Employment newsletter

DOWNS
SOLICITORS AND NOTARIES

King's Speech confirms new government's employment law plans

In our election special newsletter we set out Labour's extensive planned changes to workers' rights if it was elected. In the King's Speech on 17 July these were broadly confirmed with the announcement of an Employment Rights Bill within the first 100 days that would be the biggest upgrade to workers' rights in a generation.

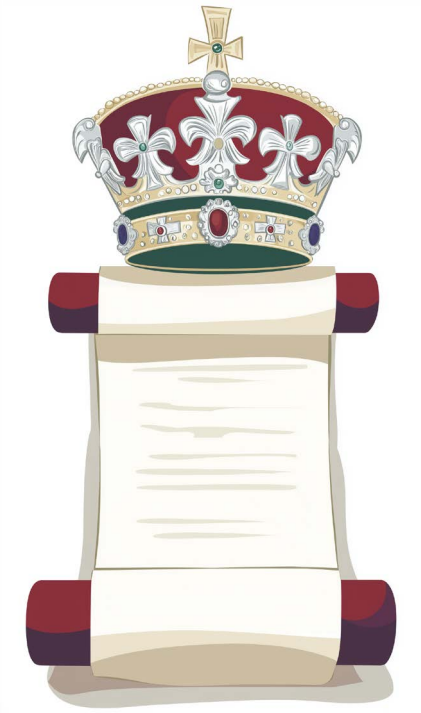
The briefing notes published by the prime minister's office are unspecific about which changes will be included in the Bill but it seems these will be those that require primary legislation.

The briefing notes refer to Labour's New Deal for Working People paper published in May and, amongst other things, the following aspects contained in the New Deal paper:

- Banning exploitative zero-hours contracts.
- Ending the scourge of 'Fire and Rehire'.
- Making unfair dismissal a day one right (but ensuring employers can still operate probationary periods to assess new employees).
- Making flexible working the day one default position for all workers (so far as is reasonable).
- Making it unlawful to dismiss a new mother within 6 months of returning to work (except in prescribed circumstances).
- Reforming trade union legislation including simplifying the statutory recognition process and improving workers' access to a union in the workplace.

Some policies set out in the New Deal paper aren't mentioned in the briefing notes such as the change to employment status rules whereby the current categories of employee, worker and self-employed will be replaced with a simplified system of just workers and the genuinely self-employed. It seems from a recent reply to a question in Parliament that the government will still be proceeding with all of New Deal with some aspects dealt with in ways that do not require legislation and other areas to be progressed following consultation.

The King's Speech also referred to an Equality (Race and Disability) Bill designed to improve equal pay protection for ethnic minority and disabled workers.
In future newsletters we will report on the detail to the government's proposals once the draft Bills have been published.



Fire and Rehire code of practice published

The statutory code of practice on dismissal and reengagement (better known as the code of practice on fire and rehire) was published on 18 July.

This stemmed from the P&O scandal in early 2022 where several hundred P&O crew were replaced with lower paid agency staff. The code does not introduce a new stand-alone right of action for its breach. Rather, like the ACAS code of practice on disciplinary and grievance procedures, it gives an employment tribunal the power to increase the compensation in relevant successful cases (e.g. unfair dismissal claims) by up to 25% where the tribunal finds that there has been an unreasonable breach of the code.

The code will be relevant where an employer is considering dismissing staff and offering to reengage them on new terms if agreement cannot be reached with the affected employees. Under the code employers will need to consult for 'as long as reasonably possible' about the relevant changes although no specific time frames are provided. Any alternatives to fire and rehire must be considered. Proposals that have not been agreed should be re-examined and employers should consider feedback from employees or their representatives. Although employers must be clear if dismissals are envisaged in the absence of agreement they must not threaten dismissal to coerce staff. Clearly, one can see disputes over how employers navigate through those obligations.

Interestingly, the code may not be in existence for long. The incoming Labour government expressed its concerns that the code, commissioned by the previous government, was inadequate and that, as mentioned in our King's Speech article above, 'banning' fire and rehire except in exceptional situations remains one of its policy aims.

Paternity bereavement law passed

Prior to Parliament ending before the general election the Paternity Leave (Bereavement) Act 2024 received Royal Assent.

