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

Episode 12:

Tarun

Hello and welcome to Coffee Break. Our monthly podcast for in-house employment lawyers, in which we talk you through the latest developments and practical takeaways that you need to know about to best advise your internal clients. I'm Tarun and in this episode we have a special treat in store for you as I'm joined by a special guest host, David Hopper, who is an (dare I say, the?) expert in all things collective employment law. Thanks very much for joining us, David.

David

Thank you, happy to be here.

Tarun

Now, as we promised last month, we are going to continue our discussion on the Employment Rights Bill and we're going to talk in particular about the new trade union rights, as well as the finer details of the new collective redundancy and fire and rehire reforms. But before we get stuck into the detail, David, can I ask you for your high-level take on the trade union related rights this Bill is going to introduce?

David

Certainly. In essence, this Bill is about empowering trade unions. For years, they have complained about so-called anti-union legislation being the reason that they're not more effective, and about how much better the world of work would be if only they had more powers. Well, the government is now getting rid of swathes of that legislation and thereby making it easier for them to recruit, easier for them to get recognition and easier to strike.

But, that said, the issue is whether the unions will be able to exploit these changes. First, do they have the necessary capacity, such as officials poised to seek to enter workplaces once allowed? Second, and I think more fundamentally, is it right that the reason that union membership is so low because people don't know they can join? Or might it be that the unions are looked at and people say, they don't really offer me a value proposition that justifies me paying the better part of £20 a month for the privilege of being a member?

Tarun

Yes, I wonder if it might be one of those cases of be careful what you wish for! So getting stuck into the detail, let's look at the reforms to recognition. At the moment, gaining statutory recognition is a complex and difficult process. I'm going to try and simplify it massively for these purposes, but you're looking at having 10% of a proposed bargaining unit being members of the union, you’re then going to have a secret ballot in which more employees must vote ‘yes’ than ‘no’ and those that vote must represent at least 40% of all eligible workers to vote. Is that right David?

David

Absolutely, and what the Bill first does is to remove the 40% threshold, meaning that any ballot would be decided by a simple majority of those voting in future. Additionally, it would give the government the power, although it hasn't said necessarily that it will exercise it, to reduce the required membership level from 10% to as low as 2% through future secondary regulations. Lowering those thresholds could therefore see it becoming far easier for a union to secure recognition. Connected to this, the government is also separately consulting on new provisions to strengthen the existing restrictions on unfair practices during the recognition

process. This includes extending the period during which the restrictions apply and, for example, prohibiting employers from recruiting new workers into a bargaining unit to dilute union membership and support - even though the government itself recognises that might disenfranchise all new hires from having their say in any ballot.

Tarun

That's really interesting. Aside from recognition, I think the Bill also makes it easier for unions to get access to workers and the workplace more generally – and this is an issue that I've seen the most questions on from my client base and particularly large employer clients.

David

Yeah, that's right. The Bill gives trade union officials the right to access workplaces for recruitment, organising and collective bargaining purposes. At the moment, they can only enter an employer's premises if the employer has agreed or if it's been ordered by the Central Arbitration Committee ahead of a statutory recognition ballot. Whereas under the Bill, what's proposed is quite a convoluted process, which would involve the unions having the right to request access, and employers can then either negotiate the terms of access agreements if they can or ultimately the union could apply to the Central Arbitration Committee for an order of access rights. I think an important point to note though, is that this is about physical access, not "digital" access which is another long standing demand of the union movement.

I think other points to pick out are the fact that the Bill strengthens the existing protections against being dismissed for participating in industrial action, as well as introducing a new right not to be subjected to a detriment for that reason, following the Supreme Court's recent decision in the *Mercer* case. In a similar vein, it extends existing protections against blacklisting to cover discriminatory actions by bodies other than employers or employment agencies.

And then last but not least, it not only repeals almost all the previous Conservative government's restrictions on industrial action, such as the requirement for minimum service levels in the transport sector, but also moves to increase union powers in key sectors, such as introducing sectoral collective bargaining in the adult social care sector.

Taken as a whole, this really will amount to a seismic change in industrial relations, although whether making it easier for unions to call strikes will in fact reduce the incidence of them remains to be seen.

Tarun

Thanks David - there's a lot to digest there. And something for our listeners to be aware of is that unlike many of the other changes proposed under the Bill, the changes that just repeal the strike balloting, notices and picketing restrictions that were introduced in 2016 will be coming into effect in just a couple of months after the Bill passes.

Now, from lots of changes to just one small change that will definitely have a big impact, we're going to turn our attention to look at the changes to collective consultation requirements under s.188.

David

Absolutely – a small change - in fact the removal of just three words - that packs a really large punch. This is the proposed amendment to the legal test for when a collective consultation is triggered under s.188 of what we call TULCRA.

As our listeners will know, under the current law, before they can make any redundancies, employers have to go through a collective consultation process and file an HR1 to the government if they're proposing 20 or more redundancies within a 90 day period at what we call one establishment.

What the Bill does is to delete the words “at one establishment” from these legal obligations for collective consultation and for the filing of an HR1.

Tarun

There's a lot to unpack there - and why are they doing this? Am I right that this all really stems back to the collapse of *Woolworths* all those years ago (and the loss of penny sweets still affects me personally), but I suppose for other people the big issue that came out of *Woolworths* was the litigation that arose out of the collective consultation, or lack thereof, when the stores closed. And I suppose the store-by-store approach to the question of establishment in that case meant that smaller stores that had fewer than 20 employees didn't need to collectively consult as they hadn't met the s.188 trigger. Crucially of course if there was no obligation to consult, there was no resulting entitlement or protective award for a breach of that obligation.

