SLAUGHTER AND MAY/

NEWSLETTER

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EMPLOYMENT BULLETIN

QUICK LINKS

THE EMPLOYMENT RIGHTS BILL 2024

On 10 October, the Government published The Employment Rights Bill, thereby meeting its deadline of introducing employment reform legislation within its first 100 days. The Bill implements key pledges from the Plan to Make Work Pay, ranging from introducing day one rights and greater protection against harassment, to tighter regulation of fire and rehire and zero-hours contracts. In some cases the Bill contains detailed provisions, but in many others it simply provides ministers with the power to make regulations. This will allow the detail of certain proposals to be fleshed out following consultation.

Our client briefing, First look: The Employment Rights Bill 2024, issued the day after publication of the Bill, is an overview of the key provisions and our initial thoughts on them.

THE INVESTMENT ASSOCIATION'S PRINCIPLES OF REMUNERATION

Earlier this month, the Investment Association issued an update to its existing Principles of Remuneration (the 'Principles') which outline member views on the commonly accepted approach to executive pay for the majority of companies. The update, which follows a review of the previous version issued in 2022, reiterates that the Principles are not prescriptive rules, but guidelines seeking to foster good practice and alignment with investor expectations. Companies can diverge from the Principles as required, in favour of bespoke remuneration frameworks which are better suited to their unique business needs. The Investment Association recommends that a comprehensive explanation is provided to shareholders for any divergence.

The 2025 Principles are underpinned by three overarching objectives; remuneration policies should:

1. Promote long-term value creation through transparent alignment with the board's agreed corporate strategy.
2. Support individual and corporate performance, encourage the sustainable long-term financial health of the business and promote sound risk management for the benefit of material stakeholders.
3. Seek to deliver remuneration levels which are clearly linked to company performance.

This client briefing, from our Employment and Incentives teams, looks at the key issues from the updated Principles.

SUPREME COURT FINDS PART-TIME REFEREES COULD BE EMPLOYEES

Summary: In a long-running case, the Supreme Court has confirmed that individual standalone assignments between part-time referees and the body overseeing their management had sufficient 'mutuality of obligation' and 'framework of control' to be contracts of employment for tax purposes, even though either party had a right to cancel the engagement without penalty and the 'employer' did not have a contractual right to intervene

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in every aspect of the individual's performance (*HMRC v Professional Game Match Officials Ltd*).

Key practice point: The Supreme Court did not decide that the referees were employees for tax purposes, only that the first two stages of the test established by the *Ready-Mixed Concrete* case – sufficient mutuality of obligation and framework of control – were satisfied. The case now goes back to the tax tribunal to decide on stage 3 – whether the other provisions of the contract are consistent with an employment contract. However, the decision does suggest that stages 1 and 2 (which also apply to employment status cases under the Employment Rights Act 1996) may not be as significant as, and the bar for establishing them may be lower than, had been thought (particularly for highly skilled individuals). It therefore has implications for employers taking on contractors on an occasional basis, particularly individuals working on an irregular basis with little intervention from the 'employer', as well as those who have to make employment status assessments under the tax rules on off-payroll working (IR35) for workers using their own personal service companies.

Facts: Professional Game Match Officials Limited (PGMOL), the body overseeing the management and administration of refereeing, had been assessed to PAYE income tax and National Insurance Contributions on the basis that it was the employer of a group of part-time referees. PGMOL argued that there was insufficient mutuality of obligation, in both the overarching contract and the match-specific engagements entered into between the referees and PGMOL, for the arrangements to be deemed to be employment contracts. The case went all the way to the Supreme Court.

Decision: The Supreme Court found in favour of HMRC. The minimum requirements of mutuality of obligation and control necessary for a contract of employment between the referees and PGMOL were satisfied in relation to the individual contracts. However, the Court sent the case back to the First-Tier Tribunal to decide whether, in the light of all relevant circumstances, the referees were engaged for individual matches under contracts of employment.

The Supreme Court explained that, in individual contracts like those in this case, mutual obligations did not have to exist before the engagement started, as long as they were evident during the period when the employee was working for the employer. Hence it was not necessary to show that the referees were under contractual obligations before their arrival at the ground. The parties' obligations in the period from their arrival (typically on a Saturday) to the submission of their match report on the following Monday would constitute sufficient mutuality of obligation. In any case, the parties were under mutual contractual obligations from an earlier point - the time earlier in the week when the referee accepted the offer of a match on the Saturday, even though either party had a right to cancel the engagement without penalty.

