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.

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.