David

Yes, and this interpretation of establishment was strongly challenged by the unions and the case went all the way to the ECJ at the time. The ECJ then ultimately held that ‘establishment’ does not mean looking across the business as a whole. This change now being proposed would reverse that judgment in effect.

Tarun

I can see this would have a really big impact in practice as it makes it harder for employers to keep track of when they may have tipped over that threshold if they're looking at the business as a whole. And it's not just the consultation process, as you said, it's filing HR1s too which employers will be very anxious to get right given that it can attract criminal liability with unlimited criminal fines - something we're not particularly used to in employment law.

David

Absolutely. And there's also the challenge of the *Marclean* scenario, or what we might call the batching question. This would arise when one set of redundancies falls below the collective redundancy consultation threshold, but another batch - which could under the proposed changes be at a different site, for example - would tip the employer over. Does an employer then have to look back as well as forwards? That's already a really difficult question, and one that will just come up more in practice once the establishment test is removed. And actually, there are other changes under the Bill that would make this risk even more potent, especially for larger employers.

Tarun

That there are. Let's start by looking at remedies first. The government has already launched a consultation potentially looking to increase the protective awards that are payable in these scenarios. This would be a sizeable increase on what is already a potentially very significant cost for employers, potentially increasing it from 90 days to 180 days’ uncapped pay, or even lifting the cap altogether. So, it's potentially a kind of unlimited compensation for not carrying out collective consultation!

David

Yes, exactly. The idea is to prevent employers from doing what the government calls ‘buying their way out’ of consultation obligations, as it appears that P&O Ferries tried to do a couple of years ago. I think the other interesting part of the consultation here, is that it also talks about the potential of allowing employees to claim interim relief at employment tribunals.

Tarun

And that's a particularly punchy remedy, isn't it? Obviously, we all know that claimants can apply for this in whistleblowing and trade union cases, but not in this context so far.

David

Yes, it is novel in this area. It would essentially mean if someone was about to be fired in breach of collective consultation requirements, the tribunals could step in and require the employer to rehire the employee, or at least keep paying them until the claim was heard. So quite an interventionist remedy that would have a significant impact on how an employer could realise its plans - or frankly which might even tip an otherwise solvent employer into making further redundancies or indeed into going under altogether if what it has been really trying to do here is to stay afloat. I think there's also a big question mark over whether the tribunal system will be in a position to cope with this though, because these are what we call 'urgent' claims and therefore, in essence, they jump ahead of other types of cases which are already in the tribunal system.

Tarun

And I can also see something else pretty monumental has snuck in at the end of the consultation: the government has also indicated it might launch a further consultation on extending the length of collective consultation, doubling that period where a hundred or more dismissals are proposed. So, as you know, this number currently sits at 45 days, but we may see that increased to 90 days in the future - taking us back to the position that was previously in place before 2013. So, employers are not only going to be more likely to meet the threshold where they have to collectively consult - as they won't just be looking at establishments in isolation - but actually the length of the resulting consultation process, if they do trigger it, could also be doubled.

David

Absolutely. It's something that could have a really big operational impact for employers and their ability to respond to changing circumstances quickly.

Tarun

I also wonder if a heightened chance of triggering collective consultation will mean that we'll see more employers use standing bodies of representatives so they can hit the ground running with collective consultation processes?

David

I'm sure you're right there, Tarun. Not having to launch fresh election processes every time is certainly going to make things easier for employers. Indeed, large multi-site employers may even find themselves perpetually in collective consultation under these new proposals which, let's be honest, is probably something that the reps on the other side of the table might themselves also find quite challenging.

Tarun

That's right. So the other thing I wanted to talk about in a bit of detail is fire and rehire - how could we not, it's so topical! We know that it's going to be an automatic unfair dismissal if you fire someone if they don't agree to a variation to their terms and conditions. They're also banning fire and replace - in effect if you fire someone and replace them on terms you know they wouldn't accept and where the new hire would be carrying out substantially the same role.

David

Exactly, and the one exception is if the business is going under *and* that fire and rehire is reasonable in all the circumstances. The fact that the business would go under without doing so is not in itself even a sufficient rationale to use fire and rehire.

Tarun

Yes, just looking at this practically, I think we're all going to have to lean more on flexibility clauses in employment contracts. If you have an express power in the contract to vary terms, you don't need employee consent. Will we see the government tightening up the law and flexibility clauses to stop this? I wonder if this

might be the next front of future changes to the legislation given how politically charged the issue of fire and rehire is right now.

David

Yes, subject to any anti avoidance provisions in the legislation that might be introduced over time as the Bill goes through Parliament, we'll surely see employers reserving more flexibility in their contracts. I think we'll also see some employers using pay as leverage in this situation. As employees generally enjoy no right to a pay rise, any pay rises could therefore be held back until an employee agrees to the changes that the employer is asking for, justified on the basis that the employer can only afford to pay that higher rate of pay to those who work in the most efficient way for the business. I also think it could lead to an increase in redundancies as if a business needs to cut costs, it may just decide not to carry out that role at all instead of thinking about how to change the terms of those currently performing it.

Tarun

Yes, that's the irony of all of this isn't it. We may see less appetite for making changes as it will be easier (despite what we've said earlier) to go for the collective redundancy consultation route instead.

If you'd like to spend more time hearing about the Bill and its impact, do sign up to our webinar on the 27th of November. The link for that is in the transcript and we also have a comprehensive dashboard showing all the plan changes on our website.

Finally then, all that's left for me to say is to thank David for joining us today and to remind you that if you're not already part of our in-house employment lawyers community (which provides you with access to market leading, LS-led and member-led training and materials), we always welcome new members so please do get in touch and we'd be happy to sign you up. Thanks very much!