The Employment Rights Bill: a closer look at the equality law provisions

On 10 October 2024, the Government published the Employment Rights Bill, which will take forward many of its proposals for workplace reform. In the third article in our series analysing the Bill, we consider the proposals for equality law reform.

Running to more than 150 pages, the **Employment Rights Bill** (**the Bill**)puts forward a vast array of reforms affecting the workplace, including family-friendly rights, dismissals, equality law, contracts and pay, trade unions and industrial action and labour market enforcement. In the third in our series of articles explaining the Bill, we consider all the proposals in the equality sphere.

Sexual harassment

From 26 October 2024, all employers must take reasonable steps to prevent sexual harassment at work. Where this duty is breached, an uplift of 25% may be applied to compensation in relevant claims, and the Equality and Human Rights Commission (the **EHRC**) will have the power to investigate and take enforcement action. Initially, the plan was for this duty to require employers to take *all* reasonable steps, however, the word "all" was eventually dropped on the basis that it would be too onerous for employers. You can find out more about the duty in our recent webinar **here**.

The Bill provides that the word "all" will be reintroduced, meaning that employers will be required to take every possible reasonable step to prevent sexual harassment, or risk a compensation uplift and EHRC action. Separately, the Bill provides that regulations may be introduced specifying the steps that are to be regarded as reasonable for the purposes of both the new duty to prevent sexual harassment and the existing reasonable steps defence. The Bill states that this may include steps such as carrying out risk assessments, publishing plans or policies, and steps relating to the reporting and handling of complaints. Currently, the recommended steps to prevent sexual harassment are set out in the EHRC's non-statutory **Technical Guidance on Sexual Harassment and Harassment at Work** and its **8-step Guide to Preventing Sexual Harassment at Work**.

In addition, the Bill provides that disclosures about actual or likely sexual harassment will be listed as one of the types of malpractice about which a whistleblowing disclosure may be made.

What will these changes mean for employers in practice?

- It will be harder for employers to discharge the duty to prevent sexual harassment once it has been enhanced in this way. In particular, a lot will be expected from large and well-resourced employers and from employers where sexual harassment is especially prevalent. That said, the proposal to set out a list of reasonable steps in regulations will be helpful in that it gives employers legal certainty about the steps required.

- Although it will be some time before these changes to come into force (the Government has suggested not until 2026), employers would be wise to begin working towards taking all reasonable steps now. Not only will this help employers be ready for the raised requirement in good time, it opens up the possibility of pleading the "all reasonable steps defence" in relevant sexual harassment claims.

- We are likely to see an increase in employers pleading the "all reasonable steps defence" in relevant cases. Given that the work that will have gone in to take steps to discharge the duty, employers are likely to want the added benefit of avoiding liability for a sexual harassment claim.

- Making it clear that disclosures about sexual harassment may amount to whistleblowing disclosures is helpful, although arguably unnecessary. The Tribunals have already made it clear that disclosures about sexual harassment are capable of amounting to whistleblowing disclosures, since they represent breaches of the Equality Act 2010 (see for example Mysakowski v Broxborn Bottlers Ltd). Nonetheless, it is a helpful sign to those wishing to report sexual harassment that they may be protected as whistleblowers.

Discriminatory harassment by third parties

Until October 2013, the Equality Act 2010 contained provisions making employers liable for harassment of staff by third parties, albeit that liability only arose where the worker had been harassed more than once. These provisions were repealed by the Coalition Government on 1 October 2013, with the result that it became much more difficult for workers to bring claims against their employer where they had been harassed by a third party. Currently, the only way in which an employer attracts liability is in respect of its *own* actions.

The Bill will reintroduce employer's liability for third party harassment. Importantly, this will extend to harassment for *all* protected characteristics under the Equality Act, not just sexual harassment, and liability will arise from the first instance of harassment. For example if a shopworker was racially abused by a customer, the employer would potentially be liable. However, employers will be able to avoid liability where they can show they took "all reasonable steps" to prevent the harassment.

What will these changes mean for employers in practice?

- The reintroduction of liability for third party harassment is one of the most important reforms in the Bill, significantly widening an employer's exposure to claims of discriminatory harassment. For employers operating in sectors where staff frequently come into contact with third parties (such as the transport, retail and hospitality sectors), that risk is heightened further. While the "all reasonable steps" defence

remains open to an employer to defend such a claim, it will be an onerous task to discharge every possible reasonable step and many employers are likely to fall short. For this reason, employers may wish to begin work on scoping out how it might meet this standard sooner rather than later.

- As far as sexual harassment is concerned, employers who are found liable for third party sexual harassment may also face the prospect of an uplift to compensation of up to 25%. A Tribunal may award this where it finds that the employer has breached the duty to prevent sexual harassment.

Gender pay gap reporting and the menopause

Currently, employers with 250 or more employees are required to publish gender pay information on an annual basis. However, in-scope employers must report their pay gap figures and nothing else – they are not required to explain the figures nor how they intend to close their gender pay gap (and, in fact, they are not required to close it all). The hope was simply that "what gets measured gets managed" and reporting alone would drive employers to take steps to close their gaps. However, progress in closing gender pay gaps remains slow.

The Bill provides that regulations may be published requiring employers with 250 or more employees to develop and publish "equality actions plans" on an annual basis. The equality actions plans must set out the steps the employer is taking in relation to addressing its gender pay gap and to supporting employees going through the menopause. The action plan will have to meet the minimum standards to be set out in regulations. There will be consequences for failure to comply, but, again, this will be dealt with in regulations.

Further, when reporting their gender pay gaps, employers will be required to set out the identity of any person it contracts with for the supply of outsourced workers. Such workers are not employees of the employer and, therefore, do not need to be included in the gender pay gap figures. It seems that the intention here is to allow a fuller understanding of an organisation's gender pay gap. For example, if an organisation's outsourced roles were typically fulfilled by low-paid female workers, this would have the effect of improving the gender pay gap figures since this pay data would not need to be factored in.

What will these changes mean for employers in practice?

- Gender pay gap reporting will become more onerous for in-scope employers. Although some employers already publish sophisticated narratives and actions plans, many do not. All will need to publish an annual plan setting out what action is being taken to close the gap. A failure to do so will have consequences, but what is not clear is whether there will be consequences for publishing a compliant plan and then not implementing it, or attempting to implement it but failing to make a

dent in the gender pay gap.

- The Government had promised to introduce both ethnicity and disability payreporting which would mirror the gender pay gap reporting regime. These proposals are not included in the Bill. However, in the separately-published Next Steps to Make Work Pay it is stated that this commitment will be delivered via the Equality (Race and Disability) Bill. The Government says it will begin consulting on that in due course, with a draft Bill to be published during this Parliamentary session for pre-legislative scrutiny. Further consultation will also take place prior to the making of regulations implementing these reforms. In other words, it is going to be some time before either of these promises come to pass.

