The Employment Rights Bill: a closer look at the provisions concerning contracts and pay

On 10 October 2024, the Government published the Employment Rights Bill, which will take forward many of its proposals for workplace reform. In the fourth article in our series analysing the Bill, we consider the proposals concerning contracts and pay.

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 fourth in our series of articles explaining the Bill, we consider all the proposals affecting contracts and pay.

Zero and low hours contracts

A zero hours contract is one where the employer does not guarantee any number of hours of work, but the worker is obliged to accept work whenever it is offered, without any certainty of how much work there will be or when. Sometimes the contracts are less onerous, and the worker is permitted to reject the work offered if they wish. A low hours contract is similar, save the employer will guarantee some hours of work, but it will be at the employer's discretion as to when the work is performed. Before the election, the Labour Party promised to ban "exploitative" zero hours contracts.

Importantly, the Bill does *not* go as far as banning zero (or low) hours contracts. Instead, it introduces two key changes, which will restrict the use of such contracts and penalise employers who abuse them.

First, zero and low hours workers who have worked a certain number of hours regularly over a "reference period" will have a new statutory right to have those hours guaranteed in their contract. The meaning of low hours worker will be defined in regulations, as will the qualifying number of hours to be worked and the reference period (the **Next Steps to Make Work Pay** document talks of a possible 12-week reference period). The rules governing this new right are extremely complex, but, in summary, require that at the end of *each* reference period, the employer *must* make a guaranteed hours offer to any worker within scope. That offer must meet certain minimum requirements set out in the Bill (and to be further set out in regulations), including that it must set out the proposed working days and hours (or specific working pattern) which must reflect the working hours over the reference period. Further, in most cases, the terms of the offer may not be less favourable to the worker, for example, making an offer on a lower rate of pay. A failure to make the offer, or making one incorrectly, will give rise to an Employment Tribunal claim for which compensation may be awarded.

Second, employers will be required to give zero and low workers (and any other worker who does not have a set working pattern), reasonable notice of shifts and changes to shift, with a right to compensation where late notice is given. Again, the rules are extremely complex. In a nutshell, they require employers to give affected workers reasonable notice of a shift that the employer wants or requires the worker to work, specifying the day, time and hours to be worked. Similarly, they must give notice of any *change* to, of

cancellation of, a shift. Regulations will set out the minimum amount of notice that must be given. Where an employer cancels, moves or curtails a shift at short notice, it must make a payment of a specified amount to the worker. Regulations will set out how much that payment must be. A breach of any of the notice or payment requirements will give rise to an Employment Tribunal claim for which compensation may be awarded.

What will these changes mean for employers in practice?

- These changes do not make zero or low hours contracts unlawful, but they will make them considerably more difficult for employers to manage and introduce risks for getting it wrong. The requirement to monitor working hours within a reference period on a rolling basis will be administratively cumbersome, particularly where an employer has multiple zero or low hours workers. Similarly, the employer is required to make repeated offers of guaranteed hours contracts at the end of each reference period. The drafting of the Bill suggests that these offers must continue to be made even where a worker has made it clear that their preference is to remain on a zero or low hours contract. Could one unintended consequence of the Bill be that workers who genuinely prefer to work on a zero or low hours basis feel pressured to accept a guaranteed hours contract by virtue of the repeated offers from their employer?

- As far as giving notice of shifts and changes to, or

cancellation of, shifts are concerned, it remains to be seen what the minimum notice required will be. If it is generous, this raises the risk of employers tripping up on the notice requirements, meaning they will be liable to make a specified payment to the worker and leave themselves open to an Employment Tribunal claim (which given the levels of public interest in these proposals would be likely to spark high levels of media coverage).

- All in all, employers may feel the benefit of a flexible workforce is not worth the potential cost and lead to a move away from the use of zero and low hours contracts, which is perhaps the intention behind these provisions. It could lead to a switch in the use of agency workers, who would not be covered by these rules (although the Bill reserves the right to introduce similar rules for them in the future).

