What would a Labour Government mean for employment law?

Earlier this month, the Labour Party published a Green Paper entitled *A New Deal for Working People*, setting out its proposals for changes in workplace rights. The ambitious document sets out over 50 proposals for change across a range of areas. In this briefing we discuss five key aspects of the Green Paper that have the potential to lead to a major shake-up of employment law.

Creation of a single worker status

Currently, we have a three-tier approach to employment status in the UK: "employee", "worker" and "self-employed". Worker status covers both employees and a wider group of workers who are engaged under a contract where: (i) they are required to work personally; and (ii) the employer cannot be described as a client of the individual's own business. Therefore, all employees are workers, but not all workers are employees.

The Green Paper argues that secure and safe work is jeopardised by certain employers exploiting the complexity in this three-tier system. Moreover, it is difficult for individuals to know where they stand, and, as a result, they often do not know their basic legal rights. To resolve this problem, the Labour Party proposes that a single employment status of "worker" should apply to all but the genuinely self-employed. It is not clear whether the existing worker status test will be retained, or whether a brand-new test will be

introduced.

All workers will be afforded the same basic employment rights, for example, sick pay, holiday pay, parental leave, protection against unfair dismissal *"and more".* The practical result is that those who qualify as workers under the existing system will receive a fairly significant upgrade in their employment rights, including the right to claim unfair dismissal. The position for employees will not change as a result of the merger of status, save that they will be known as workers, rather than employees.

Strengthening unfair dismissal protection and other employment rights

Currently, only employees are protected from unfair dismissal, and they will usually need two years' continuous service to bring a claim. The exception to this is where the principal reason for the dismissal is "automatically unfair" (e.g. because the employee has blown the whistle or because the employee is on maternity leave). In automatically unfair dismissal claims, there is no need for the employee to have accrued two years' service – it is a Day 1 right.

Prior to April 2012, the qualifying period to bring an unfair dismissal was one year, and many commentators expected the Labour Party to bring back this threshold if it came to power. However, the Green Paper takes a more radical approach, promising to abolish the service requirement altogether and make unfair dismissal a Day 1 right for all workers.

Coupled with this, the Green Paper also promises to remove the caps which limit compensation in employment claims, with the result that *"workers* [will] *receive full compensation without statutory limit if they suffer loss because of employers' breaches of the law".* It is not entirely clear whether the intention is to remove the caps on compensation on some, or all, statutory employment claims (and if not all, whether unfair dismissal will be covered).

However, assuming that the cap on compensation for unfair dismissal *is* to be removed, then the end result of these proposals would be to put an unfair dismissal claim on a par with a discrimination claim in the sense that it would be Day 1 right available to all workers offering unlimited compensation. If this comes to pass, dismissal will become more dangerous territory for employers as the prospect of getting it wrong risks more claims and higher compensation awards.

On top of this, the Green Paper also promises to remove qualifying periods for other basic rights such as sick pay and parental leave. Promises are also made to strengthen other employment rights including for pregnant workers, whistleblowers, those facing a redundancy, and those being transferred to a new employer – although it has to be said these promises are light on detail.

And, finally, tucked away towards the end of the Green Paper, is the brief statement that time limits for Employment Tribunal claims will be extended. Again, the detail is light, and we don't know whether this will apply to all claims or just a certain class of claims, or what the new time limits will be. Currently, the time limits for the majority of statutory employment claims is three months less one day from

the cause of action (albeit that this may be extended by the Acas Early Conciliation process). A six-month time limit has been mooted in the past for pregnancy (and other) discrimination claims.

Discrimination and inequality

The Green Paper promises to require employers to create and maintain workplaces and working conditions free from harassment, including by third parties. Currently, employers are not strictly obliged to take steps to prevent harassment at work and workers are not protected from harassment by third parties. The Worker Protection (Amendment of Equality Act 2010) Bill is on its passage through Parliament and will introduce a legal requirement for employers to take reasonable steps to prevent sexual harassment at work (but not harassment related to other protected characteristics). The Bill had originally sought to introduce protection from third party harassment, but this was recently dropped from the Bill. Therefore, Labour's proposals go further by introducing a duty to prevent harassment across the board and by introducing protection from third party harassment.