Moving on to whether there was a sufficient degree of control, the Court said that it was not necessary that the employer should have a contractual right to intervene in every aspect of the employee's performance of their duties, pointing out that, in many highly specialised jobs, responsibility for performance has to lie with the individual possessing the particular knowledge and skill. The combination of contractual obligations imposed on referees as to their conduct generally during an engagement, from the time the match was accepted to the time when the match report was submitted, and as to their conduct during the match, was capable of giving PGMOL a sufficient framework of control. The fact that PGMOL had the right to impose sanctions after the end of an individual engagement, such as not offering further matches or suspending or removing a referee from its list, was significant in enabling PGMOL to exercise control over the referees in the performance of their duties, on and off the pitch.

Commentary: This case is an illustration of what the Government has described as the "legal complexity and ambiguity" of the current three-tier system for employment status (employees, self-employed and workers). Reform in this area does not feature in the Employment Rights Bill; instead, there will be consultation on having a "simpler framework of a single worker status" and "differentiation between workers and the genuinely self-employed". The issues raised by this case will, however, be very relevant when the incentive for being an employee is increased by the removal under the Bill of the two-year qualifying period for unfair dismissal.

GUIDANCE ON THE NEW DUTY TO PREVENT SEXUAL HARASSMENT

As expected, the Employment Rights Bill contains significant changes to the law on harassment. When in force, which will not be before 2026, it will:

- Amend the new duty on employers to take "reasonable steps" to protect their workers from sexual harassment in the course of their employment (which was introduced by the previous government and takes effect on 26

October), requiring employers to take "all" reasonable steps – the same wording as applies to the statutory defence for employers against liability for discrimination by their employees.

- Introduce employer liability for all types of harassment carried out by third parties (anyone other than the employer or fellow employee), if the harassment is in the course of employment and the employer has failed to take all reasonable steps to prevent the third party harassment. This will make third party harassment directly enforceable by individuals.
- Enable the Government to outline in regulations what may constitute "reasonable steps", including carrying out assessments, publishing plans or policies, and steps relating to reporting of sexual harassment and to the handling of complaints. The regulations may also specify matters to which the employer must have regard when taking those steps.
- Set out explicitly that a complaint that sexual harassment has occurred (or is likely to occur) is one of the disclosures which may qualify for protection under the whistleblowing legislation.

Shortly before the Bill was published, the Equality and Human Rights Commission (EHRC) published an updated version of Sexual harassment and harassment at work: technical guidance, in anticipation of the introduction of the new duty on employers to take reasonable steps to prevent sexual harassment. The guidance is currently non-statutory but the EHRC has said it will update its statutory Employment Code of Practice to reflect the new duty.

Sexual harassment is widely defined in the Equality Act 2010 and covers "unwanted conduct of a sexual nature" which has the purpose or effect of violating a person's dignity or creating an "intimidating, hostile, degrading, humiliating or offensive" environment for them. The guidance makes clear that, as well as the obligation to take reasonable steps to prevent sexual harassment of one worker by another, the new duty includes preventing harassment by third parties - not just customers, clients and contractors, but anyone visiting the workplace or attending work events.

Failure to comply with the preventative duty could lead to enforcement action by the EHRC against the employer, even if there has been no incident of sexual harassment. In addition, although an individual cannot bring a claim for a breach of the preventative duty alone, if an individual succeeds in a claim for sexual harassment and is awarded compensation, the Employment Tribunal must consider whether the employer has complied with the preventative duty. If it considers the preventative duty has been breached, it can increase the total compensation awarded by up to 25%.

The guidance emphasises that employers should anticipate scenarios when its workers may be subject to sexual harassment in the course of employment and take action to prevent it. In line with this, the guidance now includes a statement that an employer is unlikely to be able to comply with the preventative duty unless it has carried out a risk assessment. The guidance on risk assessments (which applies to all forms of harassment) recommends matters the assessment should cover, such as policies and procedures, reporting mechanisms, and the working environment, and suggests that employers should produce an action plan that sets out preventative steps (and how the plan will be monitored). The guidance emphasises that the risk assessment is not a one-off exercise – there needs to be a process for monitoring and review.

Factors relevant to an assessment of what might be considered reasonable steps (and therefore matters that employers should consider in their risk assessments) include:

- the employer's size and resources
- the working environment and risks present
- the nature of contact with third parties
- compliance with any applicable regulatory standards
- concerns about sexual harassment that have been raised previously
- whether steps taken have been effective
- cost/benefit analysis of taking a particular step.

The EHRC has added new comprehensive case studies to its guidance. One outlines compliance for a large company which has identified risks factors including a male dominated workforce and a poor culture. A second concerns measures taken to

prevent sexual harassment that have not proved to be effective - illustrating the need for employers to review the steps they have taken. The case studies emphasise that compliance with the preventative duty is not static and employers must ensure that they carry out regular risk assessments and reviews.

EHRC has also updated its 8-step guide for employers on preventing sexual harassment at work, a checklist covering essential aspects such as conducting a risk assessment, monitoring and evaluating actions, reviewing procedures for reporting and recording incidents, and engaging and training staff.

