

The Agenda podcast by Lewis Silkin: Two Employment Bills! Pod save the King

Amy: Hello everybody, thanks for joining us. You're listening to a podcast from the employment team at Lewis Silkin. I'm Amy Russell-Hughes, and I'm joined today by my colleague, Colin Leckey.

Colin: Thanks Amy. Good to be here.

Amy: So, we're recording this episode the day after the King's Speech. Apparently it was the most legislation heavy and the longest monarch's speech at the opening of parliament in 20 years.

And we've got confirmation now that there's going to be not one, but two employment bills: an Employment Rights Bill and a Race and Disability Equality Bill. So, we knew this was coming because Labour have made its New Deal for Working People a major part of their campaign. The party's obviously been working on this new package of workers' rights for years, they've been refining it, they've been negotiating it with unions, and now it's finally being made into law.

So today we're going to be talking about what's in those Bills, what's not in the Bills, and what to expect now that Labour is moving this New Deal for Working People from the slogan to the statute book.

So Colin, let's start by looking at what's going to be in the Employment Rights Bill and I guess we should probably start with what's probably the most radical of all Labour's plans, which is to make the protection from unfair dismissal available from day 1 rather than the two years that it's currently set at.

Colin: Yes, this is definitely what's grabbing the most attention, isn't it? So Labour are sticking to their guns on this and making unfair dismissal a day 1 right for everyone. We don't know a lot of the detail around it yet, and especially how Labour will make good on their promise that employers can still use probationary periods.

But here's what we think will probably happen. The Employment Rights Bill - or Act when it becomes an Act - will be used to change the qualifying period for unfair dismissal to zero so you won't need any service at all to bring an unfair dismissal claim. But then Acas might be asked alongside that to update their existing Code of Practice on disciplinary and grievance procedures to include a whole new section on probationary periods that will set out the rules that you have to follow to dismiss someone fairly during a probationary period so you would then need to do that in order to show that you'd dismissed someone fairly. But we can assume there's going to be a fair bit of additional bureaucracy there and it's going to involve inviting people to meetings, giving them a right to be accompanied, explaining the reasons you're planning to have them fail their probationary period and so on and so forth. So quite a shift from where we are at the moment, but it's going to be interesting to see how exactly Acas do approach that when they're asked to draft the rules on this.

Amy: Yes and lots of questions that we're getting from clients at the moment are around the length of the probation period and whether we're going to get new rules on that - so will it be three months, six months, 12 months, or will employers be able to set their own rules?

Because of course, the EU recently introduced a cap on probationary periods of six months, didn't it? And we don't have that in the UK so it's very much an unregulated area as far as UK employers are currently concerned. We have this concept of a probationary period that's built into most employment contracts

but there aren't actually any hard and fast rules at the moment around how long they should be or what should happen at the end of them.

I actually heard the Business Secretary, Jonathan Reynolds saying on another podcast recently

Colin: There are other podcasts? Surely not.

Amy: Yeah, unfortunately. I heard him saying recently that Acas are going to need to spell out some guidelines on this question of what is a fair length of probation and that it might need to be sector specific.

Which would make sense, of course, because what's a reasonable amount of time to assess someone's fit and their ability to do the role is obviously going to vary quite a lot depending on the setting. So it would be really interesting to see what Acas say about the length of probationary periods.

Colin: Yeah, and also whether employers will be able to extend that period. If I had to guess, I wouldn't be surprised if we end up in a situation where you can have a sort of starting point of three months, but you can extend it up to a maximum of six months. But I'd be surprised if employers are allowed to go beyond that.

There's also a slight question mark over whether you'll be able to fire someone before the end of a probationary period if it's not working out. But I think the answer to that surely must be that you will be able to do so because we all have those situations where it becomes very obvious within a few weeks that something isn't working out and employers will want to act quickly and forcing them to wait until the end of a three month period or something like that just wouldn't make a great deal of sense.

Amy: Yeah, it wouldn't be very logical, would it?

One of the other questions I'm getting from clients already is whether employers should be changing their employment contracts now to build in a longer probation period and add in explicit rights about extending probationary periods. But of course, it's just too early to be making these kinds of changes at the moment until we have a bit more clarity.

So, leaving aside the details of probationary periods for a minute, how much of a change in practice do you think we're going to see as a result of this new day 1 right not to be unfairly dismissed?