As far as pay transparency is concerned, employers with 250+ staff will be required to report on their ethnicity pay gaps – a proposal that was mothballed by the Conservative Government. In addition, Labour are seeking to drive efforts to close pay gaps by forcing employers to not only report on their gender and ethnicity pay gaps, but to devise and implement plans to eradicate any such pay gaps. Gender pay reporting was introduced in 2017 under the mantra *"what gets measured gets managed".* But after years of disappointing gender pay gap results, with little movement in the right direction, it is apparent that mere reporting is not

enough. The requirement to take concrete action should be welcomed, although it remains to be seen what the consequences will be for failing to succeed in closing a pay gap.

Better family friendly rights

The Green Paper makes a host of promises to improve the position for working families including:

- extending maternity and paternity leave (nothing is said about adoption leave);
- reviewing the “failed” shared parental leave system;
- introducing a new right to bereavement leave;
- strengthening the rights of workers to respond to family emergencies with paid family and carer’s leave; and
- making it unlawful to dismiss a woman whilst pregnant or for six months after her return from maternity leave, save in certain circumstances (which are not specified).

Again, we must await the detail of how these rights will be enhanced, but if these changes come to pass, employers will need to be ready to rewrite Staff Handbooks and revisit any enhanced pay offerings. What can be said with some certainty

is that most employers (and employees) would welcome an overhaul of the cumbersome shared parental leave system.

Labour also promise to make the right to request flexible working a Day 1 right. The Conservative Government have promised to do the same and has said legislation will be introduced in July 2024.

Right to disconnect and protection from surveillance

Several EU member states have introduced domestic legislation or guidance on the right to disconnect, including France, Italy, Spain, Belgium, Ireland and Portugal. In 2021, a House of Lords Select Committee called upon the UK Government to introduce a right to disconnect law. However, currently, there is no legal right to disconnect in the UK.

The Green Paper states that Labour will give workers a right to disconnect from work outside their normal working hours and not be contacted by their employers. It is not yet clear what, if any, exceptions will be made to this new right and what the consequences for breach will be.

Labour also promises to protect workers from surveillance by employers by requiring proposals to introduce surveillance to be subject to consultation and the agreement of either trade unions or elected staff representatives.

What else?

There are many more proposals in the Green Paper covering a wide range of areas including:

- banning zero hours contracts and introducing greater security in working patterns for workers;
- outlawing the practice of fire and rehire;
- raising the minimum wage to at least £10 per hour for all workers and assessing how to raise the National Living Wage;
- a suite of measures to strengthen the role of trade unions; and
- introducing a single enforcement body to enforce workers' rights.

The proposals in the Green Paper are to be debated at the Labour Party conference in October 2023. We can expect those that pass muster to make their way into the Labour Party's Manifesto for the imminent General Election. And with the bookies' money on the next Government being a Labour Government, it may not be long before some of these proposals become law.

The Labour Party: A New Deal for Working People

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New law passed giving workers the right to request more predictable working patterns

On 18 September 2023 the Workers (Predictable Terms and Conditions) Act 2023 received Royal Assent and became law. The Act gives workers (and agency workers) a statutory right to request more "predictable" working patterns. Our briefing explains what the new right involves and the steps that employers will need to take to prepare.

When will a worker be able to make a request?

It is expected that workers will need six months' service in order to be eligible to make a request, although this will not need to be continuous service. The service requirement will be set out in regulations which have yet to be published.

Where eligible, workers will be able to request a more predictable working pattern where their current work pattern lacks certainty in terms of hours, days and/or times

worked. "Work pattern" also covers the length of the contract, and a presumption is made that a fixed-term contract of under 12 months lacks predictability. The purpose of the request must be to achieve a more predictable working pattern.

Are there any rules on how such requests must be made?

A request will need to be made in writing, state that it is a request for a more predictable working pattern and set out the proposed change and the date on which the worker wants it to take effect. Further regulations may be made about the precise form that such applications must take.

Up to two applications may be made in a 12-month period, although these may not be made concurrently. It is worth noting that this limit includes any similar requests made under the separate flexible working regime (i.e. where the flexible working request is for a change that would have the effect of delivering a more predictable contract).

What duties will an employer have in relation to such requests?

Employers must deal with such requests in a "reasonable manner", although this is not defined in the Act. Acas are set to publish a new statutory Code of Practice which will provide further guidance on how employers should handle such requests. We expect that employers will be asked to hold a meeting with the worker and give them the opportunity to make representations in support of their application.

The employer must notify the worker of its decision within one month of receiving the application. If the employer grants the request, the employer then has a further two weeks to offer the worker a new contract with terms and conditions that, overall, are not less favourable than the original contract and reflect the change that has been agreed.

