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Horizon scanning

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EMPLOYMENT RIGHTS BILL UPDATE

Four consultations on the Employment Rights Bill were launched last month with a closing date of 2 December 2024, covering collective redundancies, industrial relations, zero hours contracts and Statutory Sick Pay. The Government has said that they may make changes to the Bill as a result of responses to the consultation. Amendments have already been tabled as the Bill enters Committee stage in Parliament – notably the promised extension of time limits for employment tribunal claims, from three to six months. Further consultations are expected in the first quarter of next year.

Please see our briefing First look: The Employment Rights Bill 2024 for details of all the main provisions of the Bill.

Collective redundancy consultation: The Bill amends the law so that employers will have to consult collectively when they are proposing 20 or more redundancies within 90 days, even if the dismissals are not all at one establishment. The consultation on collective redundancy and fire and rehire asks for views on further measures to strengthen the remedies for a breach of the collective consultation requirements, intended to deter employers from "buying out" consultation rights:

- Increasing the maximum period of the protective award from 90 to 180 days' gross pay per employee, or removing the 90-day cap altogether.
- Making "interim relief" available to employees who bring claims for the protective award, allowing them to apply to court for their employment contract to continue pending a full hearing of their claim. Interim relief (which has to be applied for within seven days of dismissal) is currently only available for a limited number of automatic unfair dismissal claims, such as whistleblowing, and can only be awarded if the claim is "likely" to succeed – a claimant must show a "pretty good chance" of success. The consultation also proposes that interim relief should be available for employees bringing an unfair dismissal claim under the new right in the Bill not to be dismissed for failing to agree a contract variation.

The consultation also mentions the possibility of increasing the minimum consultation period when an employer is proposing to dismiss 100 or more employees - from 45 to 90 days – a change that was not mentioned when the Bill was published last month.

Commentary: If they go ahead, the proposals in this consultation may (not necessarily will) increase protections for employees but will reduce flexibility for employers. The introduction of interim relief would also increase the risks and uncertainties for employers. Although it has been rarely utilised by employees in automatic unfair dismissal cases, it might be a more attractive remedy in collective consultation and dismissal and re-engagement scenarios - there are hints in the consultation that the seven-day deadline for applying for interim relief might be extended.

Industrial relations: The consultation on creating a modern framework for industrial relations covers two main areas: industrial action and the trade union recognition process. The proposals include:

- The expiration date of a trade union's legal mandate for industrial action would be extended from six to 12 months.
- The requirements on trade unions to provide detailed worker information to employers in the ballot notice and the notice of industrial action would be simplified.
- The law which prevents unions from taking protected industrial action where there has been a "prior call" to take unofficial action would be amended to allow unions to ballot for official protected action where a prior call has taken place in an emergency situation (such as a genuine safety fear).
- Employers would be prevented from altering the number of workers in a proposed bargaining unit once a trade union recognition application had been submitted and the protections from "unfair practices" by the employer during the recognition process would be extended.

Zero hours contracts: The consultation seeks views on how the new rights to a contract with a guaranteed number of hours and reasonable notice of shifts should apply to agency workers – for example, whether the responsibility for offering guaranteed hours should fall to the employment agency or to the end hirer. On reasonable notice of shifts, the Government has decided that responsibility should rest with both the employment agency and the hirer; the consultation is about how this would work in practice.

The Government will consult later on the implementation of the zero hours contracts measures more generally, in particular on:

- Offer of guaranteed hours - how to define low hours contracts, what constitutes regular hours and how employers should calculate the guaranteed hours.
- Reasonable notice of shifts - what notice should be presumed "reasonable", the amount of the cancellation or curtailment payment, what constitutes "short notice" and some limited exceptions from the requirement to pay.

Statutory Sick Pay: The changes introduced in the Bill will mean that for some lower earners, including those earning below the lower earnings limit, their rate of SSP will be calculated as a percentage of their earnings instead of the flat weekly rate. The consultation asks for views on what this percentage should be.

NO REQUIREMENT FOR GENERAL WORKFORCE CONSULTATION ON INDIVIDUAL REDUNDANCY DISMISSAL

Summary: The Court of Appeal decided that the lack of "general workforce consultation" in an individual redundancy (where the collective consultation obligations did not apply) did not make the dismissal unfair. Individual consultation had taken place at a stage when it could have made a difference to the outcome (*Haycocks v ADP RPO UK Ltd*).