The Act provides for secondary legislation to set out the full scope of the new law. However, once it comes fully into force it will, amongst other things, disapply the usual requirement for fathers and partners to have 26 weeks' service with an employer in order to be able to take paternity leave where the mother dies in the first year following birth or adoption.

We will report on the full details of the new law once the regulations are made.

High Court injunction used to restrain former employee

In *RBT v YLA 2024* a former employee of an asset management firm had a High Court injunction made against him restraining him from approaching or communicating with the company's founder or from sending material to third parties about the business on the basis that his conduct was likely to be harassment under the Protection from Harassment Act 1997.

The defendant was dismissed during his probationary period and then sent a series of emails and WhatsApp messages to the founder and other staff making various threats and accusations including that he had the 'power to destroy the business', that he would 'fight dirty' unless he was financially compensated, that he would 'hound the business like a rabid dog to completely destroy certain individuals' and 'light so many fires around [the business] that you .... will only be able to watch it burn to the ground'. He stated that people who had crossed him had come to regret it and claimed to have run someone over in his car and gotten away with it because he had left no evidence.

The Court found that the injunction should be granted as the harassment claim was likely to succeed. The defendant's right to freedom of expression was unlikely to have much weight given his conduct including what appeared to be blackmail threats considering his unfair dismissal claim had been rejected and there was no apparent legal basis for any compensation to be paid to him by the business.

Covid vaccination dismissals were fair

Such is the backlog of cases in the employment tribunal system that only now are some appeal case decisions coming through related to events that happened during the pandemic.

In *Masiero & ors v Barchester Healthcare Ltd 2024* the employment appeal tribunal (EAT) considered the appeals of care home workers whose unfair dismissal claims had been rejected by the employment tribunal. Barchester Healthcare is one of the largest care home providers in the country with 17,000 employees.

In early 2021 it introduced a policy of mandatory vaccination against Covid for its staff unless medically exempt. Regulations were eventually introduced in November 2021 making it mandatory for care home staff to be vaccinated. However, prior to then, the employees in this case were dismissed in May and June 2021 for refusal to have the vaccination. None of them were medically exempt.

The EAT, like the employment tribunal, considered the employees' argument that their rights under the European Convention on Human Rights (ECHR) had been breached because of the dismissals. The employees argued that mandatory vaccination breached their rights under Article 8 of the ECHR concerning the right to respect for private and family life and Article 9 which protects the right to freedom of thought, conscience and religion.

Under the Human Rights Act 1998, courts and tribunals must apply legislation in a way that is compatible with the ECHR. Rejecting the appeals, the EAT found that the employment tribunal had been right to consider the care home residents' right to life under Article 2 of the ECHR. This is an absolute right as opposed to the Article 8 and 9 rights that are qualified and can be overridden in certain circumstances. The employment tribunal's judgment that Barchester's policy, aimed at reducing the risk to the lives of its residents, outweighed the employees' Article 8 and 9 rights was one it was entitled to reach.

IOD consults on code of practice

In June the Institute of Directors launched a consultation on a code of conduct for directors. The code would apply to organisations of all sizes and in all sectors. It is envisaged that adoption of the code by directors would be voluntary and should not place any additional compliance burden on directors. The code is structured around the following principles: leading by example, integrity, transparency, accountability, fairness and responsible business. The IOD sought views, amongst other things, on whether additional issues should be covered in the code, how likely existing directors are to sign up to the code, whether details of who had adopted the code would be made public and the possible role of government, regulators or professional bodies in encouraging adoption.

Victims and Prisoners Act 2024 and use of NDAs

The Victims and Prisoners Act 2024 received Royal Assent on 24 May. Section 17 of the Act, which will come into force on a date to be announced, makes void any provision in an agreement (e.g. in a non-disclosure agreement) that purports to restrict a victim of criminal conduct from, amongst other things, disclosing information about that criminal conduct to various people including the police, a relevant regulator or a lawyer for the purposes of obtaining legal advice about it.

Well drafted settlement agreements, confidentiality clauses and NDAs used for employment purposes should already have carve out provisions for these and other scenarios where employees would be free to make relevant disclosures in particular circumstances, e.g. for reporting misconduct to a regulator or other authorities or to seek legal advice.

Treatment of counsellor was constructive dismissal and belief discrimination

In *Adams v Edinburgh Rape Crisis Centre 2024* the claimant was a counselling support worker who holds gender critical belief (i.e. that a person's biological sex is immutable and cannot be changed and is separate from gender identity).