However, employers do not have to accept requests. Requests may be rejected on one or more of the following grounds:

- The burden of additional costs.
- Detrimental effect on ability to meet customer demand.
- Detrimental impact on the recruitment of staff.
- Detrimental impact on other aspects of the employer’s business.
- Insufficiency of work during the periods the worker proposes to work.
- Planned structural changes.
- Such other grounds as specified in regulations.

If the worker’s contract is terminated during the one-month

decision period the employer is still required to respond to the request, however, additional grounds for rejecting the request will then be available (namely, that the worker has resigned or been dismissed for a qualifying reason).

Employers are not obliged to offer a right of appeal but may choose to do so (and if they do, there are limits on how the appeal process should be run).

What rights will a worker have if something goes wrong?

If an employer fails to follow the statutory procedure for considering requests, or it rejects a request based on incorrect facts, then the worker will have three months to present a complaint to an Employment Tribunal.

The Tribunal may order the employer to reconsider the application and/or pay compensation to the worker of an amount it considers to be just and equitable. The maximum amount of compensation may be capped in regulations – we would expect this to mirror the maximum compensation available under the flexible working regime (i.e. 8 weeks' pay).

Workers will also be protected from detriment and/or dismissal for having requested a predictable working pattern or bringing proceedings to enforce the right to make such a request.

What should employers do now?

Employers do not need to take action just yet. Although the

Act has passed into law, its provisions have not come into force straight away. The Government's press release indicates that the Act (and accompanying regulations) will come into force in Autumn 2024.

The draft Acas Code of Practice is due to be published shortly and will be subject to a public consultation. Once finalised, employers will be in a position to prepare policies setting out how such requests may be made and whether, for example, there will be a right of appeal. Employers will also need to devise processes for handling requests (noting the tight timetable for responding to them) and be ready to amend contracts where requests are accepted.

Although we think these preparations will be relatively straightforward, it is worth remembering that several other employment bills have recently passed into law and each will require employers to take preparatory steps over the next 18 months, namely the:

- **Carer's Leave Act 2023 – expected to take effect in April 2024. Read more** here**.**

- **Employment Relations (Flexible Working) Act 2023** – expected to take effect in July 2024. Read more here.

- **Worker Protection (Amendment of Equality Act 2010) Bill**

– expected to pass into law shortly and take effect in Autumn 2024. Read more here.

- **Protection from Redundancy (Pregnancy and Family Leave) Act 2023 – expected to take effect by January 2025. Read more here.**

- **Neonatal Care (Leave and Pay) Bill – expected to take effect in April 2025. Read more here.**

Workers (Predictable Terms and Conditions) Act 2023

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Menopause and disability discrimination: a tale of

caution when addressing the performance of an employee suffering from menopausal symptoms.

In the recent case of Lynskey v Direct Line Insurance Ltd, the Employment Tribunal decided that poor appraisal ratings, a written warning and ceasing enhanced sick pay were all discrimination arising from Ms Lynskey's disability of menopause.

What happened in this case?

Ms Lynskey began working for Direct Line as a motor sales consultant in 2016. In 2019, she began to experience menopausal symptoms, which included mood swings, poor concentration and memory loss. In March 2020, she was diagnosed with a hormone imbalance and depression and was prescribed antidepressants by her GP. Before the onset of these symptoms, Ms Lynskey had been model employee, well-liked and had received good performance ratings.

In June 2020, Ms Lynskey had a difficult phone call with a customer and concerns were raised about her conduct during this call. She went off sick with work-related stress for a period of two weeks and, during this period, she was offered a different role in the telematics team. As the new role did not involve direct sales, it was thought to be less stressful and more suitable for Ms Lynskey. She willingly agreed to the new role, and things started off well. She also came off her

antidepressants. However, two customer complaints were received, alleging that Ms Lynskey had been rude during calls. She received coaching but was also told that this should not happen again and, if it did, it could result in disciplinary action.

During Ms Lynskey's annual appraisal in 2020, she was graded as "needing improvement" for the first time. As a direct consequence of this rating, she did not receive a pay rise. There was no direct mention of her menopausal symptoms, but her manager noted that it seemed she was *"struggling to retain information".*

There were further difficult calls and in April 2021 her manager decided to sit in on some of her calls. Her manager then sought advice from HR who, without knowing about her menopausal symptoms, recommended disciplinary action be taken. During the disciplinary meeting, Ms Lynskey raised her menopausal symptoms as a mitigating factor, however, this was not accepted by Direct Line. As a result, Ms Lynskey received a 12-month written warning, together with a "success plan" (i.e. a performance improvement plan). Her mental health deteriorated following the written warning, but she continued to try to work.