Statements of particulars of employment

Currently, employers must provide employees and workers with a statement of the particulars of their employment when they start work. The scope of those particulars is set out in section 1 of the Employment Rights Act 1996 (the **ERA**).

The Bill provides that employers must give workers a written

statement that the worker has the right to join a trade union, and this must be given at the same time as the statement of particulars under s.1 of the ERA and at *"other prescribed times".* Regulations may prescribe what information must be included in the statement, the form of the statement and how it must be given to the worker. A failure to provide the statement will give rise to an Employment Tribunal claim. A Tribunal may determine and amend the particulars and, if the worker has been successful in certain other substantive claim before the Tribunal, compensation of between two to four weeks' pay (currently capped at £700 per week) may also be awarded.

What will this change mean for employers in practice?

- This is a small change that should be easy for employers to deal with. Although there is no obligation to include the statement within the statement of particulars of employment, in practice this will be the easiest way for employers to meet this requirement. In most cases, employers discharge the obligation to provide a statement of particulars by way of the contract of employment.

- It remains to be seen what is meant by providing the statement at *"other prescribed times".*

Pay measures

Statutory Sick Pay (SSP)

The Bill makes some small tweaks to SSP regime. First, the "waiting days" will be removed, meaning that SSP will be payable from the first day of sickness, rather than from the fourth day as is currently the case. Second, the lower earnings limit for SSP – which currently sits at £123 per week – will be removed meaning that workers will be entitled to SSP regardless of income levels. However, nothing is said about raising the rate of SSP (currently £116.75 per week).

Tips and gratuities

Legislation regulating the allocation of tips introduced earlier this year requires affected employers to have a written policy on how it deals with tips and gratuities. That policy must include information on whether the employer requires or encourages customers to pay tips, gratuities and service charges and how the employer ensures that all qualifying tips, gratuities and service charges are dealt with in accordance with the law, including how they are allocated between workers.

The Bill amends the law to provide that before producing the first version of the policy, an employer must consult with trade union or other worker representatives, or, if none, with the workers affected by the policy. Further, employers are required to review the policy at least once every three years, and as part of such reviews the employer must carry out further consultation with workers or their representatives.

Whenever consultation is carried out, the employer must make a summary of the views expressed in the consultation process available in anonymised form to all workers.

What will these changes mean for employers in practice?

- Employers will need to adjust payroll practices to ensure that SSP is paid from Day 1 of sickness.

- Employers affected by the tips legislation will need to undertake consultation with staff about their tips policies and remember to diarise reviews as appropriate. There are no specific rules in the Bill governing what form that staff consultation should take, but, typically, it should include the provision of written information followed by one or more face-to-face meetings.

What are the next steps?

The Bill has just started its passage through Parliament, which will take time. Even when passed, some of the provisions may not come in straight away. Regulations are needed in connection with all of the zero hours measures, and consultation may also be needed. As far as the SSP change is concerned, the Government has said it will consult on what the

percentage replacement rate for those earning *below* the current flat rate of SSP should be.

Notably the Bill does not address changes to the National Minimum wage regime. Before the election, Labour promised that it would *"make sure the minimum wage is a genuine living wage".* It planned to do this by changing the remit of the Low Pay Commission (the **LPC**), the independent body that advises Government about the minimum wage. The expanded remit would mean that the minimum wage rates should account for the cost of living. Labour also promised to remove the "discriminatory" minimum wage rate age bands, so that all adults would be entitled to the same rate. Although not addressed in the Bill, the Labour Government has already taken steps to fulfil this promise by changing the remit of the LPC and asking them to recommend a new wage rate for 18-20 year olds. It is anticipated that these changes will come into force in April 2025.

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

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.

On International Equal Pay Day, we highlight a very recent decision of the Employment Tribunal: Thandi & Others v Next Retail Limited (22 August 2024).