ERCC had a new CEO who is a trans woman. It only employs women but one of the claimant's colleagues who she believed was born a female identified as non-binary and started using a male sounding name. A service user asked what sex the colleague was and some internal emails discussed how this query should be answered. The claimant suggested a reply that the colleague was born female but now identified as non-binary. The colleague told the CEO they felt humiliated by the claimant's email. The CEO responded by email agreeing that the claimant's email had humiliated the colleague and implying that the claimant was transphobic. The CEO then invited the colleague to raise a formal complaint against the claimant.

A disciplinary investigation was begun and at a disciplinary hearing two out of three allegations against the claimant were upheld. No sanction was applied to the claimant but her grievance against the disciplinary process was rejected. She then appealed against the disciplinary outcome requiring the ERCC to make an announcement to colleagues confirming that it did not believe she was transphobic. It refused stating that the disciplinary process was confidential. The claimant then resigned on the basis that she had been constructively dismissed and discriminated against. Upholding her claims the employment tribunal found that the CEO's actions had clearly been motivated by the claimant's gender critical belief. Their view that the claimant's suggested reply to the service user was humiliating to the colleague or transphobic was nonsense. The invitation for the colleague to complain about the claimant was inappropriate as was commencing a disciplinary case against her. The CEO's actions amounted to harassment related to the claimant's protected belief and breached the implied term of trust and confidence entitling her to resign on the basis of constructive dismissal.

In another case involving gender critical belief reported in July the claimant failed in his claim of direct discrimination. In *Orwin v East Riding of Yorkshire Council* the employer had a policy of inviting staff to add preferred pronouns to their email signatures. The claimant felt this promoted a political ideology with which he disagreed. In protest he added "XYchromosomeGuy/AdultHumanMale" to his email signature. After refusing to remove this he was dismissed. His attempts to argue that his ECHR rights relating to freedom of thought, conscience and religion and freedom of expression had been violated through his dismissal found no sympathy from the employment tribunal. His email signature was a deliberately provocative act and the employer was entitled to be concerned about potential reputational harm caused by the claimant's actions especially in view of his public facing role.

EHRC consults on technical guidance ahead of new law regarding sexual harassment

The Equality and Human Rights Commission has carried out a short consultation which closed on 6 August before updating its technical guidance on sexual harassment and harassment at work. This was done prior to it publishing the revised guidance expected in September before the amended law comes in to effect the following month.

From 26 October the new duty on employers to take reasonable steps to prevent sexual harassment at work will apply. Under the new rules, where a claimant succeeds in a claim for sexual harassment the employment tribunal must consider increasing the compensation by up to 25% where the employer has failed to comply with the duty.

Volunteer was a worker

In *Groom v Maritime & Coastguard Agency 2024* the claimant was a volunteer for the coastal rescue service. Its handbook entitled volunteers to claim costs for certain activities to cover 'minor costs caused by your volunteering, and to compensate for any disruption to your personal life and employment and for unsocial hours call outs'.

The claimant brought a claim in connection with the refusal to allow him to be accompanied by a trade union representative at a disciplinary hearing.

Under the Employment Relations Act 1999 workers have a right to be accompanied at disciplinary and grievance meetings. The employment tribunal rejected the claim as it found he was not a worker as he had no automatic right to be paid and most volunteers did not claim the costs referred to in the handbook.

The EAT upheld his appeal. It found there was no legal definition of volunteer. Whether there was a contract giving rise to worker status had to be determined based on the facts. Here, when the claimant carried out activities with a right to claim remuneration there was a contract and he was therefore a worker.

Withdrawal of job offer was direct discrimination

In *Ngole v Touchstone Leeds*, a judgment published in July, the tribunal partially upheld the claimant's claim of discrimination based on religion.

Mr Ngole is a Christian and declared this on his application for the role of a discharge mental health support worker. He was offered the post subject to receipt of satisfactory references. However, Touchstone were concerned about the responses to its reference requests and when it carried out an internet search found that Mr Ngole had been dismissed by the University of Sheffield in 2016 because of Facebook posts by him that were derogatory towards homosexual and bisexual people.

