

Labour's 'New Deal for Working People' The Employment Rights Bill

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Following July's election results and Labour's Sir Keir Starmer being elected as Prime Minister, there has been a great deal of speculation as to how and when Labour's manifesto promises would come to fruition. Although Labour's election manifesto gave a flavour of what is to come, the 17th July King's Speech gave far more direction on what precisely the changes are going to be and when they are likely to become law for employers.

In the King's Speech, two proposed 'bills' were announced: The Employment Rights Bill and a draft Equality Race and Disability Bill. With the Employment Rights Bill (ERB) put before parliament 10 October 2024, we now have a better idea as to the nature and scope of the government's plans in this area.

Dismissals: Unfair Dismissal Day One Right

The headline change proposed is the mooted removal of the day one right to not be unfairly dismissed. Currently it takes 2 years of continuous service for employees to accrue said right. Clause 19 of the ERB proposes to do away with this qualifying period.

With the removal of this period employees will have the right to claim unfair dismissal provided they have started work. This change would mean that new employees would gain protection from unfair dismissal from their first day, in turn making it more difficult for employers to dismiss for reasons such as not 'being the right fit'.

With that said, there is to be a consultation on a statutory probation period. It is likely that any such period would either change the test that would apply at the tribunal during this period or impose a process allowing a fair dismissal within this period. Current opinion places this period anywhere from 6 to 9 months. Until we have the full details of this probationary period it is difficult to fully predict the effects of the ERB.

Fire/Rehire Restrictions

Fire and rehire has been used as a tactic by employers, particularly gaining notoriety in recent years, when employees and employers cannot agree on contractual variations. Where the principal reason for dismissal is either that the employee refused to agree to a variation of contract, or to enable the employer to recruit another person (or rehire the employee) under new terms but with substantially the same duties Clause 22 of the ERB make the practice of firing and rehiring an automatically unfair dismissal.

Previously just having a 'substantial reason' was enough to be lawful. However, to be considered lawful under the ERB the employer must be able to establish that:-

- the reason for the variation was to eliminate, prevent or significantly reduce, or significantly mitigate the effect of, any financial difficulties which at the time of the dismissal were affecting, or were likely in the immediate future to affect, the employer's ability to carry on the business as a going concern or otherwise to carry on the activities constituting the business, and
- in all the circumstances the employer could not reasonably have avoided the need to make the variation.

This is likely to be a much higher bar.

Zero-Hours Contracts

The ERB changes to zero hour contracts are really complicated. It is proposed that they will replace The Workers (Predictable Terms and Conditions) Act 2023, which never actually came into force.

Clause 1 of the ERB contains a provision to entitle employees on zero hour contracts to a guaranteed hours contract based on the hours worked during the previous reference period. Precisely what the reference period will be is currently unclear.

This right will also apply to employees on minimum hours contracts to prevent rogue employers from replacing zero hour contracts with significantly restrictive hours in order to circumvent the rules.

A breach of the guaranteed hours would entitle the employee to financial compensation, however the level of compensation is not yet set.

Clause 2 of the ERB provides employees on zero hour contracts, and contracts where the shifts aren't known in advance, the right to reasonable notice of a shift. Whilst the ERB grants this right it does not state what is or is not reasonable, so additional regulation will be needed.

Clause 3 of the ERB provides employees on zero hour contracts the right to reasonable notice of any cancellation or change to their shifts. Again, whilst the ERB grants this right it does not state what is or is not reasonable, so additional regulation will be needed.

Protection from Sexual Harassment

From 26 October 2024 employers will have a duty to take reasonable steps to prevent third party harassment, but any employee who suffers third party harassment cannot, themselves, sue the employer. Clause 16 of the ERB inserts a new s40(1A)-(1C) into the Equality Act and a new duty on employers to take all reasonable steps to prevent sexual harassment of its staff by third parties.

From 26 October 2024, any employer who doesn't take reasonable steps to prevent third party sexual harassment will be subject to an uplift of up to 25% to the compensation award.

Given these changes we would strongly advise members to review their policies on Sexual Harassment within the workplace, any complaints processes in place to investigate complaints and to undertake risk assessment to consider potential areas where Sexual Harassment could take place.

Flexible Working

Employees currently have a right to request flexible working up to twice a year and employers are under an obligation to consider it and deal with such requests in a reasonable manner. There is not however a right to flexible working.

The detail of the ERB does appear to grant a right to flexible working, however, the employer only needs to state the grounds of refusing the application and explain why they consider it reasonable to refuse the application on one or more of the grounds that already exist. So, it currently appears that there is no significant change, employers just need to have clearer processes and provide clearer reasons if the request is refused.

Paternity, Parental and Bereavement Leave

Whilst employees have the right of Parental Bereavement Leave, there is currently no right for anyone else who has been bereaved. The ERB makes Paternity Leave and Parental Leave a Day One right. Whilst it also extends Bereavement Leave to anyone who is bereaved, the precise relationship to the deceased is still unclear and so will need further detail either through the legislative process or in additional regulations.

Enhanced protection for pregnancy and new mothers.

This is where the ERB starts to lose some specificity. The ERB contains proposals to strengthen protections for pregnant employees and returning mothers, but no detail is given as to the timescales that will apply and so will again need further detail either through the legislative process or in additional regulations.

Statutory Sick Pay

The ERB makes changes to statutory sick pay. When in force there will no longer be a waiting period for statutory sick pay, it will be paid from the first day of sickness, and there will be no lower threshold for statutory sick pay. Instead it will be calculated as a percentage of pay to be set by the Secretary of State.

Miscellaneous

There are few other changes, including:-

- obligations for employers of over 250 employees to have action plans on gender pay reporting and supporting employees through the menopause,
- Changes to Collective Redundancy Consultation when one establishment makes 20 or more employees redundant across a whole business (rather than individual establishments),
- A requirement to notify employees in the written particulars of employment of their right to join a trade union.

What is not there?

There is also some manifesto commitment that are conspicuously absent from the ERB, including:-

- a 'right to switch off', that would prevent employers from contacting employees out of hours,
- a requirement for large employers to report their ethnicity and disability pay gap,
- a simplification of employment law status,
- reviews into the parental leave and carers leave systems.

Whether these have been dropped or whether the government will return to these in the future is unknown

Concluding Comments

Whilst we now have the full wording of the ERB, there remains a lot to be worked out during its passage through parliament. With the exception of protection from sexual harassment, it is likely that the changes are at least 2 years away. We will of course endeavour to keep you updated, so watch this space.

Don't forget, this advice is general in nature and will need to be tailored to any one particular situation. As an RMI member you have access to the RMI Legal advice line, RMI template documents, including a disciplinary process, as well as a number of industry experts for your assistance.

To read the Employment Rights Bill in full, click [here](#).