

## Employment Rights Bill introduced

One of Labour's main election commitments, the Employment Rights Bill, was published on 10 October 2024. Labour had pledged to introduce this landmark legislation within 100 days of taking office and views from commentators indicating that it was a rush job are possibly accurate as amendments to the Bill were published at the end of November. As had been announced in the pre-election Plan to Make Work Pay paper, the Bill makes extensive changes to employment law in various areas including:

- Unfair dismissal
- Dismissal and re-engagement
- Collective redundancies
- Zero/Low hours contract workers
- Trade unions
- Discrimination
- Family friendly rights
- SSP

The Bill allows for much of the detail to be introduced via secondary legislation i.e. regulations and through codes of practice. Most provisions won't come into effect before Autumn 2026 and in the meantime the government has launched consultations on the changes being introduced by the Bill, initially relating to trade unions, dismissal and re-engagement, SSP and zero/low hours contract workers.

On 21 October 2024 the government published 10 factsheets on gov.uk setting out details regarding various of the reforms being made by the Bill.

### Unfair dismissal

As was anticipated, the Bill abolishes the service requirement for employees to bring an unfair dismissal claim making it a day one right. However, significantly, it introduces the concept of an initial period of employment (IPE), expected to be the first 9 months, during which a modified unfair dismissal test will apply in most cases. Interestingly, this will not include redundancy dismissals meaning that employees with

short service will have the same unfair dismissal protection in redundancy situations as established employees.

The government will issue regulations dealing with the length of the IPE, the modified unfair dismissal test and how compensation will be calculated for dismissals within the IPE following consultation.

### Dismissal and re-engagement

The Bill will make a dismissal automatically unfair where it is because an employee refused to agree to a variation of their employment terms or to allow





them to be replaced by another employee. The exception will be where the employer can show that the variation was necessary due to financial difficulties faced by the employer. This will be new ground for employment tribunals which may need to rule on evidence, including from experts, as to the veracity of employers' claims to have been forced to change employees' terms due to financial pressures. Such litigation could be complex and expensive.

## Collective redundancies

Currently, employers are only required to collectively consult with employee representatives about redundancies where 20 or more redundancies are proposed to take effect in any 90 day period at a single workplace. The Bill will remove the last part of this test so that the obligation will arise whenever an employer proposes this level of redundancies anywhere in its business. The obligation to inform the Department for Business and Trade of collective redundancies will be similarly amended. In addition, the government is consulting on changes to the remedy for failure to collectively consult the current proposal being to double it to 180 days' gross uncapped pay from the current cap of 90 days' pay or removing the cap altogether. These changes will mean that many more redundancies will give rise to the obligation to collectively consult in future and businesses, particularly multi-site operations and those with fluctuating seasonal workforces, will need to be well organised so as not to fall foul of the new rules. Those breaking the rules will face significantly increased protective awards being made against them.

## Zero/Low hours contract workers

In some of the most complex provisions of the Bill, zero and low hours workers will have the right to be offered guaranteed

hours that reflect the hours they normally work over a reference period. In the consultation on this issue that took place at the end of last year the government sought views on how agency workers should be dealt with. This is a difficult area because, in agency worker cases, it is the agency that has a contract with the worker, not the hirer. Yet it is the hirer that generally controls what hours are given to the worker depending on its requirements for workers. If the hirer was under a duty to make the offer of guaranteed hours to a worker that would make it look like the worker's employer and undermine the contractual intention a hirer generally has when using agency workers.

## Trade Unions

The Bill makes major changes to trade union law including in relation to simplifying union recognition and the rules around industrial action. The provisions reflect the government's desire to boost workers' rights by increased membership and access to trade unions. Whilst most of the changes will tend to affect larger employers, one reform will affect all. Under the Bill, workers must be given a written statement before they start work (and at later intervals to be set out in regulations) regarding their rights in this area, including to join a trade union.

The Bill also enables unions to seek access agreements with employers under which union officials can access the employer's workplace for the purposes of meeting, representing, recruiting or organising workers, or facilitating collective bargaining (but expressly not to organise industrial action). If an employer ignores a request for an access agreement or agreement on its terms is not reached then the union will be able to apply to the central arbitration committee for a ruling.

## Discrimination

The new duty on employers to take 'reasonable steps' to prevent sexual harassment in the workplace will be amended to include 'all reasonable steps'. It is unclear what difference this will make to an employer's obligations although regulations will set out what is meant by reasonable steps (which will include carrying out risk assessments and issuing to workers a written policy or plan and details on the reporting of incidents and how they will be handled).