Key practice point: The Court of Appeal's rejection of the suggestion that fair consultation entails general workforce consultation, even where statutory collective consultation requirements do not apply, is helpful to employers. However, it is still the case that the absence of meaningful consultation at a stage when the employee has the potential to affect the outcome is likely to be indicative of an unfair dismissal. As discussed in the item above, strengthening collective redundancy obligations is a key part of the Employment Rights Bill.

Facts: The claimant was one of 16 people in a team employed by the UK subsidiary of a US company. A decision was taken to reduce the workforce, and the team were scored on selection criteria, the claimant coming last in the rankings. The employer set a timetable for the redundancy process: an initial consultation meeting on 30 June 2020, followed by a 14-day consultation period, with those leaving being informed on 14 July. At his 30 June meeting, the claimant was told there was a requirement for redundancies, that the purpose of the meeting was to inform him of the situation and that he could ask questions and suggest alternative approaches. He was invited to a further meeting on 8 July. A final meeting was held on 14 July when he was given a letter of dismissal. He was unaware of the scoring at these meetings but did have them by the time of his appeal meeting, when his dismissal was confirmed. The Employment Tribunal rejected his unfair dismissal claim but the Employment Appeal Tribunal (EAT) found that the dismissal was unfair because of the absence of workforce level consultation "at a formative stage". The employer appealed.

Decision: The Court of Appeal allowed the appeal and restored the Tribunal's decision that the redundancy process was fair.

The EAT had correctly said that it is good industrial relations practice for employees, in their individual consultation, to be given the opportunity to express views on issues that might affect their dismissal, including matters common to the workforce as a whole, but the EAT was wrong to suggest that it is a requirement of good practice to conduct "general workforce consultation". It was clear from the case law authorities that redundancy situations arise in a very wide variety of circumstances and that the adequacy of consultation has to be considered on a case-by-case basis. Group meetings might be a useful way of ascertaining employees' views, but their appropriateness would depend on the circumstances.

The established principle that consultation must take place "at a formative stage" just means at a stage where it can make a difference to outcomes; in other words, when the employee can realistically still influence the decision. The later in the process the consultation occurs the greater the risk that a final decision has been taken but that is a matter for factual assessment; and an employer might not have made a final decision until after the conclusion of an internal appeal. The situation was very different in *Mogane v Bradford Teaching Hospitals NHS Foundation Trust*, where the EAT held that a "pool of one" redundancy selection without consultation was unfair (see our Employment Bulletin October 2022). In *Mogane*, consultation had commenced only after a crucial element in the selection process had been decided.

The Court of Appeal acknowledged that it would have been good practice for the employer to have carried out the consultation before the scoring started, but failure to give the claimant an opportunity to comment on the criteria before the scoring exercise started did not make the process unfair because he could have challenged the criteria during the individual consultation and asked the employer to re-do the exercise.

Commentary: The decision also illustrates the advantages of allowing a right of appeal against a redundancy dismissal. The claimant was not told his individual scores until the appeal hearing but it was accepted that this type of procedural unfairness in the decision to dismiss could be cured by a fair internal appeal.

EVIDENCE OF PRE-TERMINATION NEGOTIATIONS INADMISSIBLE IN UNFAIR DISMISSAL CLAIM

Summary: The Employment Appeal Tribunal (EAT) has confirmed that evidence of discussions conducted with a view to termination on agreed terms was inadmissible in an unfair dismissal claim. Section 111A of the Employment Rights Act 1996 protected the pre-termination discussions and there had been no "improper behaviour" by the employer which would have made the evidence admissible. In the particular circumstances, a verbal offer in a meeting to discuss return to work following sickness absence, with a deadline of 48 hours to consider it, had not placed the employee under undue pressure so as to amount to improper behaviour (*Gallagher v McKinnon's Auto and Tyres Limited*).