Commentary: Although most employers will have anti-harassment policies, training and reporting processes in place, it will be important to carry out a risk assessment in order to demonstrate that these have been reviewed and extra measures have been considered, and if necessary implemented, in the light of the change in the law on sexual harassment. For employers in regulated sectors, there will be further developments to consider. We expect the Financial Conduct Authority to finalise shortly its proposals for a new regulatory framework on diversity and inclusion, confirming that non-financial misconduct, including sexual harassment, is misconduct for regulatory purposes.

HORIZON SCANNING

What key developments in employment should be on your radar?

1 July 2024	For TUPE transfers on or after 1 July, employers with fewer than 50 employees, and all employers where a transfer of fewer than 10 employees is proposed, can consult directly with employees if there are no employee representatives (instead of having to arrange the appointment of representatives)
18 July 2024	Statutory Code of Practice on Dismissal and Re-engagement in force, where prospect of dismissal and re-engagement raised with employees/reps on or after 18 July
1 October 2024	Employment (Allocation of Tips) Act 2023 and statutory Code of Practice in force: obligations on employers to deal with tips, gratuities and service charges, including having a written policy and tipping records
26 October 2024	Worker Protection (Amendment of Equality Act 2010) Act 2023 in force: duty to take reasonable steps to prevent sexual harassment of workers
By December 2024	Publication for pre-legislative scrutiny of the Equality (Race and Disability) Bill, to extend pay gap reporting to ethnicity and disability for employers with more than 250 staff, extend equal pay rights to workers suffering discrimination on the basis of race or disability, and ensure that outsourcing of services cannot be used by employers to avoid equal pay
2025	Some provisions of the Employment Rights Bill relating to trade unions and industrial action may come into force
2025	Economic Crime and Corporate Transparency Act 2023: failure to prevent fraud offence for large organisations expected to be in force
April 2025	Neonatal Care (Leave and Pay) Act 2023 expected to come into force: entitlement for eligible employees to 12 weeks' paid leave to care for a child receiving neonatal care

2026	Earliest date for the majority of Employment Rights Bill provisions to come into force, including on dismissal for failing to agree contractual variation, collective redundancies, zero-hours contracts, flexible working, protection from harassment, family leave, equality action plans
Autumn 2026	Earliest date on which Employment Rights Bill changes to the law on unfair dismissal are expected to come into force
Uncertain	• Three-month limit on non-compete clauses in employment and worker contracts, proposed by previous government • Regulations to bring Victims and Prisoners Act 2024 into force: NDAs that prevent certain disclosures by victims of crime to be unenforceable

We are also expecting important case law developments in the following key areas during the coming months:

Contracts of employment: *Secretary of State v Public and Commercial Services Union* (Supreme Court: whether a trade union can enforce a contractual right to check-off arrangements); *Ryanair DAC v Lutz* (Court of Appeal: whether pilot contracted through intermediary was an agency worker)

Discrimination / equal pay: *Randall v Trent College Ltd* (EAT: whether worker's treatment was belief discrimination or was treatment because of objectionable manifestation of belief); *Higgs v Farmor's School* (Court of Appeal: whether dismissal was because of the manifestation of protected beliefs, or a justified objection to the manner of manifestation); *Augustine v Data Cars Ltd* (Court of Appeal: whether part-time status must be sole reason for less favourable treatment)

Employment status: *Groom v Maritime and Coastguard Agency* (Court of Appeal: whether volunteer could be worker in relation to remunerated activities)

Industrial action: *Jiwanji v East Coast Main Line Company Ltd* (EAT: whether a pay offer directly to staff during collective negotiations was an unlawful inducement); *Morais v Ryanair DAC* (Court of Appeal: whether statutory protection from detriment connected with trade union activities protected workers participating in industrial action)

Redundancy: *ADP RPO UK Ltd v Haycocks* (Court of Appeal: whether redundancy dismissal was fair in absence of workforce consultation)

Unfair dismissal: *Charalambous v National Bank of Greece* (Court of Appeal: whether a misconduct dismissal was fair when the decision to dismiss was taken by a manager who did not conduct the disciplinary hearing); *Hewston v Ofsted* (Court of Appeal: whether employee was unfairly dismissed for misconduct that he had not been forewarned would lead to summary dismissal)

Whistleblowing: *SPI Spirits (UK) Ltd v Zabelin* (Court of Appeal: whether whistleblowing detriment compensation could be capped by termination agreement); *William v Lewisham & Greenwich NHS Trust* (Court of Appeal: whether the motivation of another person could be brought together with the act of the decision-maker to make an employer liable for whistleblowing detriment); *Rice v Wicked Vision Ltd* (Court of Appeal: whether an employer could be vicariously liable for the acts of a co-worker where the alleged detriment was a dismissal); *Sullivan v Isle of Wight Council* (Court of Appeal: whether an external job applicant could bring whistleblowing detriment claim).

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