- The forthcoming requirement to publish information about the steps taken to support menopausal workers means employers will need to give thought to what it is able to say in this regard. Some employers are well advanced in terms of support offered. Others will need to start work on providing appropriate support measures in order to be able to populate the action plan. That said, most employers will already have some things to say here, for example, the provision of flexible working options and relevant benefits such as discounted gym memberships or employee assistance programmes. However, more is likely to be needed.

What are the next steps?

The Bill has just started its passage through Parliament, which will take time. Even when passed, the various equality provisions will not come in straight away. For example, regulations are needed for the reforms to the duty to prevent sexual harassment and to the gender pay gap reporting regime. And it is likely that there will be consultations on some of the proposals, although it is not yet clear which ones.

Separately, the Next Steps to Make Work Pay document promises to deliver ethnicity and disability pay reporting by way of a different Bill, which will also extend the current equal pay regime to claims based on ethnicity and disability and also provide for a new regulatory enforcement unit for equal pay. The Government also says it will produce new menopause guidance for employers.

Interestingly, no mention is made of the pre-election promise to enact the dual discrimination provisions in the Equality Act 2010, which would allow employees to claim discrimination on the basis of the particular combination of two protected characteristics. It remains to be seen whether this will be taken forward.

Stay tuned for our fourth article in the series, where we will consider the provisions of the Bill affecting contracts and pay.

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specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

The Employment Rights Bill: a closer look at the dismissal-related provisions

On 10 October 2024, the Government published the Employment Rights Bill, which will take forward many of its proposals for workplace reform. In the second article in our series analysing the Bill, we consider the proposals for dismissal-related reform.

Running to more than 150 pages, the **Employment Rights Bill** (**the Bill**) puts forward a vast array of reforms affecting the workplace, including family-friendly rights, dismissals, equality law, contracts and pay, trade unions and industrial action and labour market enforcement. In the second in our series of articles explaining the Bill, we consider all the proposals in the dismissal sphere.

Unfair dismissal

Abolition of the two-year qualifying service requirement

Currently, an employee must have two years' continuous service with their employer in order to bring a claim of ordinary unfair dismissal in an Employment Tribunal. There is a limited exception to this rule, where it is shown that the dismissal was for an "automatically unfair" reason, such as for having made a protected disclosure. In such cases, the employee is able to claim automatic unfair dismissal from Day 1 of their employment. However, where there are no such aggravating factors, an employer is able to dismiss an employee with under two years' service relatively easily. There is no need to identify a fair reason for the dismissal and nor does the employer need to show it acted reasonably.

The Bill proposes to remove the two-year qualifying period for ordinary unfair dismissal claims, converting it to a Day 1 employment right. To complement the abolition of the qualifying period, a new provision will be introduced preventing employees who have not yet started work from claiming unfair dismissal. However, if the reason for dismissal is automatically unfair, relates to the employee's political opinions or affiliations, or is connected to their membership of a reserve force, then an employee who *has not even started work* will be able to claim unfair dismissal.

Special rules for new employees

There has been much speculation in the press about whether the Bill will make it simpler to dismiss employees during a probationary period. Importantly, the Bill provides that regulations may be introduced which will "modify" the standard of reasonableness that must be met to dismiss fairly during the "initial period of employment". The initial period of employment is not specified in the Bill (this will be dealt with in the regulations) however, the Government has signalled

its preference for this period to be set at nine months. In practice, this will be longer than most contractual probationary periods operated by employers, which generally sit at between three to six months.

Exactly how the test will be modified remains to be seen. Currently, employers must show that they have acted reasonably in treating the reason as sufficient to dismiss, viewed in light of the size and resources of the employer. In many cases, this requires the employer to comply with the steps set out in the statutory Acas Code of Practice on Disciplinary and Grievance procedures. In the separately-published Next Steps to Make Work Pay it is suggested that, at the very least, the modified test will require employers to meet with employees to discuss proposed dismissals during an initial period of employment.

All of which will provide some reassurance for employers, however, there are some important limitations to note.

First, the modified test will *only* apply where the reason for dismissal is capability, conduct, illegality or some other substantial reason (**SOSR**) *"relating to the employee"*. It will *not* apply to redundancy dismissals during the probationary period, and nor does it seem to apply to SOSR dismissals which do *not* relate the employee. Where the dismissal is by reason of redundancy (or SOSR which does not relate to the employee), the existing reasonableness test will apply i.e. that the employer has acted reasonably in treating the reason as sufficient to dismiss, viewed in light of the size and resources of the employer.

Second, the modified test will *only* apply where the dismissal

takes effect on or before the last day of the initial period of employment, or where the employer gives notice to terminate before the end of the initial period of employment and the dismissal takes effect within three months of the end of that period.

What will these changes mean for employers in practice?

- The abolition of the qualifying period is certain to generate more grievances and Employment Tribunal claims, some of which will be justified and some not. But all of them will take time and money to deal with. Certainly, employers will wish to be more cautious when it comes to recruitment so as to limit the risk of a bad hire. And after recruitment, line managers will need to actively manage probationary periods to ensure that any performance or conduct issues are identified and dealt with at an early stage.

- Making it simpler to dismiss new employees takes some of the sting out of this reform for employers. However, care must be taken to diarise the relevant dates and ensure that notice to terminate is given before the end of the initial period of employment (which is expected to be nine months). And in cases where the employee has a notice period in excess of three months, that notice must be given earlier so as to ensure that the termination date falls within three months of the end of the initial period. A failure to do so may mean that the employer inadvertently falls outside the modified

test, making a finding of unfair dismissal more likely.

- It is also important to remember that it is not the case that new employees can *never* bring an unfair dismissal claim. Although the modified test will make it easier to dismiss them, employers will still be required to do something. Short circuiting those modified requirements could open the door to an unfair dismissal claim. When it comes to redundancy dismissals, employers must remember that the current test of reasonableness will apply. This means that in *all* redundancy dismissals employers will need to warn and consult with employees, adopt a fair basis on which to select employees for redundancy and consider suitable alternative vacancies (and, if applicable, collectively consult). Further, the reforms do not affect an employee's right to claim automatic unfair dismissal from Day 1 of their employment.

- The interplay between an employer's probationary period and the initial period of employment will need to be considered. Employers do not necessarily need to increase their contractual probationary periods in line with the initial period. On the face of it, there is nothing to prevent an employer dismissing an employee who has already passed their probationary period during the initial period of employment and relying on the modified test. For example, an employee could pass a probationary period of three months, after which time

their conduct or performance declined, or a one-off serious act of misconduct or negligence occurred. In those circumstances, the fact that the employee has passed their probationary period should not make any difference. That said, some employers may wish to consider aligning probationary periods with the initial period of employment.