Key practice point: The decision might be seen as generous to the (small) employer in this case - particularly with regard to the employee's argument that he had not been given a reasonable time to consider the offer. However, the EAT was at pains to emphasise the fact-specific nature of the decision and that it could overturn the Employment Tribunal's decision only if it was "perverse". "Improper behaviour" is not defined in the legislation and another Tribunal might well have come to a different conclusion. Also, if this had been a disciplinary rather than a redundancy scenario, it would have been more likely to have constituted undue pressure because of the greater probability of dismissal if the offer was not accepted.

Employers should note that section 111A is of limited use because inadmissibility relates only to claims of ordinary unfair dismissal; the evidence remains admissible in all other types of claim, such as discrimination, whistleblowing detriment and automatic unfair dismissal. The "without prejudice" rule, which can apply to all claims, was not available here because there was no actual or contemplated legal dispute between the parties at the time the statements were made.

Facts: The claimant, a branch manager, had a long period of absence due to illness. Having managed successfully to cover his role during this period, his employers considered that they could continue without the need for a branch manager. As part of an exchange of informal text messages about his recovery, one of the directors invited the claimant to a meeting to discuss his return to work. However, at the meeting, after a brief discussion about his health, the director set out the employer's proposal to terminate his employment for redundancy, with an enhanced redundancy payment. The director explained that, if he accepted the offer, the parties would sign a compromise agreement; but, if he rejected it, the company would "go through a redundancy procedure". She gave the claimant 48 hours to consider the offer. After the

claimant did not accept, he was invited to a formal meeting to discuss his potential redundancy and the possibility of suitable alternative employment. In due course, he was dismissed.

In proceedings for unfair dismissal, the claimant tried to rely on the discussion as evidence of unfairness. The Employment Tribunal found that it was inadmissible because of section 111A. The claimant appealed.

Decision: The EAT rejected the appeal and confirmed that the fact and content of the pre-termination negotiations were inadmissible, so the unfair dismissal claim would be heard without reference to them. The Tribunal had been entitled to conclude that the employer did not behave improperly overall.

The claimant maintained that there had been specific breaches of the Acas Code of Practice on Settlement Agreements, which, although not binding on the Tribunal, indicated improper behaviour under section 111A:

- The Code cites, as an example of improper behaviour, putting pressure on an employee, such as "*saying before any form of disciplinary process has begun that if a settlement proposal is rejected then the employee will be dismissed*".

  The EAT confirmed the Tribunal's decision that the employer had not made a proposition that dismissal would result if the offer was not accepted. The director had not told the claimant that he would be dismissed if he rejected the offer; she had said there would be a redundancy procedure, which would have involved considering whether there was a suitable alternative role. The fact that the employer had reached a firm view that the role was redundant did not equate to a conclusion that his dismissal would follow. The EAT went on to point out that the position might be different in a disciplinary process. For example, in pre-termination negotiations where an employer had yet to start a misconduct investigation, saying that an employee would be dismissed if they rejected a settlement proposal would effectively confirm the outcome of the process. In that scenario, the employee would be more likely to feel undue pressure to sign a settlement agreement.

- The claimant contended that the meeting had been set up under false pretences.

  The EAT commented that, although the fact that it was not really a return-to-work meeting was unfair, the Tribunal was dealing not with fairness generally but with the narrower issue of whether there had been impropriety. The Acas Code expressly acknowledges that how a settlement proposal is made can vary depending on the circumstances and the accompanying guidance also recognises that a disciplinary meeting can legitimately shift to a discussion about settlement terms. The director had not lied about the purpose of the meeting. It was also relevant that the claimant was swiftly provided with a breakdown of the settlement figure offered, that the meeting was conducted calmly and that he had time to discuss it with his family. These features all had a bearing on the nature and extent of the pressure he experienced and mitigated the initial shock of the meeting.

- The claimant was given 48 hours' notice to indicate acceptance of the offer. The Acas Code says that a minimum of 10 days should be given and that less than that is an example of undue pressure.

  The EAT commented that the reference to 10 days in the Acas Code is to consider "*the proposed formal written terms of a settlement agreement*". In this case, the 48-hour deadline related only to a verbal offer; and the claimant could have accepted or rejected it or responded with a counter-proposal. If he had accepted the verbal offer, the pre-termination negotiations would have continued, and he would have been given written terms to consider.