Third party harassment (abolished by the coalition government during its 'red tape challenge') will be reintroduced whereby employers may be liable for harassment of their workforce by third parties such as customers. This will be particularly relevant to sectors where customer interaction is more common such as in catering and hospitality.

The Bill will increase worker protection by amending the definition of whistleblowing to include a report of sexual harassment.

Regulations will be made requiring employers with 250 or more staff to publish equality action plans setting out how they will address such issues as the gender pay gap and support in relation to menopause in their organisation.

## Family friendly rights

In Labour's Plan to Make Work Pay paper it stated that the law would be changed so that a pregnant woman could not be dismissed for 6 months after her return except in prescribed circumstances. The Bill allows for regulations to be made to set out the protection being introduced and it is unclear presently what this will be exactly.



Paternity leave entitlement currently requires 26 weeks' service. Under the Bill it becomes a day one right, as will unpaid parental leave which currently has a 1 year service qualification period. Parental bereavement leave which currently only applies to parents of a child under 18 who has died or stillbirths will be extended to a wider group of relatives to be set out in regulations. However, it seems that the right to statutory pay in bereavement cases will not be extended to this wider group of relatives and remain limited to parents of children under 18 who have died or stillbirths.

On 15 January 2025 the House of Commons Women and Equalities committee published a report calling for a further change to parental bereavement leave. Currently the right to leave and pay only applies to stillbirths after 24 weeks of pregnancy. Miscarriages and pregnancy loss before 24 weeks are not included. The committee's report states that the impact of such a loss can be as severe as other

bereavements and the Bill should be amended to extend the rights to parental bereavement leave and pay to pre-24 week pregnancy loss situations. It is not known whether the government will support this change.

The Bill does not make flexible working the default from day one as the government stated in the Plan to Make Work Pay paper. However, it does make it more difficult for employers to refuse requests for flexible working by introducing a test of reasonableness. For the first time employers will therefore have a statutory obligation to justify a refusal to agree flexible working. This change is likely to mean that more employers will agree requests and employees who have been turned down will be more likely to challenge decisions in the employment tribunal. Significantly, however, the Bill does not change the existing compensation cap of 8 weeks' pay for breach of the rules by the employer. As such, the financial incentive for employers to comply remains somewhat lacking.

## SSP

Currently the first three days of sickness are unpaid under the SSP rules. The Bill removes these 'waiting days' and the requirement for workers to be paid at least the lower earnings limit rate to be entitled to receive SSP. The government put the issue of how SSP for these lower paid workers should be calculated out to consultation.

As set out at the start of this article, most of the new provisions of the Bill will not be implemented until 2026. Currently, the government is facing significant criticism of its handling of the economy with the CBI and others taking aim at the forthcoming increase to employer national insurance contributions announced in the Autumn budget and the enhanced worker rights being introduced in the Bill. It will be interesting to see if the government holds its nerve and continues with all of the measures the Bill covers despite the clamour from employer supporting groups.

# New rates published

Recently the government announced the increases to the national minimum wage (NMW) to take effect next year. Accepting the recommendations of the low pay commission (LPC), it stated that the new rates from 1 April 2025 will be as follows:

- **National Living Wage (21 and over):** £12.21 (6.7% increase).
- **18-20 year old rate:** £10.00 (16.3% increase).
- **16-17 year old rate:** £7.55 (18% increase).
- **Apprentice rate:** £7.55 (18% increase).

Following the election, the government wrote to the LPC asking it to change its remit to consider the cost of living when making its recommendations on NMW increases and to work towards a single adult rate for the minimum wage. Assuming this eventually happens, an unintended consequence of the change may be to make it more difficult for 18-20 year olds to find work if employers know they can recruit more experienced staff and pay them the same rate.

Meanwhile, the Department for Work and Pensions announced

the new rates of statutory pay for sickness and family leave expected to apply from April 2025 as follows:

- Statutory sick pay will be £118.75 per week (up from £116.75).
- Statutory maternity pay, maternity allowance, statutory adoption pay, statutory paternity pay, statutory shared parental pay and statutory parental bereavement pay will be £187.18 per week (up from £184.30).



