The Work Couch

Navigating today's tricky people challenges to create tomorrow's sustainable workplaces

RPC

Episode 23 – Employment Rights Bill: What do employers need to know? with Patrick Brodie

Ellie: Hi and welcome to the Work Couch podcast, your fortnightly deep dive into all things employment. Brought to you by the award-winning employment team at law firm RPC, we discuss the whole spectrum of employment law with the emphasis firmly on people. Every other week we explore those thorny HR issues that people teams and in-house counsel are facing right now and we discuss the practical ways to tackle them.

My name is Ellie Gelder. I'm a senior editor in the Employment Equality and Engagement team here at RPC and I'll be your host as we explore the constantly evolving and consistently challenging world of employment law and all the curveballs that it brings to businesses today. Before we kick off today's episode, we would be super grateful if you could spare a moment to rate, review and subscribe to make sure you don't miss any of our fortnightly episodes.

On the 10th of October 2024, 100 days or thereabouts since Labour gained power, the government published the first draft of its Employment Rights Bill, a Bill which businesses and employment lawyers have been eagerly anticipating and which commentators are saying heralds the most significant and far-reaching reform to employment rights in over 40 years. There's been a lot of noise about what the reforms actually mean for employers.

So, I'm very pleased to be joined today by Patrick Brodie, partner and head of RPC's Employment Engagement and Equality team, who is going to flag for us the key changes and what they mean.

Patrick, thank you so much for joining us. I believe in between injunctions and other minor matters for some much-needed clarification.

Patrick: Ellie, actually it's almost out of the frying pan into the fire from injunctions into another difficult, challenging piece of legislation regulation, excepting of course that in relation to the Employment Rights Bill, it will change and morph and vary as it goes through its consultation phases, including debates within the various Houses of Parliament.

And in many ways, the changes within the Employment Rights Bill, they suggest a generational reform to the UK's labour laws. And in many ways, unsurprising that what we're seeing is a significant interest from clients to better understand what the changes mean. So, in this podcast, hopefully I will be able to add some clarity and insight for our listeners. The Bill itself, it introduces a staggering, and I think that is the right phrasing, a staggering 28 individual employment law reforms. And I know, given the time constraints, clearly, I'm not going to be able to go through each and every one of those changes in this one episode. But I think what I will do is just focus on a number of the groundbreaking reforms, which are likely to affect most employers. And within that, it's probably helpful to flag. I don't think we're going to have time to touch on some of the changes to trade union legislation, certainly in this episode, but if you want me back, happy to deal with it at a later one.

Ellie: Happy to have you back, Patrick. Yes, please do come back and tell us about those changes in another episode. Before we get going on the detail today, it's obviously important to state right at the outset that the changes we're going to discuss aren't likely to be implemented in the near future because there's an awful lot of legislative admin to get over first.

Patrick: Ellie, you're right. We aren't expecting any of these reforms to be fully implemented for a while. And many of the reports are suggesting that the changes themselves won't come into force until at least 2026. So that gives us and as advisors, but also employer organisations, some pretty important and much needed breathing space for us to just better understand how the changes, some of which are just extremely complicated, but how those changes will work. And as I said earlier, it's worth bearing in mind that as the Bill passes through Parliament, some of the reforms will evolve and alter. So it may well be that some of the more challenging aspects of the Bill might be modified, reducing their complexity and potential constraints.

Ellie: Okay, so let's crack on then with our first big reform that the Bill introduces and that's day one rights to certain protections, and I think probably the biggest one is unfair dismissal. So currently employees are protected from ordinary unfair dismissal if they have at least two years continuous service with the employer. So clearly that's a massive upgrade to individual rights.

Patrick: Yeah, it is. As you say, the qualifying period of two years' employment will be removed entirely. What that means in effect is that employees provided they've actually started work will be protected from unfair dismissal from day one of their employment. But there's a caveat to this. The government has said it will consult on a new statutory probation period for new hires during which the employer may fairly dismiss the employee with, and I'm quoting here, "fair and transparent rules and processes". The government is seeking to establish the balance between allowing employers to properly assess an employee's suitability to a role and on the other side seeking to give reassurance to employees that they will have rights from day one. Now obviously it remains to be seen what these fair and transparent rules and processes will look like in practice. So, for example, what exactly does the employer need to do to fairly dismiss someone during the statutory probation period? Or how long is that statutory probation period going to be? The period could be for as long as nine months. And in many ways that comes from pressure from businesses. Trade unions themselves had asked for six months. And as I said, all of this is going to be subject to consultation. So there will be movement and change in relation to precisely how this legislation will work. I do think that the question of how employers will respond to the removal of the unfair dismissal qualifying period in many ways will speak to culture. For example, will employers look to introduce longer contractual probationary periods where they look to align contractual probation with the periods proposed by statute? Alternatively, the changes might encourage a, and it's been discussed previously, a demand for temporary agency workers to fill roles instead of permanent employees being hired. And that in part is to mitigate the risk of unfair dismissal claims which should otherwise be attached to those new joiners. And businesses will, they'll need to assess how they respond in relation to all of these issues with a focus on their own specific unique commercial needs. Now, what we can say is as a result of this reform when it comes into effect, employers will focus more closely and deliberately on their processes for approving vacancies and within that, a review of their recruitment policies, they'll need to ensure as far as possible that new hires are both required and right for the job. There's always a positive in every arena, in every change. So, at the same time, and this is adopting a more reflective approach and looking holistically at the need for the role and the person to fill that role, that process can underpin initiatives that also drive diversity, equity and inclusion.

