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.