# Baldness comment amounted to sex harassment

In *British Bung Manufacturing Company Ltd and another v Finn 2023*, the Employment Appeal Tribunal (EAT) considered whether an insulting comment to an employee relating to his baldness could give rise to liability for sex harassment contrary to the Equality Act 2010 (EQA). Mr Finn worked as an electrician for a small business employing about 30 staff. In July 2019 a colleague called Mr Finn a 'bald c\*nt' for which the employer issued the colleague with a warning. In March 2021 there was another altercation between Mr Finn and the colleague which led to

Mr Finn walking out. Mr Finn was eventually dismissed by the employer for another matter and he brought various claims against the company including harassment related to sex in relation to the July 2019 incident.

The employment tribunal held in Mr Finn's favour. It had no difficulty in finding that the colleague's comment had the purpose or effect of violating Mr Finn's dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The more difficult issue was whether baldness could be said to relate

to the protected characteristic of sex under the EQA. The employer argued on appeal that for the protected characteristic of sex to be engaged baldness would have to be a condition that applied exclusively to men. This wasn't the case since women may also be affected by baldness. The EAT rejected this argument which was not supported by any authority. The tribunal had correctly found that prevalence of baldness in men as opposed to women meant that the protected characteristic of sex was engaged and therefore the harassment claim was made out.

# Comments about an employee's accent could be race harassment

In *Carozzi v University of Hertfordshire and another 2024* the claimant brought claims including for harassment related to race. The claimant is a Brazilian national and ethnically Jewish. She resigned during her probationary period which had twice been extended. The harassment claim related to comments that had been made during her employment about her accent. The employment tribunal dismissed the claim finding that the comments were not motivated by the claimant's race but rather related to her intelligibility in conversation. On appeal the EAT held that the tribunal's approach had been wrong. In a harassment claim it is not necessary for the unwanted conduct to be motivated by a protected characteristic (race in this case), it just has to be related to the protected characteristic. Clearly, a person's accent may be related to their race (which includes ethnic origin and nationality). The EAT remitted the case to a different tribunal to consider the complaints afresh taking its findings into account. The new tribunal will need to consider whether, accepting that the comments related to the claimant's race, they amounted to harassment.

This decision is unsurprising given the wording used in the EQA and cautious employers will take note of the decision and ensure that any similar cases they deal with are handled carefully so as to avoid any allegation that comments made, even where well intentioned, amounted to harassment.

## Legislation passed by last government ditched

Following Labour's victory in last summer's election the new government confirmed it won't be proceeding with the Workers (Predictable Terms and Conditions) Act 2023. The Act which received Royal Assent in September 2023 was due to come into force in September 2024 and would have given workers with unpredictable hours a right to request a predictable working pattern. However, the government has confirmed that the legislation will now not come into force in light of the more extensive changes planned for workers on zero hours or low hours contracts set out in the Employment Rights Bill (see main article for more detail).



## McDonald's faces new harassment allegations

The fast food giant has recently faced new allegations including of discrimination, homophobia and sexual harassment after 700 workers joined a legal action against it. A 2023 BBC investigation reported widespread workplace harassment at McDonald's despite a legal agreement it had with the Equalities and Human Rights Commission to improve workplace conditions. In its response to the new allegations McDonald's say that protecting its workforce is its top priority and that they have hired a head of safeguarding and introduced a digital whistleblowing channel and a dedicated investigation unit.

From 26 October 2024 the law was changed to place a duty on employers to take reasonable steps to prevent sexual harassment in the workplace including by third parties. At the same time ACAS updated their guidance on sexual harassment [here](#). Under the new law, claimants bringing successful claims for sexual harassment will have their compensation increased by up to 25% in cases where an employment tribunal finds the employer failed to comply with its preventative duty. For more information on the new law please see our more detailed article [here](#).

## Private members bill on workplace harassment

The Health and Safety at Work etc.1974 Act (Amendment) Bill has been introduced this month as a private members bill. The Bill seeks to expand employers' duties under health and safety law to prevent violence and harassment in the workplace with a focus on sexual harassment. Whilst it largely mirrors the changes to employers' obligations introduced from October 2024 affecting employment tribunal claims, referred to in the article above, the mechanism for enforcement under the new Bill would be different with the HSE having the power to issue unlimited fines for infringements. Whilst the Bill seems in line with the government's policy to improve worker protection in this area, being a private members Bill, it may never become law.