It may also encourage the individual's wider economic participation by giving greater job security and by removing feelings of insecurity, this should directly or indirectly address concerns about employee wellbeing.

Ellie: I think that's really interesting looking at it more reflectively. And moving on to another day one right that the Bill introduces and that's the right to flexible working. Tell us what the Bill is changing in regard to flexible working.

Patrick: So the intention behind this reform is, and again in the government's words, to help make the workplace more compatible with people's lives. So flexible working, which we know includes remote working, hybrid working, part-time hours, compressed hours and so on, will be the default where practical. So, the question is, what does "where practical" mean?

Well, employers can refuse flexible working for eight reasons, which, by the way, haven't changed. But and here's the significant alteration, such a refusal needs to be reasonable. If an employer refuses an application, the employer will have to state the ground or grounds for refusing the application. So, relying on one of the prior eight reasons and crucially also explain why the employer considers that it's reasonable to refuse the application on that ground or grounds. So, the Bill increases the burden of justification on employers and in doing that raises the likelihood of employees challenging refusals to grant flexible working requests. Now, moving to one side, any discrimination claims flowing from a refusal to a flexible working request, the penalty for non-compliance by employers hasn't changed and that remains at eight weeks' pay which is currently capped at £5,600. We are expecting regulations that will detail what an employer needs to do before rejecting a request for flexible working. For example, how should it consult with the employee? Does it need to state its reasons for refusal in writing?

Ellie: Our next big reform relates to employer liability for harassment of its employees, including some really big changes to the law on sexual harassment of employees.

Patrick: That's right, Ellie. This is important and hugely valuable change in relation to providing appropriate safeguards and protections to employees. The amendment itself produces a significant buttressing of current harassment protections for employees. There are three key reforms. Firstly, and many listeners will already know that, is that from 26th of October 2024, there'll be a new legal duty on employers to take reasonable steps to prevent sexual harassment of their employees in the course of their employment. This is coming into effect under the Workers Protection (Amendment to the Equality Act 2010) Act 2023.

Now that Act was delivered via a Conservativeled initiative. The Employment Rights Bill goes much further in strengthening that duty. And it does that by introducing an amendment such that the duty requires employers to take **all** reasonable steps to prevent sexual harassment of their employees, as opposed to simply taking reasonable steps. "All": it's a small word but introduces potentially a seismic change. The employer must now ensure that all the reasonable endeavours that could be taken have been taken.

We'll have to wait for further guidance in the case law to understand exactly what steps are deemed reasonable for an employer to have taken. And that's likely to depend on the circumstances of each individual case. The Bill allows the government to make regulation at a later date, which could specify the steps that are regarded as reasonable for the purposes of meeting this obligation.

Secondly, and this applies not just to harassment related to sex, but to harassment on the grounds of any other protected characteristic, the Bill will introduce an obligation on employers not to permit harassment of their employees by third parties, whether customers, suppliers, members of the public. It's another significant change. Third party harassment, whether related to sex or any other protected characteristic, is not currently prohibited under the Equality Act. And finally, the third big change relates to harassment and whistleblowing. For those who want a more detailed explanation of law on whistleblowing, please do check out our previous episode on whistleblowing. But for the purpose of today's podcast, and put it very simply, for a worker to qualify for protection from detrimental treatment for whistleblowing, they have to have made what's known as a protected disclosure. Now, a protected disclosure is a disclosure of information that in a worker's reasonable belief is made in the public interest, and that information must show a relevant failure. When we talk about a relevant failure, Section 43B of the Employment Rights Act lists a number of relevant failures, for example criminal offence or a failure to comply with any sort of legal obligation or health and safety concern. The Employment Rights Bill adds sexual harassment to the statutory list of relevant failures. So, if an employee who blows the whistle about an instance of sexual harassment, they make a qualifying protected disclosure, is subject to a detriment as a result of that disclosure, they will be protected legally.

