The Work Couch

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

RPC

Season 3

Episode 15 – Work Couch Live – Employment Rights Bill: What do employers and leaders need to know?

Please note: *This episode was recorded on 30 September 2025 in front of a live audience at RPC's London offices as part of the Employment, Engagement and Equality team's panel event exploring the Employment Rights Bill.*

All information is correct at the time of recording. The Work Couch is not a substitute for legal advice.

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 unpack those thorny HR issues that people teams and in-house counsel face today and we discuss the practical ways to tackle them. My name is Ellie Gelder, I'm a Senior Editor in the Employment, Engagement and Equality 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. We hope by the end of the podcast that you'll feel better placed to respond to these people challenges in a practical, commercial and inclusive way.

Ellie: This week, in our second Work Couch live episode, I was lucky enough to be joined by a panel of three leading voices in employment law – from academia, legal practice and industry. In front of a packed audience of RPC clients in our London offices, the panel explain all the latest in relation to the Employment Rights Bill. We hope you enjoy listening!

Thank you very much, Patrick. I hope everyone can hear me. Please say if you can't. As we've heard, the Employment Rights Bill, is or absolutely should be on the agenda of every business leader, GC, HR professional and employment lawyer. So we're really thrilled to be joined by three employment law experts today who are here to help us dissect the bill, and to share their insights.

So a very warm welcome to our panellists today. Firstly, Professor Catherine Barnard, who gave us that fantastic keynote earlier, which really helps put the Bill into context. You've given us a great springboard to dive into some of the finer details of the reforms. So thank you for joining. For the purposes of the podcast, Catherine, would you mind just introducing yourself?

Catherine: Yes, thank you very much. My name's Catherine Barnard. I'm a professor of European law in employment law at the University of Cambridge.

Ellie: Fantastic. And we're also joined by, leading barrister and academic, John Bowers KC. John, if you'd like to introduce yourself.

John: So I'm a Principal of Brasenose College, Oxford, I'm a recovering lawyer. I practice at Littleton Chambers as a door tenant. The clue is that I'm behind every door in the Chambers and I also sit part-time as a judge in the Employment Appeal Tribunal.

Ellie: Thank you. John. And completing our panel, Shantha David, head of legal services, at Unison, if you'd like to introduce yourself.

Shantha: Hi. Yes, I'm Head of Legal services at Unison. The largest UK Trade Union with 1.4 million numbers, of whom 80% are female. What we do is manage the legal services for all our members, but also, advise the internal organisation, and run strategic legal cases like the Employment Tribunal fees case that was mentioned, but also more recently some holiday pay cases that have changed the law in the appeal courts and that's my background.

Ellie: Thank you. So I think it's fair to say we have a wealth of knowledge on this panel. And while we won't be able to go into every reform proposed by the Bill, we've heard that there's quite a few, we're limited on time. So we're going to focus in on some key areas. And for those who are with us in the audience today, there'll be an opportunity to discuss the other reforms that we haven't managed to speak about after the recording.

So the first aspect of the Bill I want to look at is what many might describe as the most headline reform, and that is the removal of the two year qualifying period for bringing an ordinary unfair dismissal claim so that protection becomes a day one right, subject to an initial period of employment during which the employer can adopt a "lighter touch process", if a new recruit isn't right for the job. And John, I want to ask you, would you say this is the most far reaching and significant change for employers and what are the consequences of day one rights going to be?

John: Well, I think it's a massive change because, the latest research suggests that 31% of the labour force have worked for less than two years. So this is going to bring in an extra 31% into the scope of unfair dismissal. It was a manifesto commitment. But I think it's fair to say that not a lot of work was done to flesh it out.

What the government has said is that there will be this initial period of employment, which is effectively a probationary period. Initial indications are that it's going to be, nine months. But, the aspect of the lighter touch that can be used by employers in dismissing, in the first nine months, is up for consultation. And it's unclear, whether it will be some sort of a reiteration of the statutory, disciplinary processes that we saw with, much litigation, which was then phased out a few years ago, or whether it'll be something else entirely. But I think it is a massive, change. And bearing in mind that there are already apparently 491,000 cases in the system of employment tribunals already to add to it a massive increase, by permitting people to apply, from day one without, at the moment, any commitment to increase the amount of money available for employment tribunals. I personally think is reckless.