- Is there any upside for employers in making ordinary unfair dismissal a Day 1 employment right? Conceivably, it could lead to some reduction in claims for automatic unfair dismissal (such as whistleblowing claims) and discriminatory dismissal claims, which are currently the only statutory claims that employees with under two years' service can bring about their dismissal. A decline in those types of claims could be a good thing for employers, not least from a reputational perspective and because the cost and complexity of defending those types of claims is higher. However, compensation is uncapped for certain automatic unfair dismissal claims and for discriminatory dismissal claims, meaning there is still an incentive for claimants to bring such claims. Therefore, in terms of impact on claims, the most likely outcome is that claimants with automatic unfair dismissal or discriminatory dismissal claims (especially if higher paid) will continue to bring those claims but will plead ordinary unfair dismissal as an alternative claim.

Dismissal during pregnancy and following a period of statutory family leave

The Bill provides that regulations may be introduced which will provide enhanced protection from dismissal during pregnancy and following return from maternity leave, adoption leave or shared parental leave (it will also apply to return from certain other forms of leave which are not yet in force and so are not discussed in this briefing). It is not known how long the protection will apply following the return from family leave, however, the Government has previously suggested it will be six months. No further details of this proposal are given in the Bill or the Explanatory Notes to the Bill.

What will these changes mean for employers in practice?

- We must await the publication of the related regulations to understand the full extent of this proposal. However, it seems likely that the intention is to restrict the circumstances in which an employer may dismiss a pregnant employee or family leave returner fairly.

- It is *already* unlawful to dismiss an employee because of her pregnancy or maternity leave (or for a reason related to it), by reason of redundancy during pregnancy or following the return from maternity leave, adoption leave or shared parental leave where there was a suitable alternative vacancy available. Therefore, this

proposal appears to go further and suggests that even if there is a non-discriminatory and fair reason for dismissal, the dismissal would be unlawful, subject to some exceptions. Common sense would suggest that the exceptions must, at least, permit dismissal for gross misconduct, gross negligence or illegality or also where there is a large-scale redundancy such as where the whole business is closing down.

Dismissal for failing to agree a variation to a contract

"Fire and rehire" is a shorthand used to describe the practice of dismissing an employee then offering to re-engage them on inferior terms and conditions. Before the election, the Labour Party had talked about wanting to end fire and rehire practices altogether. This was slightly watered down during the General Election, with a promise to end the practice, save in exceptional circumstances.

The Bill delivers on that promise and proposes that it will be automatically unfair to dismiss an employee:

- for failing to agree to a change to their terms and conditions of employment; or
- in order to re-engage them (or someone else) under varied terms and conditions of employment, but where the role is otherwise substantially the same.

The sole exception will be where the reason for the variation was to eliminate, prevent or significantly reduce or 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 its business, and there was no way the need to make the variation could reasonably have been avoided.

However, even where the exception does apply, the dismissal could still be *ordinarily* unfair, even if not automatically unfair. The Bill provides that in such cases various matters must be taken into account by an Employment Tribunal when determining whether the dismissal is fair or not, including any consultation with the employee and any trade union or employee representatives about the proposed variation and anything offered to the employee in exchange for agreeing to the variation.

What will these changes mean for employers in practice?

- It will be much riskier for employers to impose contract variations on employees by way of fire and rehire practices. Nor can employers escape the risk of automatic unfair dismissal by simply "firing" in these circumstances and not offering to rehire. This is not to say that it will never be right to deploy fire and rehire practices – the practice may still be used but it carries a high risk of Tribunal claims. However, it is possible that the employee may relent and agree to be rehired on the varied terms. If the employee does not go on to bring a claim in time, the employer will have

achieved its aim.

- Once this change comes into force, the current statutory Code of Practice on dismissal and re-engagement (which came into force on 18 July 2024) will need to be replaced. As it stands, that Code prescribes the process to be followed by employers before dismissing and offering to re-engage in any circumstances. A breach of that process does not give rise to a legal claim in itself but may lead to an uplift of 25% to any compensation awarded in related claims.

Collective redundancies

Currently, collective redundancy consultation is triggered where there is a proposal to dismiss as redundant 20 or more employees assigned to one "establishment" within a 90-day period. The question of what an "establishment" has been ventilated in litigation – with employees arguing it should mean the business as a whole rather than the local place of work. This would mean that collective consultation would be triggered more frequently as redundancy numbers would have to be counted across the whole business. After some to-ing and fro-ing the senior courts concluded that "establishment" meant the local unit where the employee works, *not* the business as a whole.

The Bill proposes to reverse this, so that collective consultation is triggered where there are 20 proposed redundancies within 90 days *across the business* rather than in just one workplace.

What will this change mean for employers in practice?

- Collective consultation will be triggered more frequently and multi-site employers will need to have a system in place to ensure that they keep track of proposed redundancies across the whole business.

- The process will be administratively more burdensome as employers will need to have appropriate representatives in place for all affected employees no matter where they are based.

- The consultation itself will potentially be cumbersome and disjointed as employers may be consulting about several small pockets of unrelated redundancies.

- Getting it wrong will be costly: employees may claim a “protective award” capped at 90 days’ gross actual pay.

The Government has also committed to consult on lifting this cap.

What are the next steps?

The Bill has just started its passage through Parliament, which will take time. Even when passed, the various dismissal provisions will not come in straight away. Indeed, in the context of dismissals alone, the Government has said it will consult on:

- the length of the initial period of employment for the purposes of unfair dismissal;
- how the initial period of employment interacts with the Acas Code of Practice on Disciplinary and Grievance procedures;
- the appropriate compensation regime for dismissal during the initial period of employment;
- lifting the cap on protective awards where an employer is found to not have properly followed a collective redundancy process; and
- what role interim relief could play in protecting workers in fire and rehire situations.

Regulations will also be needed in relation to the modified unfair dismissal test and the restriction of dismissals during pregnancy and following the return from family leave.

Next Steps to Make Work Pay states that the majority of the reforms will not come into force until 2026, with the unfair dismissal reforms taking effect *"no sooner than Autumn 2026"*.

Stay tuned for our third article in the series, where we will consider the provisions of the Bill affecting equality law.

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The Employment Rights Bill: a closer look at the family-friendly provisions

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friendly reform.

Running to more than 150 pages, the Employment Rights Bill (**the Bill**) puts forward a vast array of reforms affecting the workplace, including family-friendly rights, dismissals, equality law, contracts and pay, trade unions and industrial action and labour market enforcement. In the first in a series of articles explaining the Bill, we consider all the proposals in the family-friendly sphere.