Colin: Well, I think we are going to see quite significant change. Employers invest a lot in recruiting people and want to get it right. And employees already have quite a lot of day 1 rights. So you can't discriminate against people from day 1, you can't dismiss them for blowing the whistle about something, they have the right to maternity leave and so on and so forth. So it's not really the case that employers simply fire people with no good reason soon after hiring them - there always is an actual reason - but at the same time many employers take a lot of comfort from the fact that there is a lengthy 2 year qualifying period for unfair dismissal. And generally, you don't worry so much about following a process or having all of your evidential ducks in a row when you're dismissing someone who's been with you for less than 2 years. So we are going to see some real shifts in practice here.

More caution about hiring decisions? Yes, to some degree. There's some evidence in continental Europe that there's a degree of structural unemployment that's related to day 1 employment rights making employers there slightly more cautious about hiring decisions. But we're still going to have to hire people. So I think where the greater focus will probably be will be more process around probation so proper end of probation reviews, maybe even mid-probation reviews because there's the risk that if you leave it too long, then the employee goes off sick or the review gets canceled for all sorts of good reasons. I think planning and diarising and making sure we're not missing deadlines and that meetings are scheduled, all of that good stuff is going to become ever more important.

Amy: Yeah, I do think we're going to see more norms emerging about the handling of probation. And eventually a bit of a culture change overall.

But I want to come on to talking about how quickly Labour are going to make this shift to day 1 unfair dismissal rights because what I'm picking up from employers at the moment is that this is what they're most concerned about. They're worried about whether it's all going to happen in a rush before they've really had any time to adjust.

Because we keep on hearing about Labour introducing the bill in the first 100 days and that's sounding really quite alarming to many employers. I'm even getting questions now from clients who are working through performance concerns with employees who've been employed for less than two years and they're wondering whether they need to move to making a decision sooner rather than later.

Colin: Yeah, I'm seeing that too. It'd be ironic, wouldn't it, if Labour moved too quickly and then find out that it actually causes a wave of dismissals, which isn't really the kind of shock to the Labour market (if you'll pardon the pun) that I think they're wanting to achieve.

And yes, on the timing of all this, it's very difficult to say, isn't it, because we just don't know at the moment how much consultation there's going to be and how quickly Labour plan to move to put all this into practice. But I do think we can expect more consultation and while I would expect that Labour will pass the legislation during the course of the next parliamentary term, I expect it will be sometime next year before we see all of this come into practice.

Amy: Ok, so I think that apart from day 1 protection from unfair dismissal, the proposal that I'm probably getting the most questions about from employers at the moment is the plan to change the rules on when employers have to consult representatives on a collective basis about redundancies so I just want to chat about that one for a bit.

Because we don't know for certain that this is definitely going to be in the Employment Rights Bill but it's part of the package of proposals that Labour have said that they want to implement so I think there's a good chance it's going to make the cut.

So as we know, a business making redundancies today would have to consult employee reps if they're making 20 redundancies within 90 days at any one of their sites, and Labour are saying that they want to scrap that site-based test so that businesses have to count up redundancies across the whole business.

And you can see the argument that in situations like Woolworth's it's arguably unfair to give the employees in smaller stores different rights, and actually I also think this site-based test is a little old-fashioned in the new world of remote working because it's actually not always the case now that people are so easily attached to one particular site.

But for large businesses with multiple sites, then I really think this could be quite a shift because the reality is that they'll be making small numbers of redundancies all of the time and if they have to count them up across the whole business then - assuming we're sticking with a threshold of 20 redundancies within 90 days - that threshold is going to be triggered much more easily in the future, meaning that there's going to be lots more of collective consultation exercises needed.

Colin: I always get a slight bit of nostalgia at the mention of Woolworths because they were my first ever employer. I remember wearing my turquoise shirt on a Saturday morning, selling the videos and the cassettes to the local punters. Amy, you're too young to remember what a cassette or a video is but it was a thing that people once bought.

Amy: I barely remember Woolworths.

Colin: Probably not, yeah.

Meanwhile, back on employment law. Yeah, well, before we got the final ruling in the Woolworths case, and that was about 10 years ago, and basically confirmed that you could take a site by site approach when you were deciding whether you were over the collective redundancy consultation threshold. But before that, there was a period that some of you will remember, when we all had to operate on the basis of an earlier ruling, which said that employers had to count redundancies across all of their sites and there were complicated spreadsheets that you had to have, and you know, it's a challenge often for employers with disparate multi-site businesses to just keep track of the sheer numbers of onesies and twosies of redundancies going on all over the place across their operations. But it could be that we're heading back to that again.

Amy: Yeah and we should say, of course, this doesn't mean that employers can't go ahead with redundancies but just that the collective process is slow, it means electing representatives if there aren't any in place already. And actually, it's quite hard to consult with employees as a group when the redundancies are in different locations with different drivers.

