there's a little bit of uncertainty about what's going to happen with that.

Tarun

That's right, and I've been wondering the same thing too. But what that does do is nicely bring us onto Labour's plans themselves. So, Labour have had a lot to say about employment law reform and they've released a paper called the New Deal for Working People. If you've not had a chance to read that, you should, although I should warn you it's a fairly lengthy document and introduces you to new words like 'Securonomics'! But rather than focus on analysing whether any of their new terms deserve a place in the new dictionary, what we're going to do instead is focus on the proposals that we think are going to have the biggest impact for you, our in-house employment lawyer audience, and what your directors, your board, and your key HR stakeholders are going to want to know about.

So, starting off with something that isn't really a surprise but does have a potentially significant impact, Labour plan to introduce a day one right not to be unfairly dismissed. Now, after some pushback from businesses around this, we understand there's going to be some sort of allowance for probation periods, but only if a fair and transparent process has been followed. Now, like everything else we're going to talk about today, we have the proposal but not really how this is going to work in practice. And as ever, the devil is going to be in the detail.

What will a fair and transparent process look like in probation? And how will it differ from the normal process for an unfair dismissal when that is specifically designed to allow for a fair process? If it's going to be the same, what's the point? Whereas if it's not, what exactly can they remove from what would normally be a fair process that would still end up in something that they see as being fair and transparent during probation?

Lucy

Yeah, it's interesting, isn't it? If I was guessing, I think probably we'd say that a dismissal for failing your probationary period in some way will be added as the potentially fair reasons for dismissal. But you know, who knows?

Tarun

That's right. I think there's going to need to be some clarity on this and arguably, even today, we would still be justifying that as a "capability" or "conduct" dismissal, whatever the appropriate current head would be if we needed to.

But what do you need to do about this now? Look, it's sensible advice to have a clear probation period in an employment contract and I'm sure everyone listening today will already have one of those. But if we're honest, probation periods often aren't managed very well by businesses. Very often I have clients come to me and talk to me about a situation with an employee that's really been underperforming from day one, but somehow has been allowed to pass probation, or no one has spoken to them at all for their entire three months and they've passed by default. I think these sorts of processes are going to have to be tightened up in any new world under a Labour government and there's going to be much more emphasis on a clearer process and taking appropriate action at the probation stage where expectations aren't being met by new hires.

Lucy

The other thing I think will be quite interesting is what impact that has on contingent labour. Are we going to see an increase in employers opting for other types of resourcing? So, agency staff, for example, where you've always been a little bit freer in terms of your ability to let them come and go.

Tarun

I think that's a really good point. And actually, thinking about my experience in-house where there are other markets where there are already tougher dismissal regimes, you often see employers using different arrangements like fixed term contracts to try and address that. But it's important to remember that in the UK,

ending a fixed term contract counts as a dismissal just like any other. So using this may be a good way of managing expectations but we might still have to end up defending the fairness of it when non-renewal comes up.

Lucy

I think the other proposal that may have a significant impact and is related is the suggestion that there'll be a ban on zero-hour contracts, or I should probably say a ban on "exploitative" zero-hour contracts. And what, I hear you ask is a zero-hour contract that is exploitative? That is the question that we would all like to know the answer to. Is it just by its very nature a zero-hour contract is exploitative, or is it only when it falls into the trap of being what Labour have described as one-sided flexibility?

It does feel like it won't be a complete ban on zero-hour contracts. But as part of giving employees more predictable income, Labour also wants to bring in a new right to an average-hour contract, so that's a contract that reflects the hours that somebody has regularly worked looking back over a 12-week reference period. And that is one of the proposals that I think we are really going to have to wait and see the detail on because it raises more questions for me than it answers.

So, I don't think people need to be ripping up their zero-hour contracts just yet, but if you are a business that relies on zero-hour labour resourcing, I think you are going to have to monitor this quite closely and obviously we'll stay close to it for you and try and give you some more updates as we know more.

Tarun

That's absolutely right, Lucy. The next proposal I'm going to come onto is pay reporting.

Lucy

I know! Triple pay reporting, Tarun - gender, ethnicity and disability!

Tarun

I know, it's a mathematician's dream, isn't it? Look, Labour would make ethnicity pay gap reporting compulsory for businesses with more than 250 employees and that threshold is interesting because frankly, it's so low. The current guidance is that you need at least 50 employees and need at least two out of five ethnic groups before any meaningful data can be reported on externally. But these new requirements will be coming in if we have a change of government so, for now, employers should really be making sure that they're addressing any data gaps that they might have and that will make reporting and running those calculations more difficult.

Lucy

Disability pay gap reporting is a bit more difficult and I really think that's quite unclear. There isn't really any agreement about how you're going to define disability (for the purposes of reporting it), and how you ask people to disclose the information to you when perhaps it isn't obvious. You know, we talk a lot about hidden disabilities, and obviously all of that will be the subject of detailed consultation but it makes it (in disability pay gap reporting) a little bit harder to close some of those data gaps.