Flexible working

Currently, employers may refuse flexible working requests where they consider that at least one of eight grounds specified in the Employment Rights Act 1996 (the **ERA**) applies. This includes things like the burden of additional costs, an inability to reorganise work among existing staff or detrimental impact on quality or performance. Importantly, this is a *subjective* test. In other words, as long as an employer considers that one of the eight grounds applies, and that view is based on correct facts, that is a sound basis upon which to reject a request. Employees are unable to challenge the decision on the basis that they feel the decision was an unreasonable one (albeit they may be able raise other claims such as automatic unfair dismissal or indirect sex discrimination).

The Bill proposes that the law is changed to require an employer's refusal of a request to be based on one of the existing eight grounds and be an *objectively reasonable* one. Further, when refusing a request, the employer must notify the employee of the ground for refusing the request and explain why it considers that it is reasonable to refuse the application on that ground. Where an employer's decision is not reasonable, or where it fails to explain this to the employee, the employee will be able to complain to an Employment Tribunal.

There is one further small change. From 6 April 2024, employers have been required to consult with employees before refusing a request. The Bill provides that, in future, regulations may be issued setting out the precise steps that an employer must take in order to comply with this consultation requirement.

What will these changes mean for employers in practice?

- We think that employers are going to have to go further to be able to justify the ground or grounds for refusal. For example, if a request is refused on the basis of an inability to reorganise work among existing staff or recruit additional staff, and the employer has not consulted with existing staff about the possibility of doing so or attempted to recruit additional staff, it is likely that a refusal on such grounds would be unreasonable. Or where a request was to be refused on the basis of detrimental impact on quality or performance, again, the question will be: what is the evidence for this view? Unless there is some historical evidence (e.g. if an employee has worked the same or similar pattern in the past and it was unsuccessful), it is likely that an employer would need to allow a trial period of the proposed working pattern for a reasonable period of time in order to assess whether there was, in fact, such a detrimental impact. The end result is that more requests are likely to be accepted.
- Where an employer breaches the rules governing flexible working requests, an employee may complain to an Employment Tribunal. The Tribunal may order the employer to pay compensation of up to eight weeks' pay (currently capped at £700 per week) and require the employer to reconsider the application. Where an employer's refusal is found to have been unreasonable, we can expect Tribunals to more readily order employers to reconsider requests.

- Further, if a refusal is unreasonable, this could assist the employee in other potential claims. For example, if an employer has adopted an unreasonable position this may be sufficient to amount to a repudiatory breach of contract, justifying constructive dismissal. Indeed, in the recent case of Johnson v Bronzeshield Lifting Ltd, a Tribunal held that an employer's failure to take into account relevant information before refusing a flexible working request was a repudiatory breach. This was on the basis that the hours that an employee works has a major impact on their lives, and it also matters how flexible working applications are dealt with – the outcome is not the only thing of importance. It is not a stretch to see that a Tribunal could reach a similar decision where a request has been refused unreasonably.
- It looks like specific rules are on the way governing the form of consultation needed before refusing a request. The existing statutory Acas Code of Practice on requests for flexible working sets out recommendations on the scope of such consultation. The Code suggests gathering all relevant information, holding a meeting with the employee to discuss the request and considering alternatives if needed. A written record of the meeting should be kept, and a right of appeal is also recommended. A failure to follow the Code does not give rise to a claim but Tribunals will take it into account when considering relevant cases. Therefore, we think it is likely that the Code's provisions on consultation will be elevated into law.
- In due course, employers will need to update policies and practices to reflect the new rules on refusing requests.

Family leave rights

There are three proposed areas of change in the field of

family leave rights.

Unpaid parental leave

Currently, employees with one year's service have a right to take up to four weeks' unpaid parental leave per year in respect of children under the age of 18 (up to a maximum of 18 weeks' leave in total).

The Bill proposes to remove the service requirement and make unpaid parental leave a Day 1 employment right.

Paternity leave

Currently, employees with 26 weeks' service ending with the week immediately before the 14th week before the expected week of childbirth (or the week in which an adopter is notified of a match) have a right to take up to two weeks' paternity leave. The same service requirement applies in respect of eligibility for statutory paternity pay.

The Bill proposes to remove the service requirement for paternity leave, making it a Day 1 employment right. However, the Bill is silent on whether the service requirement will be lifted for statutory paternity pay, which suggests that it will remain.

Further, currently, where an employee is entitled to paternity leave and pay and shared parental leave and pay, the paternity leave and pay must be taken *before* the shared parental leave and pay. If the employee takes the shared parental leave and pay first, they lose their entitlement to paternity leave and pay. The Bill proposes to remove this restriction, meaning that employees may take shared parental leave and pay first if they wish and retain their entitlement to paternity leave and pay.

Bereavement leave

Currently, employees have a Day 1 employment right to take two weeks bereavement leave if a child under the age of 18 dies (and those with 26 weeks' service ending with the week before the child died are also entitled to receive statutory parental bereavement pay). Employees taking parental bereavement leave are also protected from detriment and dismissal. However, there is no general right to take bereavement leave outside of this, for example when a spouse, parent or sibling dies. Of course, many employers do permit compassionate leave in such circumstances, but there is no legal requirement to do so.

The Bill proposes amending the parental bereavement leave rules (which are set out in the ERA) to turn "parental bereavement leave" into "bereavement leave", although some special rules will still apply where a child dies. Regulations will specify the relationships which will entitle an employee to take bereavement leave, however, we can expect it to cover most close relationships such as a spouse, civil partner, other life partner, grandchild, parent, sibling or grandparent. The Bill says that the bereavement leave entitlement must be not less than one week, however, the leave entitlement will stay at two weeks' where a child has died. It appears from the drafting of the Bill that the leave will be unpaid, save that statutory pay will remain available where a child dies.

What will these changes mean for employers in practice?

- The removal of the service requirements for unpaid parental leave and paternity leave will mean that a larger cohort of employees will become eligible to take these forms of leave. The result is that employers will have to manage a higher number of these types absences than is currently the case. In due course, employers will need to adjust relevant policies to reflect the wider scope.
- Many employers already offer paid bereavement leave but the new statutory right will introduce rules around how

such leave is managed and provide protections for those taking the leave. Employers will need to revise their bereavement leave policy in due course and will also need to consider whether to enhance the right and offer paid leave.

What are the next steps?

The Bill has just started its passage through Parliament, which will take time. Even when passed, the family-friendly provisions will not come in straight away; regulations will be needed to bring them into force. Regulations may also bring different parts of the Bill into force at different times. The Government may also consult on certain aspects of the proposals. Indeed, it has said that in relation to the flexible working reforms it is important to take into account a range of views and it will develop the detail of the approach *"…in consultation and partnership with business, trade unions and third sector bodies".*

It is also worth noting that at the same time as publishing the Bill, the Government published a document entitled Next Steps to Make Work Pay setting out its plans for further workplace reform outside the Bill. It acknowledges that some reforms will take longer to implement, including a full review of the entire parental leave framework and a review of the benefits of introducing paid carer's leave. No specific time frame for these reviews is given.