Ellie: Shantha, staying with the theme of dismissal, the Bill is introducing restrictions to the so-called practice of "fire and rehire". So that's where an employer uses the threat of dismissal without discussion or engagement to impose detrimental changes on employees. And rather than a total ban, the Bill now prohibits what it calls "restricted variations". Shantha, can you explain how the restrictions are meant to apply in practice?

And also touch on the other reforms, proposed by the Bill that will strengthen collective redundancy rights?

Shantha: Absolutely. So you've explained how fire and re-hire works is that an employer seeks the employee's agreement to downgrade contractual terms and conditions, under the threat of dismissal. And if the employee doesn't agree to those changes, then the employer terminates the contract and gives the relevant notice, etc. And then the employer can issue new contracts downgrading terms and conditions.

Fire and rehire, of course, is something that we got to learn a lot about after the P&O ferries scandal, where 800 seafarers were sacked without notice or consultation and then replaced with, lower paid agency workers. And this has had sort of a series of progressionary measures. So initially the previous government issued a Code of practice on dismissal and re-engagement back in July '24, which tribunals must take account of when they assess whether an employer has acted reasonably for the purposes of unfair dismissal, and a breach of this code of practice can result in an uplift of an award for unfair dismissal at tribunal. These changes, these further changes, were introduced in the ERB. As a result of this perception of one sided flexibility for the employer, who can exercise its economic power over employees. Now, if these provisions come into force in October 2026, and of course, we're still waiting, it will be automatically unfair dismissal where the employer seeks to vary the terms of a contract and the employee does not agree to the variation or, in circumstances where the employer employs another person or re-engages the same person under reduced terms and conditions or, different duties, etc.

And it is, a defence, if one of the reasons the employee needs to do all of this is to address financial difficulties affecting their ability to carry out the business as a going concern. I'm saying these words because these are the words in the legislation and that's all we know. So, and crucially, one of the defences is that the employer couldn't reasonably have avoided the need to make the variation.

But this is an evolving story, as most of the Employment Rights Bill is at the moment, and since July 2025, not all variations are caught by this section. So it is only, automatically unfair to vary certain key, contractual terms. Like pay, the required number of working hours, pensions, shift times and length, time off rights and other changes to be defined in Regulations, which is kind of the theme of the Employment Rights Bill.

There's a lot we need to sort of wait and see, in Regulations and following consultations, these are what were described as the restricted variations. It also closes a few more loopholes.

So if you were thinking, "*Okay, that's fine, we'll make a variation to the terms and conditions, so that the flexibility clause, says you can make these changes*" so no, you can't do that either. And then what we are expecting also is further Regulations to clarify that expenses and certain types of pay could be out of scope. And there will be further definitions of what changes to contractual benefits are permissible, other than pensions, so this also stops the P&O situation where employees were dismissed and replaced with self-employed contractors or agency workers, etc. Now with these sort of amendments as they come on incrementally, certain changes won't be automatically unfair. And we need to know what those are in due course, but whether or not it is unfair will be judged on all the principles that currently apply.

TUPE transfers won't get caught by this. So if the dismissals are related to a reduction in work, they are not caught by this. And, place of work, so a variation about a place of work won't be caught by this either. So there is a lot of wait and see in all of this to see what the Regulations say, and the detail is in numerous pages of documents. Where there is this situation of fire and rehire the collective redundancy consultation requirements kick in. So currently the situation is that where the employer is proposing to dismiss by redundancy 20 or more people in an establishment within a period of 90 days, they must go through a process of collective consultation before they make any redundancies.

And if an employer doesn't comply then an employee can get up to 90 days' pay as a protective award. And the Bill has changed this process. There will be a new threshold test. And if there are 20 or more redundancies, at one establishment, that's one of the tests or it could be another threshold test that we will find out about soon.

And it will involve counting employees across all sites, employee workplaces, potentially. And, the test could be related to a percentage of employees, they say the lower of 10% or 100 employees across the business. The Bill also says that when carrying out a collective consultation, the employer doesn't need to consult all the employee representatives together. They can try and reach agreement, the same agreement with, representatives in the different places. And finally, the maximum protective award if you don't follow the correct process, whatever that may be, which we will find out in future is, an award of up to 180 days' pay. So this is something that people will have to look at carefully, when it comes to changes and reorganisations in the workplace.