International Equal Pay Day, celebrated on 18 September 2024, represents the longstanding efforts towards the achievement of equal pay for work of equal value between women and men, recognising that the gender pay gap is estimated at 20% globally. It further builds on the United Nations' commitment to human rights and against all forms of discrimination, including discrimination against women and girls.

In the UK, we've had equal pay legislation since 1970 but there remains a gender pay gap of 7.7% for full-time employees across the UK. This does not necessarily mean that employers are not paying men and women equally for doing the same job, although that is one factor. Other factors which contribute to the gender pay gap are the lack of representation of women in the most senior (and therefore highly paid) roles in organisations and the prevalence of gender segregation in certain types of roles and sectors with what is traditionally considered "women's work" being historically undervalued.

An interesting development in the UK in recent years has been the number of claims being brought by large groups of claimants in the retail sector who work as sales assistants on

the shopfloor (mainly women) who have argued that their work is of equal value to warehouse workers (mainly men).

In Thandi & Others v Next Retail Limited, the Employment Tribunal held that it was a breach of equal pay law for Next to pay warehouse staff a higher rate of basic pay than shopfloor staff. The Tribunal had already found at an earlier hearing that the work of both groups was of equal value. The recent hearing addressed Next's argument that the difference in pay between the two roles was a material factor *"other than the difference in sex"* – what is known as the *"material factor defence."*

The material factors Next had relied upon were market forces and market price, difficulty recruiting and retaining warehouse staff and the viability, resilience and performance of Next and its group of companies. The Tribunal considered whether the material factors Next had relied upon were directly or indirectly discriminatory on the grounds of sex.

It found there was no direct discrimination. Next had not decided to pay men more than women. There were men and women working in the warehouse and they received the same rate of pay regardless of their sex as did the shopfloor staff.

However, the Tribunal did find that there was indirect discrimination. Under equal pay law, if claimants can produce statistics which demonstrate *"an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men"* an employer must then provide an objective justification for the difference. In Next's case, 77.5% of its sales staff were female whereas warehouse staff were 52.8% male. In

addition, Next benchmarked its pay against the market and the higher paid warehouse labour market was predominantly male.

The Tribunal found that the only reason for the difference in pay was cost-cutting. Next could have afforded to pay a higher rate of basic pay to the sales staff but had decided to keep labour costs to a minimum and maximise profitability. Next was therefore unable to justify the difference in pay as a proportionate means of achieving a legitimate aim because cost alone can never be a legitimate aim.

Interestingly, the Tribunal also said that if market forces were allowed to be a “trump card” in cases like this, it would defeat the purpose of the equal pay legislation and allow lower pay for certain types of work due to indirect discrimination to be continued in perpetuity. This case addresses head on the fact that women’s work has historically been undervalued which is the precise issue that the equal value aspect of the equal pay legislation was designed to address.

The implications of the Tribunal’s decision are very significant. The back pay and compensation claimed is said to be more than £30m – divided between 3,540 claimants. Next has said it is appealing the judgment. Tesco and Asda (among other large retailers) who are defending similar claims will be analysing the judgment carefully. All these cases are likely to be hard fought by the employers concerned because of significant compensation sought for backpay and also the cost of equalising pay for their staff going forwards, meaning the issue is unlikely to be settled by the time International Equal Pay Day 2025 comes around.

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 BDBF Partner Claire Dawson (ClaireDawson@bdbf.co.uk) or your usual BDBF contact.

Gender pay gap reporting: where are we and what lies ahead?

With the latest round of gender pay gap reports published earlier this month, Amanda Steadman and Blair Wassman take a look at what the process entails, what the latest figures show and what the future holds for this area of law.

Equal Pay Day – can we move forward if we keep looking back?

Today on #EqualPayDay BDBF is pleased to share details of the FawcettSociety's campaign to #EndSalaryHistory. In this article, BlairWassman and Polly Rodway explain the basis for that campaign & tips to address pay gender inequality.