It also states that the Government will deliver some reforms through means other than legislation, such as taking forward a "right to switch off" through a statutory Code of Practice. This suggests that there will be no statutory right to switch off – rather statutory best practice guidance which may be taken into account by an Employment Tribunal in relevant claims. This appears to be a watering down of the pre-election promise that a *right* to switch off would be introduced. Although not stated, it is likely that there will

be a public consultation upon any such Code of Practice before it comes into force. However, as legislation would not be required, this could be introduced relatively quickly.

Stay tuned for our second article in the series, where we will consider the provisions of the Bill affecting dismissals.

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BDBF Webinar – Complying with the new duty to prevent sexual harassment at work – 8 October, 2024

In this 1-hour webinar, BDBF Partner Nick Wilcox and Associate Julia Gargan explore the steps employers need to take in order to be ready for the new legal duty to prevent sexual harassment at work, coming into force on 26 October 2024. This webinar was originally delivered on 8 October 2024 and reflects our understanding as of that date. Do get in contact with either of the speakers if you would like to discuss any of the issues raised.

To view the PDF webinar slides please click on the image below, or view the recording of the webinar:

https://youtu.be/84GYF9DtWA8

Please contact Nick Wilcox (NickWilcox@bdbf.co.uk), Julia Gargan (JuliaGargan@bdbf.co.uk) or your usual BDBF contact, for further advice.

Working parents – the changing legal landscape

The workplace has seen a lot of changes since Covid, but fundamentally it still runs along traditional lines. An office working day of 9am to 5pm (and beyond) is more or less incompatible with the routine of children going to school or nursery. Organising pick-ups, drop-offs and inevitable childhood sicknesses between two working parents can become something resembling a military operation.

Combined with the cost of childcare, this often results in parents (predominantly mothers) taking career breaks or lower-paid jobs and sacrificing long-term earning potential.

While the legal protections around pregnancy and maternity are well-known and operate to protect women at the start of the parenting journey, having children is a lifelong commitment for both female and male employees. It is often not the early stages of having a child, but the long-term juggle of work and family responsibilities which forces mothers to leave employment. This leads to a lack of women at senior levels in businesses, which, in turn, is a significant driver of the gender pay gap.

The law itself recognises that this is a problem that disproportionately affects women. In *Dobson v North Cumbria NHS Trust,* the EAT held that notwithstanding changing social attitudes it remains a fact, of which Tribunals should take judicial notice, that there is a 'childcare disparity' between men and women, with the burden falling more heavily upon women.

The statutory rules on flexible working were amended in April 2024 to allow greater scope for employees to make a flexible working request. It is now a 'day one' right and the employer must consult with the employee before making any decision to refuse the request. However, the range of permitted reasons for refusing a request is very wide, making it relatively simple for employers to comply with the legislation. The compensation for any breaches of the legislation is also so limited that for many employees it is not worth pursuing. The Labour Government has promised to legislate to make flexible working the default – but exactly what this will mean in practice and when it will happen is yet to be seen.

The better avenue for working mothers (as it was in *Dobson*) is to claim indirect sex discrimination against their employer. They can argue that the employer's practice (for example, of mandating full-time office working) will disadvantage those with childcare responsibilities and thus disproportionately affect women. If the employer cannot successfully argue that their policy is a legitimate requirement for their business, and they have acted proportionately in enforcing it, the employer will be liable for indirect sex discrimination. In *Dobson,* it was held that the employer had acted in a proportionate way and worked with Mrs Dobson to find a reasonable compromise, and her claim failed. However, in *Thompson v Scancrown* the employer refused to budge on their policy of a 6pm finish, and Mrs Thompson's claim succeeded. She was awarded compensation equivalent to over a year's salary plus damages of £13,500 for injury to feelings.

While working mothers have a long and weary history of trying to have and do 'it all', working fathers in the 2020s are far more likely to see parenting as something that should be genuinely 50:50. The new generation of fathers might feel justifiably put out that the law does not count them as being discriminated against by policies which disadvantage parents.

The January 2024 changes to the Equality Act could change this. The new concept of 'indirect discrimination: same disadvantage' in s19A of the Equality Act means that if:

- an employer imposes a policy on male and female employees;
- the policy disproportionately disadvantages women due to their childcare responsibilities;

- the policy would also put a man with childcare responsibilities at substantively the same disadvantage; and

- the employer cannot show the policy to be a proportionate means of achieving a legitimate business aim,

then the man in question could make an indirect sex discrimination (same disadvantage) claim.

This is welcome news for working fathers in demanding roles, who often face more pushback from employers when trying to carve out time for their family life.

The search for a flexible working arrangement that both employer and employee can work within can be a long and sometimes frustrating one. However, with millennial parents becoming increasingly senior within their organisations, the possibility of discrimination claims in this area is something that employers are having to take more seriously. Working fathers in the City are using their networks to benchmark family-friendly offerings when looking for a new role, and this trend is only going to increase over the next ten years as millennials move towards the most senior positions. Trust between the employer and employee is paramount, and employees do better work when they feel valued and trusted to do the work within the time available to them, even if sometimes that does not fit standard office hours or means some working from home.

Employers can start to address this cultural shift, and retain and attract talent, by considering their own workplace policies. There is a growing trend for instigating gender-neutral leave policies for the first year after a child's birth, and this sets a great precedent and often helps to retain talented employees in a key transition in their lives. However, policies addressing the ongoing responsibility of raising a family would be as attractive to employees – for example, pay enhancements to the under-utilised unpaid statutory parental leave entitlement of 18 weeks per child.

Policies like flexible start and finish times, hybrid office and home-working and enhancements to the statutory right to emergency time off for dependants could also be beneficial to not only working parents but any employees with caring responsibilities – for example, those caring for elderly parents or a disabled partner. These individuals may also benefit from the indirect discrimination: same disadvantage provisions of the Equality Act.

Culture change takes time, but the upcoming generation of business leaders envisage a very different workplace to the one in which their parents operated.

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Connie Berry (ConnieBerry@bdbf.co.uk) or your usual BDBF contact.

BDBF retains long-standing ranking as a top tier firm in The Legal 500 UK 2025

We are pleased to announce that we have again been ranked as a top tier firm by The Legal 500 UK 2025.

Please see below the comments made about our team.