Ellie: Thank you. And I'm sure we're all aware that the employment tribunal system is buckling. And that's before this Bill is even implemented. And the Bill is seeking to transform enforcement of certain types claim by creating a single enforcement body, which will be called the Fair Work Agency. John, can you explain in a nutshell, if that's possible, how this Fair Work Agency will work and what this is going to mean for employment disputes in the future?

John: Well, thank you for giving this one. I think the way to look at it is that in employment law, we've had, individual enforcement by claimants, and then we've had, State enforcement. The balance has always been in favour of, individual enforcement by claimants or groups of claimants, but there have been bodies that enforce by the State.

For example, the Gang Masters Labour Abuse Authority, the Employment Agency Standards Inspectorate. And then there have been various labour rights that have been enforced, through HMRC, the minimum wages provisions. And there's also been the ability to enforce, to name and shame people who don't pay the tribunal awards.

But the idea of the Fair Work Agency is to bring all of this together and also give it, two, extra, areas of responsibilities. One is to enforce, holiday pay and, leave claims, which are often very complex although they may involve only relatively small amounts for each individual employee.

They may be mass claims and some of you may have been involved many hundreds of thousands of pounds, but that will come into the Fair Work Agency's area of responsibility. And also there will be the ability of the Fair Work Agency to actually fund cases in the same way as the Equality and Human Rights Commission has the ability to fund cases.

Now, how significant this will be will depend on the funding, which is available to it, and early indications are that the amount of funding will be, relatively, small. The anticipated implementation is on the 6 April 2026. So we won't really know until then, what this body is going to do. It's been labelled as a solution to the tribunal backlog.

If anything, I think it's only a very partial solution to it.

Ellie: Thank you, John. Catherine, I want to look now at some of the reforms which aim to promote a safer, more equitable work environment, including strengthening the law around preventing sexual harassment, the introduction of bereavement leave, and just greater family friendly rights. So can you just talk us through these changes, and identify any key watchouts for employers?

Catherine: Well, thank you. In fact, there's quite a lot here. But it's quite detailed and obviously with time is limited. So I will rattle through the things that stand out for me. I've subdivided into equality and family friendly, just as a way of just trying to get a handle on this. So if you think about the changes in respect of equality, the first, gender pay action plans, for large employers.

Now, at the moment, large employers. So 250 plus, have to produce their pay gap reports and some employers go further and also publish what they're going to do to address the pay gap. This will become mandatory, under clause 31 of the Bill. And that's from 2027. There is also some, information provisions in respect of contract workers, which will be less onerus for employers, but nevertheless add to the reporting obligations.

In respect of harassment, you'll recall legislation was changed in 2023 where there is a duty on employers, a separate duty on employers, to prevent sexual harassment. The Bill adds an extra word. **All** reasonable steps now, not just reasonable steps. And this is intended one to make clear that employers have got to be proactive in trying to stop the harassment from occurring and also to bring it in line with the employer's defence under section 109.

And then there's the issue of liability in respect of third-party harassment. Now, this is a bit of a hokey cokey provision in the sense that, way back when there was originally a plan in the 2010 Act to deal with third party harassment and by third party harassment, this will be customers coming into a shop or a bar, or it could be, contractors coming on site and, the, government I think it was the coalition government said we're not going to bring this into force because it's too difficult, it does raise practical questions about what to do, what constitutes reasonable steps.

But now this has been brought back in and crucially, not just on the grounds of sex, but on the grounds of all of the protected characteristics. One final thing, there's also disclosure of sexual harassment is going to be a qualifying disclosure for the whistleblowing legislation. So that's under equality. And on family-friendly. There's quite a lot of technical stuff here. Perhaps the most striking of the provisions, there are others. But the most striking provision is on bereavement leave. Now, currently, the law is that you can get parental bereavement leave for the loss of a child under 18 or a stillbirth after 24 weeks, and you get two weeks paid for that.

The new provision is for bereavement. The word parental is being removed. The Regs will define to whom this right will apply, likely to be close family members. It will be a day one right. But it will be unpaid, and it will also apply, and this was a later amendment, in respect of miscarriage as well, i.e. for those who've lost a child under 24 weeks.

Now, it also may extend not just to miscarriage, but also to those who've had unsuccessful IVF, and it may even and it's something worth thinking about as well, it also applies to those who've had an abortion. And of course, all of this raises immensely sensitive issues, both for the employer and for the individual concerned. But again, as we've heard, it's all going to be fleshed out in these many Regulations.