With gender pay gap reporting, the big change of course is there's going to be an inclusion of outsourced workers and that will make it a much bigger exercise for some businesses. It's going to make it a much bigger headache in terms of collecting data. There's been a sense that businesses have been able to avoid or narrow pay gaps by outsourcing certain functions. Although anecdotally I've heard that happens, it's not very clear how widespread that is and whether this is actually going to help fix that.

Tarun

That's right. Next up then, trade unions. Labour, unsurprisingly you might say, have a lot of plans to strengthen union rights and reverse the reforms brought in over the recent years of Conservative

government. But the only one I want to mention today, because it's of wider relevance to all of our audience, is the introduction of a right for trade unions to have access to workplaces, albeit on notice. This is a really big change as there are currently only very limited rights of entry ahead of a statutory recognition ballot. We're also likely to see a new digital right of access for remote and platform workers and I think this is going to leave many employers a little bit nervous, so it's something to keep an eye on as to how it progresses and how employers manage these requests.

Lucy

So next on my list is sexual harassment. Now, as you said earlier, the duty to take reasonable steps to protect employees is coming in October 2024, and we're waiting for the EHRC guidance on that. But what Labour wants to do is take it one step further and have an all reasonable steps bar and that would include third parties. Now obviously, an all reasonable steps bar is going to be much more difficult to challenge and that is particularly going to be the case if you have employees who are on the front line as they're much more vulnerable to harassment by customers. It is going to be very difficult to say that you have taken literally every last reasonable step to protect them from harassment. The other notable thing here is that employees who experience sexual harassment are likely to be treated as whistleblowers.

Tarun

That's right. That of course opens up the risk of interim relief claims, this is where an employee can say there's a link between their dismissal and the harassment allegation, and if they're successful with an interim relief claim, they can continue to receive their salary while their claim is being processed, which let's be honest, with the current backlogs could be several years.

I'm always surprised in practice that claimants aren't more alive to bring these interim relief applications as a possibility in standard whistleblowing claims, so we'll have to wait and see if this new ground (in the context of sexual harassment) really takes off. But if it does, it could be potentially very costly and resource intensive for employers and crucially, can get a lot of the key evidence before a tribunal at a much earlier stage, which will increase that pressure around settlement much earlier than employers are normally used to.

Lucy

Yeah, I completely agree with that. Labour also say they plan to strengthen protection for whistleblowers, although there's no detail on how yet, and it may be that that is what we've been talking about. You mentioned ET claims and you mentioned the backlog. It's obviously worth saying that Labour propose to extend the time limit to bring ET claims from three months to six months. There's no big surprise there, but it may mean that we see more ET claims and as you say, the system's already struggling as it is.

Tarun

That's right. And a quick flag for your data protection colleagues, if you currently have some aggressive data retention policies based on the current three-month time limit, it might be worth flagging the need to extend that if we do see this reform come in.

Lucy

There's one more thing I just wanted to cover and that's family rights because we've heard about this seemingly quite strong proposal to ban dismissing maternity returners for six months except in very specific circumstances. We don't know what those very specific circumstances are, there's a spectrum - on one hand, it may be saying, well, you can only dismiss if there's a closure of the whole site, for example. And if that's what it is, it would be a really significant change. But it may not be that at all, the other end of the spectrum is it may simply be a requirement that you need to show, for example, there's a genuine reason that's nothing at all to do with pregnancy and maternity, that's the reason for dismissal. And of course, if that's what's happened, I mean, it's not really any more than the obligation that already exists. So potentially quite a material change, but we really need to see a little bit more detail on that.

And then the last thing I wanted to mention on family rights, Labour also want to review the parental leave system. They've said they'll do that in their first year of government and they want to make parental leave a day one right, so really watch this space. But I mean, I'm not going to lie to you, this is so long overdue in my view that I would be really excited about a reform of the shared parental leave regime.

Tarun

That really was a whirlwind tour through Labour's proposals. And there's quite a few that we haven't even mentioned, such as planned changes to employment status which frankly, I think can justify a podcast on their own as and when we learn more about it. And the right to disconnect, which between us, I think it's going to end up being quite soft in practice. You'll be able to see all of the proposals in our employment law election tracker on our website. The link to that will be in the notes.

Now, having spent our time in this podcast flagging the key proposals, it's worth talking very briefly about what's missing in this paper despite its length. And I was surprised by the complete absence of anything at all on non-competes, a topic close to my heart as many of you will know. This is a really hot topic globally and in particular in the US, and we've talked previously about the proposals the government had in the UK, albeit no action has been taken to implement the three-month cap proposed.

Lucy

I agree, it's strange, isn't it? It's strange not to even have a policy position on it.

But that really is all we've got time for today. A quick reminder for our international employers, it's our Managing an International Workforce event on the 20th of June. We really hope to see lots of you there.

Tarun

If you would like to be part of our In-House Employment Lawyers Community, please do get in touch with us. We would also love to hear what you thought of today's episode, so please leave us a review wherever you get your podcasts.