Employment: Senior Executives – Tier 1

The team:

Brahams Dutt Badrick French LLP enjoys a strong reputation in the senior executive space, regularly advising those in the financial services, insurance, medical, legal and accounting sectors. The team is distinguished by its specialist expertise in discrimination and whistleblowing matters, as well as sensitive matters involving sexual harassment. Overseeing the practice, **Gareth Brahams** is highly skilled in acting for senior finance professionals and senior executives in discrimination and whistleblowing claims. Other notable members of the practice include **Claire Dawson**, who specialises in employment litigation; **Paula Chan**, whose expertise lies in high-value exits and tribunal and High Court claims in the context of sexual harassment, discrimination, whistleblowing and breach of contract; **Polly Rodway**, who is a key contact for senior executives working in the media, financial services, insurance and legal sectors; **Nick Wilcox** who has a wealth of experience in regulatory employment disputes; **Clare Brereton**, who assists clients with matters involving disability discrimination and work-related personal injury claims; and **Samantha Prosser**, who has a particular specialism in advising consultants and senior healthcare professionals on whistleblowing, discrimination and unfair dismissal claims.

Individual rankings:

- Gareth Brahams – Hall of Fame
- Claire Dawson – Leading Partner
- Nick Wilcox – Next Generation Partner
- Polly Rodway – Next Generation Partner
- Clare Brereton – Next Generation Partner
- Paula Chan – Key Lawyer
- Samantha Prosser – Leading Associate

Testimonials:

‘BDBF was recommended to me by a personal contact that had heard great things about the BDBF team from their other clients. When I interacted with various members of their team I felt a sense of continuity in our conversations – it felt fluid and easy when dealing with multiple people. Everyone was kept in the loop on my case and there were never any knowledge gaps on what had been shared.’

‘I really enjoyed working with Polly Rodway. Polly is exceptional at what she does. She is able to take personal, emotional situations in combination with the data and facts to craft what is a compelling and effective case for her clients.’

‘Very smoothly and seamlessly run. Very transparent communication on scoping, pricing and good handover across the team.’

‘I found the technical expertise exceptional, the outcome strategy compelling, and the commercial approach pragmatic in terms of what I wanted to achieve. Overall, I was facing concerning corporate conduct and I felt that BDBF helped me bring together a very strong approach and strategy and having their capability and name in my corner put me in a very strong position. Ultimately, I attained a great outcome that I do not think I would have achieved alone or with another firm.’

‘Gareth Brahams is the go-to solicitor for high-value claims involving senior executives. His tactical acumen and legal knowledge are unsurpassed in the City. Sam Prosser is an experienced and personable employment law litigator who inspires confidence from her clients, with an encyclopaedic grasp of the papers. An absolute superstar.’

‘Nick Wilcox is a tower of strength for individual clients. Highly deft and human in his approach to dealing with clients, but totally commercial. Clare Brereton is a really wonderful partner working for individuals and senior executives. Very thoughtful but pragmatic and direct. Clients find her super-supportive.’

‘BDBF manage to combine the excellence and professionalism of a top City firm with the client care of a small practice. They combine legal knowledge with tactical nous and are relentless in pursuing justice and fairness.’

‘Claire Dawson is an outstanding partner – her approach combines professionalism with compassion and she is efficient, effective and supportive.’

Employers – Tier 6

The team:

Brahams Dutt Badrick French LLP handles work for both employers and senior executives. It particularly excels in handling major disputes, and has considerable expertise in regulated professions. The team has a strong focus in the financial services and insurance industries. In addition, the practice also advises a number of law firms. **Gareth Brahams** heads the department, which also includes **Nick Wilcox**. Recent highlights have included **Clare Brereton**’s promotion to the partnership in April 2023.

Testimonials:

‘BDBF have a fantastic employment team. They do work of the highest quality and profile across the entire field, including high value work, and international work. It is striking how experienced and “can-do” even their most junior solicitors are.’

‘Stand out practitioners are Nick Wilcox and Tom McLaughlin. They are both highly experienced and knowledgeable. I have also been very impressed with Blair Wassman (particularly for attention to detail and hard work).’

‘BDBF, a firm which is renowned for acting for senior executives in high profile employment disputes, has an increasingly strong reputation acting for employer clients. It has, in my view, a high quality team of lawyers who are well versed in handling both Employment Tribunal and High Court litigation.’

‘I have recently worked with Nick Wilcox and Blair Wassman, who have demonstrated impressive legal acumen, strategic judgement and client management.’

‘We have worked with Nick Wilcox and Blair Wassman. Both have been extremely forthright and helpful in their opinions, offering guidance and talking through the process in a very thorough way.’

‘Overall offering to the client is extremely well-rounded and their knowledge of the client and associated client management is excellent. Really a pleasure to deal with.’

‘Gareth Brahams and Tom McLaughlin are particularly excellent. Client management, flexibility, commerciality.’

‘Pragmatic advice – availability – experienced. Gareth Brahams – very skilled and experienced with a broad knowledge of the law. Trusted adviser. Tom McLaughlin – knowledgeable and pragmatic advice.’

Thank you to our clients, referrers and employment law colleagues for the incredible feedback.

If you would like to discuss your employment law needs please contact your usual BDBF contact, email us at info@bdbf.co.uk or call us on 020 3828 0350.

BDBF continues growth with latest new associate hire

Top-ranked, specialist employment law firm BDBF is delighted to announce the recent appointment of **Adele Getty**, who joins as a newly qualified lawyer having trained at Winckworth Sherwood LLP.

Adele's appointment demonstrates the continued growth of BDBF and brings the firm's headcount to six partners and 15 associates, in addition to its seven-strong practice team.

BDBF's ability to attract high calibre talent is testament to the quality of its client base, its stellar track record in litigation, the complex and interesting work the team does, and the collaborative approach it fosters.

BDBF has been top ranked by the leading independent directories for acting for senior executives for the last ten years consecutively. BDBF also has a growing practice acting for employers on their high stakes and high value employment work.

Gareth Brahams, Managing Partner of BDBF said, "We are delighted that Adele will be part of our market-leading team, helping us to enhance the firm's offering and deliver exceptional results for our clients."

Adele Getty said, “I am delighted to be joining BDBF on qualification and feel honoured to begin my practice as part of such a highly regarded team, especially at such an exciting time in the employment law sphere. I am looking forward to assisting the firm’s esteemed clients achieve great results and contributing to BDBF’s continued success.”

Do not make promises you cannot keep: employer

prevented from dismissing employees in order to deprive them of a permanent contractual entitlement.

The Supreme Court has ruled that an implied term prevented a private sector employer from dismissing and offering to re-engage employees on new terms, where the objective was to withdraw a contractual payment that was intended to be a permanent benefit.

What happened in this case?