## Inquiry launched into low uptake of SPL

Shared parental leave, which allows parents to share statutory family leave (typically with the mother curtailing their maternity leave and the father taking SPL) has had a low uptake since its introduction in 2015. A government evaluation in 2023 found uptake was only 1% of eligible mothers and 5% of eligible fathers. The House of Commons' Women and Equalities select committee has launched an inquiry as it sees unequal sharing of childcare responsibilities as a major cause of gender inequality and the gender pay gap. In order to explore options for reform of the SPL regime it has published a call for evidence seeking submissions including regarding the extent to which SPL has given parents choice in how they share childcare and why the uptake of SPL is low and possible solutions.

## Certain judicial functions delegated to Legal Officers

Legal Officers work in the employment tribunal service carrying out various low level judicial and administrative functions. They are not judges. On 6 January 2025 the Senior President of Tribunals issued a practice statement setting out various judicial functions that

Legal Officers were permitted to carry out, for example, deciding whether a claim should be rejected because of a substantial defect or determining an application by a respondent for an extension to submit a response to a claim. Users of the employment tribunal system

will be well aware of the long backlogs in the system which became significantly worse during the pandemic. It is hoped that this use of Legal Officers will help free up tribunal judges to make decisions in more weighty matters and relieve pressure in the system.



# EAT wrong regarding consultation in small-scale redundancies

In *De Bank Haycocks v ADP RPO UK Ltd* 2024 the Court of Appeal found that the EAT's judgment in an unfair dismissal case involving redundancy had been wrongly decided. The employment tribunal had originally rejected the claim but on appeal the EAT reversed this finding that the dismissal had been unfair because the employer had failed to consult with the workforce at a formative stage. This was not a collective redundancy case (i.e. where 20 or more dismissals were proposed within a 90 day period) where collective consultation with employee representatives would

have been required. However, the EAT's decision implied that similar wider workforce consultation obligations arose even in small scale redundancies, as in Mr De Bank Haycock's case involving a total of 16 employees where only 2 dismissals were proposed. The Court of Appeal found that whilst individual consultation was normally required in all cases, the EAT's approach requiring wider workforce consultation in small-scale redundancy cases was clearly wrong and placed obligations on employers in such cases that were unclear and which would be better introduced

by Parliament or through ACAS guidance.

This decision will be welcome to employers and their advisers who may have been confused as to how to proceed in small-scale redundancy cases. Nevertheless, employers needing to make redundancies should ensure that fair processes are carried out regardless of the numbers involved. Furthermore, as covered in our main article, when implemented, under the Employment Rights Bill full unfair dismissal rights in redundancy cases will apply to all employees regardless of length of service.

# EAT considers employer's alleged improper behaviour

Many readers will be aware of the concept of so called 'protected conversations' whereby an employer's offer of a settlement agreement cannot be used in evidence by the employee in a subsequent unfair dismissal claim. An exception is where the employer's behaviour in making the offer is found to have been improper. In such cases the offer may be admissible in evidence. In *Gallagher v McKinnon's Auto and Tyres Ltd* 2024 the EAT considered whether the employer's behaviour had been improper in relation to:

- Informing the employee that a redundancy process would commence if he did not accept the offer.
- Inviting the employee ostensibly to a return to work meeting following sickness but using it to make the settlement offer.
- Giving a 48 hour deadline for acceptance.

The EAT found no error in the employment tribunal's finding that none of these matters constituted undue pressure on the employee.

Interestingly, the ACAS guidance on settlement agreements states that employers should give employees 10 days to consider a written settlement agreement offer. However, the tribunal found that this did not apply to the 48 hour deadline given in this case because the offer had been purely verbal. Perhaps controversially, the EAT accepted this approach. However, our advice would be to not make purely verbal offers of settlement agreements but rather to ensure they are set out in writing and comply fully with the ACAS guidance.



**DOWN'S**  
SOLICITORS AND NOTARIES

**Dorking Office**  
150-156 High Street  
Dorking  
Surrey  
RH4 1BQ

**Godalming Office**  
The Tanners  
75 Meadow  
Godalming  
Surrey  
GU7 3HS

**Cobham Office**  
15A High Street  
Cobham  
Surrey  
KT11 3DH

**Reigate Office**  
7-11 High Street  
Reigate  
Surrey  
RH2 9AA

By appointment only

E [enquiries@downslaw.co.uk](mailto:enquiries@downslaw.co.uk)

T 01306 880 110

T 01483 861 848

T 01932 589 599

T 01737 307 100