In July 2021, Ms Lynskey went off sick due to stress at home. An Occupational Health report was obtained, which recommended that Ms Lynskey have a phased return to work and stated that it was "likely" that she was disabled under the Equality Act 2010. In addition, it was suggested that her targets be removed until her symptoms improved. During this period, Ms Lynskey received enhanced sick pay. She was entitled to receive this benefit for up to 26 weeks, however, Direct Line chose to withdraw it after only 13 weeks.

Upset by the outcome of the disciplinary and the decision to remove her enhanced sick pay, Ms Lynskey challenged these decisions by raising a grievance in November 2021. Her enhanced sick pay was reinstated, but the disciplinary warning was not reversed. She remained off sick. In May 2022, Ms Lynskey resigned as result of the above treatment and brought claims in the Employment Tribunal for constructive unfair dismissal, disability, age and sex discrimination.

What was decided?

Given the length of time that had passed between the events complained about and Ms Lynskey's resignation, the Tribunal rejected the claim of constructive dismissal. It also rejected the sex and age discrimination claims but found that there had been disability discrimination.

The Tribunal agreed that Ms Lynskey's menopausal symptoms amounted to a disability under the Equality Act 2010 as her symptoms had a significant impact on her day-to-day activities and her ability to perform at work. In particular, it concluded that Ms Lynskey was treated unfavourably because of something arising out of her disability in three instances, namely the appraisal rating, the written warning and the decision to withdraw the enhanced sick pay (even though this was eventually reversed).

Appraisal rating

As regards the appraisal rating, it was found that the rating did not take into account the fact that Ms Lynskey was performing at the best of her ability in light of her

symptoms. The Tribunal was also critical of the link between the appraisal rating and Ms Lynskey's pay award. It noted that *"need for improvement is inherently unfavourable if the person, through disability, cannot, in fact, improve, or meet the required standards"*. Whilst Direct Line identified high quality customer service as a legitimate aim, it failed to provide any evidence showing how linking pay awards to appraisal ratings achieved this aim. The Tribunal took into account Ms Lynskey's previously good appraisal ratings and the fact that she had informed Direct Line that she was struggling as a result of her menopausal symptoms.

Written warning

Turning to the written warning, the Tribunal applied the same analysis as above and explained that the disciplinary process and written warning were unfavourable treatment because of something arising in consequence of Ms Lynskey's disability. In addition to the substantive unfairness, both the disciplinary investigation and meeting had been conducted by Ms Lynskey's manager, falling foul of the Acas Code on Disciplinary and Grievance Procedures, and ignoring Direct Line's internal policies which stated that managers ought not to be involved. The manager also failed to consider Ms Lynskey's symptoms as mitigating factors when deciding on the appropriate sanction.

Withdrawal of enhanced sick pay

The Tribunal also concluded that the decision to withdraw Ms Lynskey's enhanced sick pay after 13 weeks was unfavourable treatment. This decision was made by her manager because it was considered that she was not doing enough to return to work

and withdrawing sick pay would force a return. This was despite the medical evidence available, and Ms Lynskey regularly engaging with her GP and occupational health.

Finally, the Tribunal decided that Direct Line ought to have referred Ms Lynskey to occupational health at the onset of her symptoms to ensure that she was supported and that reasonable adjustments were made at an early stage. Further, they had failed to make adjustments to the telematics role that would have helped her manage her symptoms.

The Employment Tribunal awarded Ms Lynskey compensation in the amount of £64,645. This included compensation for loss of earnings as well as an award for injury to feelings due to the impact of the loss of her job. Unusually, an aggravated damages award was made due to Direct Line's failure to concede Ms Lynskey's disability status earlier on in the Tribunal process – it was only during the final hearing that Direct Line conceded that it knew, or ought to have known, about her disability.

What does this mean for employers?

Employers are under a duty to make reasonable adjustments for disabled employees and to ensure that such employees are not subjected to unfavourable or less favourable treatment. This extends to all aspects of work, including performance. This case is a sobering reminder that it can be challenging to deal with performance issues which intersect with disability.