In 2007, Tesco restructured its distribution centres, which meant closing some centres, expanding others and opening some new ones. Staff at the closing centres were asked to relocate to different sites instead of being made redundant and receiving redundancy payments. To incentivise the staff to do this, Tesco agreed with the trade union, USDAW, that it would make a "retained payment" to those who agreed to relocate to a different site. The retained payment reflected the difference in value between the employees' contractual entitlements at the old and new distribution centres. In some cases, this was significant and represented between 30% to 40% of overall pay. It was agreed that the retained payment would be a permanent entitlement for those employees, and a term to this effect was incorporated into their employment contracts.

In 2021, Tesco sought to withdraw the retained payment. The affected employees were offered a lump sum payment in exchange

for agreeing to the removal of the benefit. The employees were told that if they did not agree to this, they would be dismissed and offered a new contract of employment on identical terms but excluding the retained payment. In response, USDAW and several of the affected employees applied to the High Court for a declaration as to the meaning of the retained payment term, and an injunction to restrain Tesco from dismissing for the purpose of removing or reducing the retained payment.

USDAW and the employees succeeded at the High Court stage, with the Court deciding that there was an implied term preventing Tesco from terminating and offering re-engagement as a means of withdrawing the retained payment. However, this was overturned by the Court of Appeal, which held that such an implied term was not justified. USDAW and the employees appealed to the Supreme Court.

What was decided?

Tesco argued that the retained payment was permanent only for the duration of the employment contract and was subject always to Tesco's contractual right to dismiss on notice. This approach was rejected by the Supreme Court on the basis that this would render as meaningless the promise that the retained payment would be a *permanent* entitlement.

The correct meaning of the term was that it would continue for the duration of employment in the same role. Yet the term had value if Tesco could simply dismiss and offer to re-engage as a route to unilaterally withdrawing it. Therefore, Tesco's right to terminate the employment contract on notice was

subject to an implied term that it could not dismiss for the *purpose* of depriving the employees of the retained payment.

The Court noted that the affected employees had been incentivised by the retained payment to agree to otherwise "unpalatable" relocations. It simply could not have been the intention that Tesco would have the right to dismiss as a means of withdrawing the retained payment – that would *"flout industrial common sense".* However, this did not mean that Tesco could never terminate the employment of the affected employees; they could do so for other reasons, just not to avoid the retained payment. The Court said that the existence of an implied term restraining dismissal in this way was not new. Similar implied terms had been upheld in cases where an employee had a contractual right to permanent health insurance (PHI) benefits, and the dismissal would have deprived a sick employee of such benefits.

In deciding whether to reinstate the injunction preventing dismissal, the Court highlighted that "specific performance" of contractual obligations will not usually be ordered against parties to employment contracts. However, there is an exception to this rule, insofar as specific performance *may* be ordered against an employer provided there has been no breakdown of mutual trust and confidence. Given that Tesco was prepared to re-engage the employees on inferior terms, there had clearly not been any such breakdown in this case. The Court also noted that specific performance will not be ordered where damages were an adequate remedy for the wronged party. However, it was decided that damages would be inadequate in this case since it would have been limited to damages recoverable in an unfair dismissal claim.

Therefore, the Supreme Court restored the injunction

preventing Tesco from dismissing the employees for the purpose of removing the retained payment term.

What does this mean for employers?

Employers stuck with a contractual benefit that they do not like should recognise that fire and rehire will not always come to their rescue – although it should be borne in mind that the facts of this case were unusual. Although it remains a highly unusual step for a Court to limit an employer's right to terminate a contract of employment, this case underlines that it is possible in certain situations. Here, a term was implied to prevent dismissals aimed solely at removing a contractual benefit intended to be permanent. A similar term may be implied where an employer dismisses a sick employee entitled to PHI benefits, thereby depriving them of the very benefit intended to help them when sick. In both cases it would be necessary to imply the term in order to make sense of the contract and/or to reflect the parties' actual intentions.

To avoid situations such as these, employers should exercise caution about promising contractual benefits which might be regarded as permanent. When entering into employment contracts, clear wording setting out the parameters of benefits are advisable, for example, by stipulating that they are time-limited and may be withdrawn by the employer.

However, it is important to remember that this decision does not go as far as preventing dismissal for other lawful reasons, for example, misconduct or redundancy. Although, given the background of this case, there is a risk that a

future dismissal by Tesco would be viewed as a sham designed to hide the true reason i.e. ending the retained payment.

Tesco Stores Ltd v USDAW and others

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Indirect discrimination: those without the protected characteristic in question, but who suffer the same disadvantage as the protected group, may bring claims

In the recent case of *British Airways plc v Rollett and others* the EAT has held that individuals may bring claims of indirect discrimination despite not sharing the protected characteristic of the disadvantaged group, provided that they suffer the same disadvantage.

What happened in this case?

The claimants are cabin crew members employed by British Airways (**BA**) who were adversely affected by scheduling changes following a restructuring exercise. The claimants argued that these changes unfairly disadvantaged groups with certain protected characteristics, namely: (i) non-British nationals who were required to commute to Heathrow Airport from abroad; and (ii) employees with caring responsibilities (who were predominantly women).

Some claimants had the relevant protected characteristic (i.e. they were non-British nationals and/or women), whereas others did not. Those who did not share the relevant protected characteristics nevertheless argued that they experienced the same disadvantage as those who did. For example, a *British* national commuting from France argued that she suffered the same disadvantage as her non-British colleagues, as did a *male* employee with caring responsibilities.

What was decided?

The Employment Tribunal (**ET**) held that claimants do not need to share the protected characteristic of the disadvantaged group, so long as they suffer the same disadvantage as a result of the employer's provision, criterion or practice (**PCP**). The PCP in this case was the scheduling change implemented by BA.

BA appealed, arguing that only those who shared the protected characteristic should be allowed to bring claims of indirect discrimination. BA argued that the ET's decision was incompatible with the statutory regime on indirect discrimination, since the Equality Act 2010 (**Equality Act**) requires claimants in indirect discrimination cases to have the same protected characteristic as the group disadvantaged by the PCP.

The EAT dismissed the appeal, holding that the Equality Act could be read compatibly with EU case law, particularly the European Court of Justice's decision in *CHEZ Razpredelenie Bulgaria* (**CHEZ**), which allowed individuals who did not share the protected characteristic to bring indirect discrimination claims if they faced the same disadvantage. The EAT stated that this interpretation of the Equality Act was in line with its purpose, namely to strengthen the law and support progress on equality.

On 1 January 2024, the Equality Act was amended to reflect the decision in CHEZ. BA also sought to challenge the validity of the amendment but the EAT rejected that line of argument.

What does this mean for employers?