The role he had been offered involved working with people from the LGBTQ+ community so, concerned by this information, Touchstone withdrew the job offer. When this decision was challenged it invited Mr Ngole to a second interview with a view to seeking reassurances that he would be supportive of LGBTQ+ rights. The second interview went ahead but Touchstone were not convinced and the job offer was not reinstated. Mr Ngole claimed that his Article 9 right under the ECHR to freedom of thought, conscience and religion and his Article 10 right to freedom of expression had been violated by Touchstone and that the withdrawal of the job offer and the manner in which Touchstone had treated him amounted to unlawful harassment, direct and indirect discrimination based on religion under the Equality Act 2010 (EQA).

The employment tribunal found that Touchstone had been entitled to have concerns about how Mr Ngole would be able to perform the role given his views on people from the LGBTQ+ community expressed in the Facebook posts. Accordingly, his ECHR rights had not been unlawfully overridden. However, Touchstone had been wrong to initially withdraw the offer as it had. This had been a disproportionate response and was direct discrimination.

Had Touchstone approached the matter differently and invited Mr Ngole to a second interview to discuss the issue before reaching a conclusion then the decision might have been different.

John Lewis publishes interview questions

John Lewis' decision to publish interview questions for candidates on its website was widely reported in the media earlier in the year. The company did this in order to help candidates by avoiding nerves allowing them to perform better at interview.

The company believes that the recruitment process is no less rigorous as a result and follow up questions at interview related to the prepared answers are used to test the candidates.

Other organisations have endorsed this approach especially in assisting neurodiverse candidates who may have more difficulty with the traditional interview procedure where candidates have no warning of what they will be asked.

Pay deductions for holiday scheme breached NMW rules

In the recently reported case of *Revenue and Customs Commissioners v Lees of Scotland Ltd* the employer was served a notice in relation to underpayment of national minimum wage. An employment tribunal had found the decision to issue it had been wrong but HMRC's appeal against that finding was successful. Employees of Lees paid money into a holiday savings scheme via voluntary deductions from their wages. They were free to withdraw sums from their savings pot at any time (and did so). These deductions took employees' pay below NMW level leading to the underpayment notice. The EAT noted that Lees did not pay the money into a separate account controlled by a third party, rather it was held within the company's trading bank account and could be used by Lees as it saw fit. Had Lees been insolvent the employees would not have been protected. The EAT also rejected the employment tribunal's finding that payments to employees out of the fund reduced the company's liability for the wage arrears as there was no basis in the NMW legislation to treat such payments as deferred wages in that way.

Subject access rights exemption applied because of risk of intimidation

Many employers will have had to deal with responding to a data subject access request (DSAR), sometimes from disaffected employees.

In *Harrison v Cameron and another 2024* the High Court considered a data controller's handling of a DSAR where it had declined to disclose the identities of individuals who had been sent a recording of a telephone conversation between the claimant and the first defendant relying on the 'rights of others' exemption within the Data Protection Act 2018. In the recording the claimant is heard making threats of violence. He wanted the identities of those who had received it disclosed.

The relevant exemption requires the data controller to consider whether it should disclose data that would reveal information about others. In doing so, the data controller should consider whether the others should be asked to consent and, sometimes, whether the data should be dislosed whether or not such consent has been given. The context is important when considering this issue in a particular case. In the present case, the Court was persuaded that the claimant's threats and the intimidating tone used in legal correspondence by or on his behalf meant that the defendant's approach when responding on the DSAR had been within the rules.

Failure to hold-off dismissing employee was disability discrimination

In *Cairns v Royal Mail Group 2024* a postal worker had to give up outdoor work due to a knee injury and osteoarthritis which amounted to a disability under the EQA. For a time he was given an indoor role but there was no vacancy for that type of work.

The employer consulted with him regarding dismissal on the grounds of ill-health retirement and in the absence of any vacant sedentary roles he was dismissed. The employment tribunal rejected his claims for unfair dismissal and disability discrimination even though at the time of his appeal against dismissal an imminent merger with another postal centre would have created indoor roles.

The employee's appeal on the discrimination decision was upheld by the EAT. The employment tribunal's approach had been wrong. It would have been a reasonable adjustment to wait the short time until the merger so that the employee could take up one of the anticipated indoor roles. In addition, the employee's inability to work outdoors arose from his disability. Therefore, the dismissal was discriminatory under s.15 EQA as it was not justified given the imminent merger.

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