Ellie: Thank you. And then looking at industrial relations, Shantha, the Bill is going to introduce a whole package of trade union measures, which, in the government's view, are intended to "*strengthen democracy and participation in the workplace*". I know it's a difficult ask, can you explain very briefly what these reforms are?

Shantha: Think we're probably at about 100 pages! Anyway, so access to union rights and membership will change. So what the Employment Rights Bill does is gives, workers, the opportunity to get a written statement from their employer of their right to join a trade union when they provide that workers or employees s.1 statement. And then the Regulations will also explain in due course, what information is to be included in that statement.

So that's access. There is also a change to recognition rights, trade union recognition is not a new concept, but what the Employment Rights Bill does is it makes union recognition less onerous. And the thresholds for recognition will be reduced. I am not going to go through them because it's all percentages and the Central Arbitration Committee, and I'm sure you can read a lot more about it.

If you're interested. Then it changes, some of the old legislation. So the Strikes Minimum Service Levels Act 2023, which previously allowed the Secretary of State to set minimum service levels for strikes in certain services like health, transport, education, etc. That piece of legislation is being struck down, so it will go away on the day the Employment Rights Bill gets Royal Assent.

Another thing that the Bill does is that currently employees cannot be subject to detrimental treatment or dismissal because of their trade union membership or activities. But this, provision had its limits. And the Supreme Court recently confirmed in an issue that was litigated by my team on behalf of Unison member Fiona Mercer, that there is no protection from detriments for any action short dismissal when they take part in industrial action. And I know they don't have a lot of time. I just want to give this a human element because we're talking about a lot of different sections within this Bill without understanding it's implications for individual people. And here, Fiona, she was a social care worker who took strike action over her employer's plans to cut payments to care staff who worked sleep-in shifts, we're talking about a low paid woman here. Her employer wasn't happy and singled her out and suspended her and barred her from going into work

or contacting colleagues at this time. So what we argued, and it had to go all the way to the UK Supreme Court was that the, the protections under the existing protections don't comply with article 11 of the European Convention on Human Rights.

And the Supreme Court made its first ever declaration of incompatibility in the employment law, context, under the Human Rights Act. The law didn't protect Fiona, but the Employment Rights Bill now has introduced a protection that says that workers who participate in industrial action, which is a right, cannot suffer detriments for taking part in that action.

And this new law will protect workers in this way. It will also protect and strengthen some of the dismissal provisions for taking part in industrial action. And why is that important? It's important because we live in a democratic society where we can question unacceptable practices like reducing pay for doing day work, etc. There is also a provision for blacklisting, so it is unlawful to refuse someone employment in relation to their trade union membership or to compile a blacklist of union members. There are various changes in industrial action ballots and support thresholds for taking part in industrial action. I won't go through them. But they are tweaks rather than, wholesale changes. And there is also, now, an opportunity for union equality representatives, in workplaces of recognised unions.

And these people will have facility time to promote equality in the workplace, which, again, is not a bad thing and nothing to be afraid of. Equality is a good thing. It also, introduces, separately in separate provisions, a Fair Pay Agreement for the adult social care sector and also for the school support staff sector. These, at the moment with social care, pay is set by individual employers and, Catherine's already mentioned how it's impossible in certainly, you know, in certain professions, and areas to enforce rights, because people are far too afraid anyway to approach any kind of authority. So having a Fair Pay Agreement for the adult social care sector and also for the school support staff sector, these are at the moment with social care, pay is set by individual employers, and Catherine's already mentioned how it is impossible to, certainly in certain professions and areas, to enforce rights, because people are far too afraid to approach any kind of authority. So having a Fair Pay Agreement in the adult social care sector is a good start, because we need to make sure that people are paid properly to do this work that, is very hard to recruit to as well.

Ellie: And, and so from your perspective as, as the head of legal services at Unison, the largest UK union, will those reforms that you've just outlined lead to a sudden surge in employees joining trade unions, and how will that affect employers' ability to engage with workers?