The indirect discrimination regime already requires employers to avoid PCPs which apply equally across the workforce, but which place groups with particular protected characteristics at a disadvantage. Claimants who share the relevant protected characteristic may bring indirect discrimination claims and will be successful if they can show that they were disadvantaged by the PCP, and the PCP cannot be objectively justified. The EAT's decision does not change this. However, the decision clarifies that Employment Tribunals also have jurisdiction to hear such claims even where the claimants do not share the protected characteristic of the disadvantaged group. Although this position was codified in the Equality Act on 1 January 2024, the EAT's decision remains relevant to claims predating that amendment (as well as also underlining that the amendment is valid).

Employers should remain cautious and consider the impact of any PCP on groups with different protected characteristics, but remember that the class of potential claimants in indirect

discrimination cases is broader than it may first appear. For example, a policy of full-time office working may disadvantage workers with certain disabilities (e.g. CFS, depression or conditions affecting mobility), by causing them to suffer additional pain, exhaustion, distress or difficulty. Now, workers who do not meet the legal test of disability, but who experience the same types of disadvantages, may be able to bring indirect disability discrimination claims. For example, a menopausal worker whose symptoms were not considered to have a substantial enough effect on her day-to-day activities to amount to a disability, or a worker suffering from short-term reactive depression who did not pass the long-term element of the test might pursue claims for indirect discrimination on a "same disadvantage" basis. In theory, it might even extend to workers who are specifically *excluded* from the definition of disability, such as those suffering from alcoholism.

British Airways plc v Rollett and others and Minister for Women and Equalities (Intervener)

BDBF is a leading employment law firm based at Bank in the City of London. If you would like to discuss any issues relating to the content of this article, please contact Abdullah Ahmed (AbdullahAhmed@bdbf.co.uk), Amanda Steadman (AmandaSteadman@bdbf.co.uk) or your usual BDBF contact.

New guidance for employers on how to support disabled

workers with hybrid working

The Equality and Human Rights Commission (EHRC) has published new guidance for employers on how to support disabled workers with hybrid working. Aimed at managers and leaders, it provides practical tips, conversation prompts, questions and case studies, and covers both recruitment and employment.

On 5 September 2024, the EHRC published new guidance for employers on how to support disabled workers with hybrid working. The guidance recognises that working arrangements can bring benefits to disabled workers, including being better able to manage their health and wellbeing. However, it highlights that if it is not designed and implemented well it can also create difficulties like a lack of inclusion, isolation from colleagues or not having the necessary support or equipment in place to enable a worker to thrive in their role.

The guidance addresses the following topics in detail:

- What the law has to say about reasonable adjustments in employment.
- How to identify when a worker or job applicant may need reasonable adjustments.
- Identifying barriers to effective hybrid working.
- How to identify the adjustments needed to overcome the barriers.

- How to implement the adjustments.
- How to review how the adjustments are working.
- How to make your working environment inclusive and accessible for disabled workers.

It also discusses a number of types of adjustments to hybrid working arrangements for disabled workers including things like: digital support, IT equipment, furniture, online and hybrid meeting etiquette and travel to work. It includes various case studies designed to showcase different types of adjustments including:

- Adjusting a working pattern for a worker with depression to allow him to attend the office for 60% of his working time, rather than the standard 40%, as too much homeworking is exacerbating his condition.
- Providing specialist software and a large monitor for homeworking for a worker with a degenerative eye condition who is struggling to read emails and documents on his computer.
- Allocating a dedicated desk in a workplace which operates hotdesking to a worker with a musculoskeletal condition which necessitates specialist display screen equipment to minimise discomfort.
- Providing a quieter desk in an open plan office to an

autistic worker who is struggling with the noise and recording the same in an “adjustments passport” to ensure future managers are appraised of her needs.

- Agreeing an accessible meeting standard for online meetings by turning on live captions and using the inbuilt accessibility checker on Powerpoint to enable workers with hearing and visual impairments to participate fully in such meetings.

Although non-binding, the guidance will be a useful reference document for all employers operating hybrid working arrangements.

Supporting disabled workers with hybrid working: Guidance for employers

BDBF is a law firm based at Bank in the City of London specialising in employment law. If you would like to discuss any issues relating to the content of this article, please contact Principal Knowledge Lawyer Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

Labour Government scraps law allowing workers the right to request predictable working patterns

Just weeks before it was due to come into force, the Government announced it has no plans to introduce the new right for workers to request predictable working patterns. Read on to find out why and what is coming in its place.

What is the background?

On 18 September 2023 the Workers (Predictable Terms and Conditions) Act 2023 became law. The Act was intended to give workers (and agency workers) a statutory right to request more "predictable" working patterns.

Where eligible, workers would be able to request a more predictable working pattern where their current work pattern lacked certainty in terms of hours, days and/or times worked. "Work pattern" also covered the length of the contract, and a presumption was to be made that a fixed-term contract of under 12 months lacked predictability. However, employers would be able to refuse such requests on a wide range of grounds. You can read our full summary of the proposed right here.

Although the Act had passed into law, its provisions did not come into force straight away. The intention was that it

would take effect on 18 September 2024. In readiness, Acas published a draft statutory Code of Practice which provided further guidance on how employers should handle such requests.

What has changed?

Earlier this month, a spokesperson for the Department of Business and Trade confirmed that the Government had "no plans" to bring the Act into force. The Government has its own plans to address insecure working and intends to go further than providing a mere right to request a fixed working pattern. Instead, it plans to legislate to give workers the right to a new contract that reflects the number of hours worked over a period of 12 weeks or more. The spokesperson said the Government did not wish to confuse employers and workers with two different models, hence the scrapping of the right to request.

The planned right to a new contract will be complimented by proposals to:

- ban "exploitative" zero hours contracts altogether; and
- require employers to give workers reasonable notice of changes to working times or shifts, with a right to compensation where late changes are made.

The full detail of these proposals remains to be seen but all are expected to feature in the forthcoming Employment Rights Bill, which Labour had promised to publish within 100 days of taking power (so by 12 October 2024).

What does this mean for employers?

Some employers may have already prepared new policy documents to reflect the right to request a predictable working pattern. It appears these are no longer needed. To the extent that they have been added to Staff Handbooks, they should be withdrawn, and staff notified.

Employers should watch out for the new Employment Rights Bill to understand the proposed scope of the new right to have a fixed working pattern. For those wishing to be as well prepared as possible, it would be sensible to review the working patterns of staff with variable working hours over the previous three months. This will help you identify the average working week of such workers and the potential scale of the changes you may need to make in future.

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BDBF shortlisted for Senior Executive Team of the Year and Boutique Law Firm of the Year at IEL Awards 2024

BDBF has been shortlisted as a finalist for Senior Executive Team of the Year and Boutique Law Firm of the Year at the IEL (International Employment Lawyer) Awards 2024.

The annual awards “celebrate the world’s best employment and labour law specialists.”

Winners will be recognised at an award ceremony in London on 13 November 2024.