GUIDANCE ON THE OFFENCE OF FAILURE TO PREVENT FRAUD

The Government has issued advisory guidance on the new corporate criminal offence of failure to prevent fraud, contained in the Economic Crime and Corporate Transparency Act 2023. The Home Office has confirmed in a Press Release that the offence will come into force on 1 September 2025. Large employers will need to have measures to prevent fraud in place, including to require and monitor compliance by employees.

Under the offence, which will be punishable by an unlimited fine, an organisation (including partnerships) may be criminally liable where an "associated person" (including employees, agents and subsidiaries) committed a specific fraud or false accounting offence under UK law (listed in the Act) with intent to benefit the organisation, or another person to

whom they provide services on the organisation's behalf. It will not need to be demonstrated that the organisation knew about the fraud but it will be a defence for it to show, on the balance of probabilities, that it had reasonable prevention procedures in place, or that it was unreasonable to expect it to have such procedures.

The offence applies to organisations which meet two of the following three criteria:

- more than 250 employees
- annual turnover of more than £36 million
- total balance sheet assets of more than £18 million.

These criteria apply to the whole organisation, including subsidiaries. The offence applies to organisations regardless of where they are headquartered or where subsidiaries are located. If a UK-based employee commits fraud in the UK, the employing organisation could be prosecuted, wherever it is based. If an employee of an overseas-based organisation commits fraud in the UK, the organisation could be prosecuted. However, the offence can only take place if the person commits fraud whilst acting in the capacity of an associated person - an employee acting in the capacity of an employee, for example.

The guidance deals in detail with the defence of reasonable fraud prevention procedures. Points of particular note for employers include:

- The first step should be to carry out a comprehensive risk assessment to identify the unique fraud risks specific to an organisation's business and sector. An organisation's risk assessment is the foundation on which "reasonable procedures" are built. The organisation should then draw up, implement, monitor and review a fraud prevention plan, with procedures proportionate to the risks identified in a risk assessment. The prevention procedures should take account of the level of control and supervision the organisation is able to exercise over a person acting on its behalf and its proximity to that person. The guidance notes that an organisation is likely to have greater control over the conduct of an employee than that of an outsourced worker, but that appropriate controls over outsourced workers should be implemented via contract.
- The board or senior management should be responsible for promoting a culture where fraud is unacceptable, including communicating the organisation's stance on preventing fraud and ensuring that there is governance of the fraud prevention framework. They should be committed to training and resourcing and lead by example, fostering an open culture, and should be accountable for overseeing whistleblowing.
- The organisation should conduct due diligence of persons who perform services on their behalf. Examples of best practice include:
    - using tools such as third-party risk management, screening, vetting and checks of professional or regulated status;
    - reviewing contracts with those providing services, "*to include appropriate obligations requiring compliance and ability to terminate in the event of a breach where appropriate*"; and
    - monitoring well-being to identify staff who may be more likely to commit fraud because of stress, targets or workload.

Commentary: The new offence has similarities with the existing offences of failure to prevent bribery and facilitation of tax evasion. Employment contracts typically include provisions on bribery and tax evasion, with failure to comply with the employer's policy on prevention being treated as a disciplinary matter which could lead to termination. In light of the guidance, employers will want to extend this provision to cover the failure to prevent fraud offence. Anti-corruption or ethics polices, and whistleblowing processes, should also be updated to cover prevention of fraud.

For comment on the implications of the guidance for organisations more generally, please see this client briefing from our Global Investigations Group colleagues.

REWARD AND INCENTIVES TEAM OF THE YEAR AT THE IEL AWARDS 2024

We are pleased to report that we were named the Reward and Incentives Team of the Year at this year's International Employment Lawyer Awards.

Our incentives practice was recognised for having delivered cutting-edge advice designed to attract, retain, and motivate key employees in achieving business critical objectives, while also remaining compliant with a shifting regulatory landscape.

HORIZON SCANNING

What key developments in employment should be on your radar?

26 October 2024	Worker Protection (Amendment of Equality Act 2010) Act 2023 in force: duty to take reasonable steps to prevent sexual harassment of employees
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 cannot be used to avoid equal pay
2025	Some provisions of the Employment Rights Bill relating to trade unions and industrial action may come into 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
1 September 2025	Economic Crime and Corporate Transparency Act 2023: failure to prevent fraud offence for large organisations in force
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 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: *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 relations: *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)

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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