If performance issues arise where an employee is struggling with menopausal symptoms or other symptoms which could amount

to a disability, it is important to seek early legal advice to avoid any pitfalls. Remember to engage your occupational health services early on if appropriate and consider and implement the recommendations made in any occupational health report.

This decision also highlights the need for continued awareness around the menopause. Frequent training for managers is vital to ensure they are equipped to handle such matters and also to ensure that employees who are suffering with symptoms are treated fairly and supported.

Lynskey v Direct Line Insurance Ltd

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Employment relationship was terminated by mutual agreement despite employer

stating that the employee had been “dismissed”

In the recent case of Riley v Direct Line Insurance, the EAT held that an Employment Tribunal was entitled to reject an unfair dismissal claim on the basis that the termination of employment came about by the free mutual consent of both parties, despite the fact the employer’s termination letter referred to the “dismissal” of the employee.

What happened in this case?

Mr Riley was employed by Direct Line as a home claims advisor from March 2012. He was disabled by reason of Autism Spectrum Disorder (**ASD**), anxiety and depression. Between 2014 and 2017, Mr Riley was off work primarily due to anxiety and depression. Direct Line made a series of reasonable adjustments to facilitate his return to work. However, these were unsuccessful and, ultimately, a medical assessment indicated that he would never be able to return to work.

In August 2018, Direct Line proposed the option of ceasing employment while continuing to receive benefits under the company’s permanent health insurance (**PHI**) scheme. Mr Riley was happy with the proposal. On 19 September 2018 a final meeting took place to confirm the termination of the employment relationship. During the meeting, Mr Riley asked to have it put in writing that he was no longer employed. On 25 September 2018, Direct Line wrote to him, stating that he had been *dismissed* with effect from the 19 September 2018 on the grounds of capability due to ill health. As a result, Mr

Riley brought various Employment Tribunal claims , including for unfair dismissal and failure to make reasonable adjustments.

The Tribunal dismissed all of Mr Riley's claims. It found that he had not been dismissed but had proactively pursued the option of the PHI scheme and agreed to the termination of his employment to take advantage of it. He had understood the proposal and was not put under pressure to agree, nor tricked into doing so.

On the reasonable adjustments claim, the Tribunal found that Direct Line had failed to make two adjustments, namely, a failure to provide Mr Riley with noise cancelling headphones and a failure to roll out management training on awareness of Asperger's syndrome. However, because Mr Riley was unfit to work from 25 May 2018 , these adjustments would have made no difference to his ability to return to work. Therefore, any claim had to be brought within three months (less one day) of that date, unless it was just and equitable to grant an extension of time, which the Tribunal decided it was not. The fact that Mr Riley had changed his mind about the termination of his employment was not a good enough reason to extend time.

Mr Riley appealed to the EAT.

What was decided?

The EAT dismissed the appeal.

The EAT acknowledged that, on its face, the letter was

entirely consistent with a straightforward dismissal letter. However, the Tribunal had correctly considered the substance of the termination, rather than the terminology used in the letter. The decision that the termination was by mutual consent, and that Mr Riley understood the nature of it, was upheld. The EAT clarified that a consensual termination, agreed upon freely by both parties, does *not* constitute a dismissal.

In examining whether the Tribunal had erred in refusing to extend the time limit, the EAT also upheld the decision that Mr Riley's change of heart about the agreement to terminate his employment by mutual consent was not a ground for a just and equitable grounds extension of time.

What does this mean for employers?

This decision highlights that the terminology used in employment documents and agreements can have serious consequences. Here, the incorrect use of the term "dismissal" appears to have triggered the employee to launch Tribunal claims.

However, even where the wrong terminology is used, this decision demonstrates that Tribunals will look at the substance of the termination to assess whether it amounts to a dismissal or a consensual parting of the ways. Where both parties have freely agreed to end the employment relationship, the termination will not be regarded as a dismissal. In this case, the fact that Direct Line kept detailed records throughout the process was key to them successfully defending the claim. Therefore, confirming with an employee that they fully understand what they are agreeing to and documenting

everything in writing will help to prevent misunderstandings and potential disputes down the line.

Being careful of terminology and adopting a considerate approach when dealing with terminations, especially involving employees with disabilities, will mean employers are more likely to achieve legal compliance, reduce the risk of legal disputes, and maintain good employee relations in the process.

Riley v Direct Line Insurance Group Plc

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