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Employment Rights Bill – Day 1 rights including unfair dismissal

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What we will cover

- Employment Rights Bill update
- Other day 1 rights introduced by the Bill
- Unfair dismissal day 1 right
- Preparing for the changes
- Q&A

Employment Rights Bill - Update

- All government amendments proposed in the November 2024 Amendment Paper were passed at Committee stage including the extension of time limits for making employment tribunal claims from 3 to 6 months
- Currently at Report stage in the House of Commons where further amendments may be considered

Employment Rights Bill - Update

Expected timeframes:

- Royal Assent expected in second half of 2025
- Strikes (Minimum Service Levels) Act 2024 will be repealed immediately
- Most of Trade Union Act 2016 repealed two months after Royal Assent
- Most of Bill's provisions will require secondary legislation and will not be in force until 2026
- Day 1 unfair dismissal – not until Autumn 2026
- 2025 will be dominated by consultations

Other day 1 rights – parental leave

Current position

- Requires 1 year's service
- Provides eligible employees with right to take up to 18 weeks' unpaid leave per child under the age of 18
- Subject to 4 weeks per year under statutory default scheme

Impact of change

- Day 1 right
- Increase in eligible employees
- Employers will need to accommodate request from new employees
- Impact limited as remains unpaid and usually subject to 4 weeks per year

Other day 1 rights – paternity leave

Current position

- Requires 26 weeks' service as at the date 15 weeks before EWC
- Employees lose entitlement to paternity leave and pay if they take shared parental leave ("SPL") and pay before exhausting paternity leave entitlements

Impact of change

- Day 1 right
- Increase in eligible employees
- Employers will need to accommodate request from new employees
- Paternity leave may be taken after SPL

Other day 1 rights – bereavement leave

Current position

- No statutory right to leave unless employee's child dies under the age of 18/is stillborn after 24 weeks of pregnancy (Parental bereavement leave ("PBL"))
- PBL is a 2 week entitlement that may be paid

Impact of change

- Expanded right to unpaid bereavement leave of 1 week
- Necessary relationship to deceased will be set out in regulations
- Limited impact given most employers provide some form of leave for bereaved employees
- PBL rights will be unaffected

Other day 1 rights – statutory sick pay

Current position

- Eligibility dependant on earning at least the Lower Earnings Limit (currently £123 per week)
- First 3 days are unpaid “waiting days”

Impact of change

- SSP payable from first day of sickness absence
- Some lower earners will be paid a lower rate of SSP
- Will increase sickness absence costs
- Will discourage unwell workers from attending work and spreading illness

Other day 1 rights – practical steps to take

- Prepare to amend relevant policies
- Consider whether any enhanced benefits should remain subject to a service qualification period
- Make managers aware of the impending changes and organise training at the appropriate time
- Make employees aware of the changes
- Impact of these changes will be significantly amplified if plans to remove the distinction between “employees” and “workers” set out in Next Steps policy paper proceed

Unfair dismissal - context

- Total number of employment tribunal claims (all jurisdictions) in 2023/24 - 97,489
- 646 unfair dismissal claims where awards were made:-
 - Maximum £179,124
 - Median £6,746
 - Average £13,749
- Vast majority of potential unfair dismissal claims settle

Unfair dismissal - context

- Maximum (capped) award – compensatory award of £115,115 (or 12 months' gross pay, if lower) plus basic award of up to £21,000
- Cap does not apply in certain circumstances
- Key factors in level of compensatory award:-
 - Level of salary of employee
 - How long employee is out of work for
 - Whether employee has taken reasonable steps to find alternative work

Unfair dismissal – context

Legislation	Qualifying period
Industrial Relations Act 1971	2 years
Trade Union and Labour Relations Act 1974	1 year (for a transition period) then 6 months
Unfair Dismissal (Variation of Qualifying Period) Order 1979	1 year
Employment Act 1980	2 years for employees in firms with less than 21 employees
Unfair Dismissal (Variation of Qualifying Period) Order 1985	2 years in all cases
Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 1999	1 year
Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012	2 years

Unfair dismissal – current position

- Qualifying period for protection from unfair dismissal is 2 years
- Can dismiss, with some exceptions, for any non-discriminatory reason, during first 2 years of employment
- No requirement to follow fair procedure within first 2 years of employment
- No statutory rules on probationary periods – contractual only

Unfair dismissal – current position

Current position

- Exceptions to 2 year rule include dismissals:-
 - Connected with pregnancy, childbirth, statutory family related leave
 - For health and safety reasons
 - For reason connected with rights under Working Time Regulations
 - For reason related to the national minimum wage
 - For making a protected disclosure
 - For asserting certain statutory rights
- If a dismissal is for a discriminatory reason no qualifying service period is required

Unfair dismissal – proposed

- All employees will have protection from unfair dismissal from day 1
- Light touch procedure to be followed during initial period of employment (“IPE”)
- Government preference for IPE is 9 months

Unfair dismissal - proposed

- Light touch procedure expected to apply where:-
 - Termination date is during the IPE or where notice was served during IPE (provided termination date is no more than 3 months after the end of the IPE)
 - Reason for dismissal is capability, conduct, illegality or some other substantial reason – NOT redundancy
 - Some other substantial reason must “relate to the employee” – this is likely to include customer complaints about the employee, but would not cover, for example, a business reorganisation
- Employee will still be able to claim unfair dismissal during IPE and employer will have to show dismissal is for one of the above mentioned reasons

Unfair dismissal – light touch procedure

“As a starting point, the Government is inclined to suggest [a fair procedure] should consist of holding a meeting with the employee to explain the concerns about their performance (at which the employee could choose to be accompanied by a trade union representative or a colleague).

“The Government will consult extensively, including on how it interacts with Acas’ Code of Practice on Disciplinary and Grievance procedures.”

Next Steps to Make Work Pay policy document - Oct 2024

Unfair dismissal – IPE compensation

- Amendment to Bill provides for Secretary of State to specify a cap on the compensatory award for dismissals during the IPE
- Cap will be lower than the current cap applicable in standard unfair dismissal cases

Unfair dismissal - impact

- According to the UK Government's impact assessment on making unfair dismissal protection a day 1 right, once implemented "*this legislation would considerably alter the employment rights landscape in the UK*"
- An extra 9 million will potentially be able to claim
- Number of Employment Tribunal claims in 2009/2010 – 236,000
- Impact also of extension of time to lodge Employment Tribunal claim from 3 to 6 months

Unfair dismissal - consultations

Consultations expected to include:-

- Length of IPE
- How modified procedure will work, including interplay with ACAS Code
- Compensation regime

Unfair dismissal – potential trapdoors

- Treating 9 month period in the same way as the current two year period
- Automatically unfair dismissals
- Redundancies
- Discrimination – in particular capability dismissals
- Employees with longer notice periods
- Confusion with contractual probationary periods

Unfair dismissal – practical steps to take

- Start auditing your current use of probationary periods over the coming months
- Review current policies/processes, in particular:-
 - Recruitment
 - Pre-employment screening and checks
 - Performance reviews during probationary period
 - Capability/ conduct procedures
- Consider whether changes to contractual probationary periods or notice periods are needed
- Ensure those involved in recruitment and managing employees are properly trained
- Ensure managers are aware of risks of discrimination claims
- Respond to the consultations when they open



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