NEGOTIATING SENIOR EXECUTIVE CONTRACTS – PITFALLS AND TIPS

With bonus season behind us and restrictions beginning to lift, many people are beginning to rethink their career or plan their next job move. BDBF Partner Paula Chan and Associate Blair Wassman offer some guidance on negotiating your contract.

Job Support Scheme: expansion of the scheme and further details released

Last month we reported on the new wage subsidy scheme designed to replace the Coronavirus Job Retention Scheme (i.e. furlough) from 1 November 2020. With further restrictions imposed on businesses under the new coronavirus alert levels, the Chancellor has been forced to revise and expand the scheme. In addition, further details of how the scheme will operate have been released.

New Bill gives employees the right to know colleagues' salaries and expands pay reporting obligations

A new Bill seeking to increase transparency in the field of equal pay and expand pay reporting obligations to smaller organisations has begun its passage through Parliament. In this briefing we bring you up to date with what is proposed.

The Job Support Scheme – what do we know so far?

The Chancellor of the Exchequer has announced that a new wage support scheme will run between 1 November 2020 and 30 April 2021. In this briefing, we explain what we know so far about the new "Job Support Scheme"

The government needs to get strict on gender pay

reporting

In April 2020, companies with 250 or more employees must publish their gender pay gap information for the third time under the Equality Act (Gender Pay Information) Regulations 2017

Pay inequality issues continue to remain high on the agenda

The interest in pay inequality between men and women shows no signs of waning in 2020. In a little over two months, pay inequality will come under the spotlight again, when large employers publish the third round of gender pay gap reports.

Samira Ahmed wins BBC equal pay case

TV News host Samira Ahmed win equal pay case against BBC for her work on Newswatch. After being underpaid £700k Samira wins tribunal after comparing her pay with Jeremy Vine show Points of View.

Made in Dagenham – a clarion call for equal pay in the City

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Today, 7 June 2018, marks the 50th anniversary of the strike by 187 female sewing machinists at a Ford car factory seeking sex equality, a story that inspired the 2010 film 'Made in

Dagenham.' The strikes led to a meeting with Barbara Castle, then Employment Secretary, to discuss recognition and inequality of pay for females and, two years later, led to the inception of the Equal Pay Act 1970.

Further developments have occurred since, including the introduction of the Equality Act 2010 which replaced the 1970 Equal Pay Act, the launch of a Women and Work Commission, and the appointment of a Minister for Women and Equalities. However, 50 years on there is still a significant gap in pay between men and women. The World Economic Forum predicts this gap will not close for another 217 years.

Gender Pay Reporting

The latest initiative to address the imbalance in pay is the gender pay reporting obligation. Since 6 April 2017 organisations with 250 or more employees have been obliged to publish the following information each year:

1. overall gender pay gaps, showing the mean and median pay for both sexes;
2. the number of men and women in each of the 4 pay bands (lowest to highest salaries) to show how pay differs at different levels of seniority; and
3. information on pay gaps relating to bonuses and the proportion of males/females who received a bonus.

Over 10,000 firms have disclosed such information following the first round of mandatory reporting in April 2018. Of those, 78% of organisations reported a gap in favour of men. In addition, men were paid more than women in every single industry; there is no sector that pays women more than men.

Gender Pay Gap in the Financial Services Sector

One of the largest disparities in gender pay can be found, unsurprisingly, in the financial sector.

According to research by law firm Fox and Partners, the gender pay gap in the financial sector is 22% for salaries and 46% for bonuses. Compared to the average UK gap of 9.7% this is a startling amount. A number of institutions within the financial sector are also performing much worse than this average – 43.5% at Barclays Bank Plc, 36.9% at Nomura International Plc, 36.5% at RBS and a 36.4% gap at Goldman Sachs. The gap is also substantially enlarged for individuals paid more than £1 million per year – the gender pay gap then rises to 91% in favour of men.