Ellie: Okay, so three really far-reaching changes around harassment there. And for those listening who are thinking, "goodness, we really need to make sure we're compliant, but we could do with some help", do contact our Employment Engagement and Equality team who are on standby to provide guidance and support to ensure your organisation's compliance with the new duty and these additional changes.

OK, next on our list are the rules around dismissal and re-engagement or more colloquially known as "fire and rehire".

Patrick: This follows a real push to clamp down on employers who use the threat of dismissal with neither proper discussion nor engagement to impose detrimental changes on employees. As you say, also known as "fire and rehire". What the Bill does is it removes almost entirely the ability for employers to use fire and rehire because it changes the existing law and unfair dismissal so that where employees are dismissed for failing to agree to a change in their contract of employment, those dismissals will be, say for limited exception, be treated as automatically unfair. That means, save for the exception which I'll come on to the employer won't have a defence to a claim for unfair dismissal. The only exception to this new rule is where the employer can show evidence of financial difficulties that means the business is unable to continue and therefore demonstrate that the need to make the change in contractual terms was unavoidable. This is a, in the way that legislation has been framed, it's going to be a high hurdle and is likely only to apply in rare cases. Consequence of this may well be that employers look to adopt broad express variation clauses within their contracts of employment to avoid the need to seek employee consent for a change. But this is, it's far from straightforward. I suspect the consequence of this is that during the consultation stage of the Bill, there'll be a significant pressure from business lobbyists to loosen the constraints imposed by the current proposals.

Ellie: And just staying with the theme of dismissal and those businesses facing tough financial decisions, including redundancy, the Bill also introduces an important change to the rules on collective redundancy consultation. So when we talk about collective redundancy consultation, we're referring to those circumstances where a certain number of redundancies are being proposed.

Patrick: Yeah, exactly, Ellie. So the relevant piece of legislation is the Trade Union and Labour Relations (Consolidation) Act and that's colloquially referred to as TOLR(C)A. Now, that Act currently provides that where the employer is proposing to make 20 or more people redundant at one establishment within a 90-day period, it must consult with appropriate employee representatives and provide notification at least 30 days before the first redundancy takes effect. If the employer is proposing to make 100 more people redundant, the employer has to provide notification at least 45 days before that first redundancy takes effect. Currently, these collective redundancy consultation obligations apply where the employer is proposing to make redundant 20 or more employees and here's the important part **at one establishment**. The Bill proposes to strengthen these protections by changing the current legislation so that the obligations to consult apply regardless of whether the redundancies are taking place at one establishment or not. That's a significant change.

Employers will now, when assessing whether or not that they've met that 20-or-more-redundancy threshold, need to take into account proposed redundancies across the entire business and not just at one site. For large multi-site employers, the obligation to consult may well, if the proposals are adopted and bearing in mind the look back and look forward obligations when assessing employee numbers, result in every proposed redundancy triggering the obligation to consult collectively.

Ellie: That's a really big change then, isn't it? I can see that's going to have massive consequences.

Our next item of change relates to different types of entitlements to time off and a focus on family-friendly rights. So just run through those for us, Patrick.

Patrick: Yeah of course, so we've spoken about flexible working already but there are a number of other family-focused reforms introduced by the Bill. Paternity leave. To be eligible for paternity leave, currently the employee must have completed 26 weeks of continuous service with their employer while then in relation to parental leave, a year of service is required. The Bill will change all of that. So much of the rhetoric has been about day one rights. So, the Bill will make the amendment so that for both paternity leave and unpaid parental leave, as I said, these will become day one rights. Secondly, and staying with paternity leave and parental leave, the Bill will allow parents to take their paternity leave and pay after their shared parental leave and pay. Currently, paternity leave and pay has to be taken before shared parental leave and pay begins. And thirdly, the Bill introduces a new right to bereavement leave for all employees to take time off to grieve the loss of a loved one. But we're still waiting for clarification, and that's by way of regulation, on the relationship that the employee must have had with the loved one and that's going to be subject to further consultation. Currently the only statutory entitlement for employees to take time off to grieve is it's limited to parents who either lose a child who is under 18 years old or who have stillbirth after 24 weeks of pregnancy. And in those situations, they're entitled to two weeks leave, which may be paid if they meet the statutory eligibility requirements. It's important to bear in mind that many employers will already offer a certain amount of paid compassionate leave to a bereaved employee and the length of this will usually depend on whether or not the person who's died was the employee's dependant. Often that's going to be a child, somebody's wife or husband or civil partner or partner or their parents. Also, there are changes to statutory sick pay. So that's the minimum amount that employers are required to pay their employees when they're off sick. At the moment employees have to earn at least the lower earnings limit, that's £123 per week to be eligible for SSP. If eligible, the current position is that the employee is entitled to SSP after four consecutive days of incapacity of work. It's not payable for the first three days. The Bill will remove this restriction and also the lower earnings limit requirement so that all employees are entitled to SSP from the first day of their sickness.

