The Employment Rights Bill: a closer look at the family-friendly 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 first in a series of articles analysing the Bill, we consider the proposals for family-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.

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.