The glass ceiling

There has been a lot of discussion as to the reasons for this divergence. Looking at the statistics, one of the clearest explanations is the lack of female representation at the highest levels within financial institutions. According to a Financial Times study in 2017, women account for 58% of the total workforce at junior levels. However, this drops significantly to around 25% at senior levels. When this is broken down further, studies show that nearly 23% of board directors are women, but only 1 in 7 women are represented on executive committees. At JP Morgan only 9% of higher paid jobs are held by women.

Steps are being taken to address the imbalance at leadership levels in financial services. Independent reviews have been undertaken and non-binding and voluntary recommendations have been made; these include increasing the representation of women for FTSE100 executive committees to 33% by 2020 and requiring FTSE350 companies to disclose the numbers of women on their executive committees. So far, the government has resisted some calls for binding recommendations and/or quotas on boards or executive committees. The hope is that these various initiatives, together with the increased transparency around gender pay gaps as a result of the new reporting obligations, will drive culture changes within organisations. Not least because at present, there are no sanctions for firms

who report a gender pay gap.

What options does an individual have in light of the gender pay reports released by their own employer?

Our experience as employment lawyers acting for senior individuals is that despite the advent of gender pay gap reporting, the issues of pay and reward are still shrouded in secrecy. Differentials have started to appear even in sectors where pay scales exist due to the payment of bonuses in addition to basic pay. In the NHS for example, full-time male consultants are paid 12% more than their female counterparts and male consultants are six times more likely to be paid bonuses. Pay differentials have been revealed to affect every professional and regulated sector.

It is however important to remember that a gender pay gap may not necessarily mean that there is a difference between the salaries or contractual bonuses of men and women performing like for like work or work of an equal value. If there is, this may give rise to a claim for equal pay. Alternatively, any less favourable treatment on the basis of sex, such as being passed over for job offers, promotions, discretionary pay rises or bonuses, may give rise to a claim for sex discrimination instead.

Specialist employment advice should be sought if you believe you have a claim for equal pay or sex discrimination. If so, the first step would be to request the information required to make an assessment as to whether there is a difference in pay between men and women performing like work and/or any less favourable treatment.

Stopping you enquiring about any discriminatory pay gap is unlawful

Whilst companies can request that employees keep their salaries confidential, section 77 of the Equality Act 2010 makes pay secrecy clauses in contracts of employment

unenforceable to the extent that they prevent an employee from finding out whether or to what extent pay is connected to his/her gender, age, race, sexual orientation or disability, for example. Section 77 also makes it unlawful to victimise an employee for raising the connection between pay and gender or any other discriminatory reason for a pay gap to their employer.

Therefore, if a woman asks her male colleagues about how much they are paid because she is concerned that she is being paid less for carrying out the same or similar work, it would be unlawful for the employer to sanction her in any way for asking the question.

If any differences in pay or treatment are identified then further options could include submitting a formal grievance to the employer to address the situation.

Lessons from Dagenham – a collective approach

One of the key lessons from the Dagenham strike is the importance of collective action. City executives are largely non-unionised and pay negotiations happen behind closed doors on an individual basis. The era of asserting individual rights has moved generations away from the shield provided by collectivism. The power of collective movements has been palpable lately from #MeToo and #TimesUp putting a spotlight on sexual harassment, objectification and representation of women, to the organising by trade unions of individuals contractually classified as ‘self employed’ to obtain workers rights for them.

From our experience of advising many City women, raising such issues under the banner of ‘discrimination’ is perceived to be job or career ending. There is strength in unity, lots of practical advice that can be shared when women talk to one another whether within City women’s networks or in external professional networks, and there is power in bringing

collective grievances to change the practices and culture of City employers. City employers may begin to understand that they cannot isolate employees easily and that such complaints call for systemic change.

Only time will tell whether we will see the gender pay gap in the financial sector narrow over the next annual gender pay reporting dates. One can only hope that the search for recognition and equality driven by the Dagenham factory girls moves its way quickly and persuasively into the City without a further 50 years going by.

Arpita Dutt is a Partner and Samantha Prosser is a solicitor at leading employment law firm BDBF both specialising in equality law.

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