Ellie: Okay, and last but definitely by no means least, there are some really complicated reforms to the law on zero hours contracts and guaranteed working hours, which forms part of the government's clampdown on what it calls one-sided flexibility. Now, Patrick, obviously we are constrained with time, and I appreciate you can't go into the full detail, but if you can give us just a summary of the key changes in this area, that would be really helpful.

Patrick: Of course. Ellie, I think it's lovely of you to be able to manage both my time and the listeners' time as well in relation to this. You're doing brilliantly well, Ellie. It's really good. This moment in relation to zero hours contracts and guaranteed working hours. I place a cold towel right in my head, go into a huge decline and debate.

Ellie: Try and please everyone with time.

Patrick:	why I became a lawyer but the only counter I get, Ellie, at this point is that I am not a I'm not a parliamentary drafts person so that is the one saving grace. It is
Ellie:	I don't think you're the only one.
Patrick:	It's hideously complicated, it's hideously involved and in some extents counter intuitive. It's hard. So I will try my very best to draw out the main points. I think just distilling this, we could say the government has said that the Employment Rights Bill will end, what it seeks to do, will end exploitative zero hours contracts. So how will this work? Well, it will do this by conferring the right to be offered guaranteed hours to certain qualifying zero hours or low hours workers and there's workers who during a reference period, the length of that remains to be defined, worked a number of hours, the number and regularity of which is also to be outlined in the subsequent regulations. So, it's a wait and see. The Bill provides that the worker in question could be employed by the employer under one or more worker's contracts, and they don't have to be employed by their employer continuously. So, it's widening the scope of individuals who will gain the benefit of the proposed protections. If the worker meets the criteria, then the employer is obliged to offer the worker guaranteed hours after the end of each reference period, where those hours reflect the hours which the worker worked during the reference period. How do I put that in a nutshell? So, the effect of the reform is to make sure that all workers are entitled to a contract that reflects the hours which they regularly work. Now the workers will also have the right to reasonable notice of changes affecting shifts and to payment for cancelled, moved or curtailed shifts. Again, we're going to have to wait for secondary legislation about what reasonable length of notice is and how much or the value of payments for cancelled, moved or curtailed shifts should be. Back into the wait and see arena. Coming back then to the drafting. The reforms as they relate to zero hours contracts which I've just outlined they exclude agency workers which given the changes to unfair dismissal and the fact that this could well lead to employers making greater use of agency workers leaves potentially a significant gap in protections. Now with that in mind you could see further legislation extending the right to guaranteed hours, reasonable notices of change to shifts, and payments for cancelled change shifts to agency workers as well. There are also question marks as to how the new rules on guaranteed hours will apply to the many and different forms of casual working across different sectors and we might see adjustments to the employer duties by way of collective agreements to ensure that the purpose of the legislation is not lost. Massive themes, clarity will emerge, different ways of thinking will develop. And on one level, and actually this is the optimistic element of it, just new models and ways of working will emerge where the safeguards to workers and employees will be advanced. And I think employer organisations, when they rise to that challenge and embrace those safeguards, I think potentially position themselves really well within the market.
Ellie:	So, it's not all negativity is what we're saying. There's a lot to get our heads around, but
Patrick:	It's so easy to look at new legislation and identify the failures within the legislation and work through why the rules themselves create a burden. And I do think there's a moment to step back to almost look at the rules from a distance, ignore the real detail and just see if there are broader themes that might emerge and which can be embraced and adopted by employers for their own benefit, while at the same time securing benefits for their employees and workers.
Ellie:	Absolutely, striking that balance. And you've covered seven really big reforms there and provided a really helpful summary on what they may mean for employers going forward. And as you said, we are going to need more detail on specifics, and we will revisit these as we get more information, and we can do a deeper dive. For now, thank you so much for providing some much-needed clarity.
Patrick:	Thanks, Ellie.

Ellie: If you would like to revisit anything we discussed today, you can access transcripts of every episode of The Work Couch podcast by going to our website: www.rpclegal.com/theworkcouch. Or, if you have questions for me or Patrick, or perhaps suggestions of topics you would like us to cover on a future episode of The Work Couch, please get in touch by emailing us at theworkcouch@rpc.co.uk – we would love to hear from you.

Thank you all for listening and we hope you'll join us again in two weeks.