So I do think that this is quite a big change if it comes into place. And I wonder whether we're going to see a shift towards employers having to get used to more collective consultation programmes and maybe they'll be setting up more standing bodies of representatives who are then ready to consult as and when needed.

Colin: So I want to come on to talking about the Race and Disability Equality Bill but before I do that, what else do we need to cover off in the Employment Rights Bill? So the proposals around zero-hours contracts have got a lot of headlines, haven't they, but in reality, we don't have enough detail to know how that's going to work.

Amy: No, I did just want to quickly flag statutory sick pay though, because we saw during Covid that the UK statutory sick pay regime is just not enough of a safety net because you don't get it for the first three days of sickness absence and you don't qualify at all if you earn less than £123 a week.

So I personally think that it's a good thing that Labour are addressing this. But I also do think it's a bit of a myth that UK employees generally don't get sick pay from day 1 because as we both know, most larger corporate businesses operate their own much more generous schemes, most of them pay sick pay at a higher rate and from day 1 of absence.

Although of course it's true that there are many people who are relying on that statutory floor so as I say, I think this change seems like a good one.

Colin: And that brings us on to how on earth this is all going to be enforced because anyone who works in employment law knows that the tribunal system is on its knees. We had one case in the team this week, didn't we, a lengthy hearing in London South listed in 2027.

Amy: Yeah

Colin: We're sitting here in July 2024 and we're having hearings listed in 2027. That's not good for employers, it's not good for employees. And that's the current system, that's not the system having to deal with all of these multitude of new claims, so how on earth is it all going to work?

Well, part of the answer to that from Labour is that they're setting up what they're calling the Fair Work Agency - or though, as I like to call it to send shivers down the spines of EMEA employment lawyers, the UK Labour Inspectorate - and this is going to be a new state enforcement agency for enforcing rights like sick pay and holiday pay and minimum wage and things like that.

Amy: Which is much more like we see in continental Europe.

Colin: Yeah, and as I keep saying, we're basically becoming France, but without the wine and the cheese. Well, that's not entirely true, is it, because with climate change, we're getting more and more of the wine and some of it's pretty good. But actually, I think it's still pretty unclear what the remit of this new body is going to be, whether it's going to be adequately funded, what kind of approach it's going to take in practice. You can see that there's a role for a body like this in targeting some of those more exploitative employers that are out there and the fact that it's going to sweep up responsibilities of things like the Employment Agency Standards Inspectorate and the Gangmasters Licensing Authority, you know, points to its role in policing that slightly shadier part of the employment market.

But in terms of, you know, the approach it's going to take to more mainstream employers, I think this could be a really important development in the years to come, but the details of that are yet to be seen.

Amy: Yeah. Okay, so shall we get on to the Race and Disability Equality Bill now then Colin?

Colin: If we must. Yeah, so this is a separate bit of legislation which looks like it's going to do two big things. So first, Labour wants to introduce ethnicity and disability pay gap reporting on a compulsory basis. So we already have gender pay gap reporting, but going further and extending that to race and disability as well.

And secondly, and this is the bit I have a real issue with, Labour wants to extend equal pay laws to cover race and disability as well as gender. Now, this was an idea that came out of the blue earlier this year and of course, giving people rights to equal pay in principle, that's not a problem and basically you have it already, because it's already unlawful to pay somebody less because of their race or because they're disabled.

But the problem with this really is that the equal pay regime in the UK is deeply flawed. If you've ever been involved in an equal pay claim, you'll know that cases take years and years to be resolved. There's multiple stages that you have to go through involving independent experts and lengthy reports and multi-stage hearings and things get bogged down in complexity. If you think of those claims involving the large supermarkets, I mean when were they launched back in 2014 or something, and they've not even got to the end of the preliminary stages in some of those cases yet. So extending that to race and disability, it's really not clear to me what that plan is aiming to achieve. But hopefully employers who are concerned about that will get a chance to tell the government how bad an idea they think it is because the King's Speech says that this is just a draft bill and we understand reading the tea leaves that that means that there will be a chance for more thought to go into that in a consultation process before it gets put in front of parliament.

Amy: Yeah. And it's worth saying finally that Labour have said that they will toughen up the laws on sexual harassment too, which brings me nicely onto saying that we've got another podcast coming out in August on the new proactive duty to prevent sexual harassment in the workplace. It's coming into force in October this year and Labour have said that they will build on and strengthen it, so please do look out for that.

Thanks for joining us today.

Colin: And Pod Save the King.

Amy: Pod Save the King.