Shantha: It might do, I don't know. But I'm just going to quote, Professor Alan Bogg and Michael Ford KC from a paper that they wrote for the Employment Rights Bill Committee. And they said "*The reforms in the Employment Rights Bill are ambitious, but they are neither radical nor revolutionary in comparative and international terms. They only appear to do so because the current baseline is so low. In terms of job security and the use of flexible contracts, the UK is extremely lightly regulated compared with other OECD countries. Even if the reforms of strike law are implemented, the UK will continue to have one of the most restrictive frameworks in Europe and many of its retained provisions (such as the ban on secondary strike action or the duty to give notice of the strike ballot) violate international standards. So it is important to retain a sense of perspective on this Bill and where it sits on the spectrum of international and comparative law and practice.*"

And I'll also quickly say that in our experience, certainly employers find it useful to have reps involved in certain situations which are fractious or difficult. And, I think for most employers and most employments, that employee engagement is a very nice buzzword. People talk about employee engagement all the time and trade unions are simply another form of employee engagement. And I know that in the past unions have been seen as anti-modern with stories from the 70s about rubbish being piled up on the streets, and, you know, and unions appear, to have positions that go against economics growth. But, we're not alll, in that sort of homogenous lot. Unions do not act in isolation, they act in the instructions of their members. And the Trade Union Congress is made up of 48 member unions covering 5.5 million working people who think unions are worth joining. So I speak for Unison, really. and our experienc is where employees are consulted and treated like grown-ups they tend to be happy and employers tend to thrive and make progress.

So whilst it does seem onerous, there is a good side to this Bill as well where if you think "*Well, what has a union ever done for me?*" I would suggest that if we look through history, we can talk about anti-discrimination laws, equal pay, rights to annual leave and, proper working hours, etc.

So those rights enrich all of our lives and therefore it's nothing to be afraid of.

John: Well, if I could just intrude on this on this happy scene.

I think it's fair to say that not all employers have the same experience. Happy experience. That Shantha, has said, I'll leave it at that because she is a good friend, and I want her to remain a good friend!

Ellie: Thank you. So I just want to finish actually, now, by asking each of you for your top practical takeaways for our audience to go away with as they grapple with what the Bill means for their business. So if I can start with you, Catherine.

Catherine: Yeah. Thank you. I would say, first of all, don't panic, because as we've heard, there's going to be a lot of detail fleshed out in SI's. And the reality is some of them may never come into force. And so that's my start. My second point is, I think some of the things that are very likely to come in, for example, would be the addition of the word "all" in respect to the duty to take all steps to combat sexual harassment. And you've already got an obligation on employers, it's just the ante has been increased a bit. So I would start with, making sure that the policies are in good shape and that training's in good shape and that it's all documented.

And on the subject of policies, I think the provisions on bereavement leave are very likely to come into force. And so you should be thinking about how you deal with issues to do with bereavement. A lot of good companies do this already and offer compassionate leave. And I suspect that everyone in this room would do just that, because by definition, you're interested it's the companies who aren't in rooms like this who won't be doing it. The problem about the bereavement leave, of course, it's, potentially unpaid. And so that, of course, incentivises employees to take sick leave, which, of course, it will become, they will be entitled to pay from day one. But it's as always policies and it's documenting what you've got.

Shantha: I've spoken about better engagement, but John, who was my advocacy tutor when I did my advocacy course, not that long ago, one of the things that as a lawyer I'm keen for is there to be clarity in the law. And, I think it's really important that you all use your voices and your written skills in the consultation responses to seek that clarity, because I think what we don't want to do is have this piece of legislation end up in the tribunals, which do not have the resource to hear all these claims at the moment.

And also, lobby government to ensure that these things are resourced, if we are going to have new rights, there needs to be a proper employment tribunal system that can hear these rights or the Fair Work Agency that can actually mediate or do whatever it will be doing to take these things out of the tribunal system.

So, yes, I would say seek clarity and do use your voice and ask for that before this all comes into force.

John: Well, firstly consult RPC about all these matters. They've got excellent offices as you can see, good coffee and their brilliant at law as well! But more seriously, I think, consider your position about probationary employees because I think, at the moment, people have the culture of, you don't have to worry for the first two years and now, you will have to worry, and I think assess very carefully what it is that you need employees to measure up to.

I think that is actually the most significant change. Secondly, if you do feel that unions are going to seek recognition, they will have much more ability to do that by these changes, some of which we've discussed, many of which we haven't. So if you need to have, a bulwark against or you feel that you do need to have a bulwark against trade union recognition, look at that very carefully, because once you're in the Central Arbitration Committee processes the periods are quite short. And I think thirdly, shape up on your leave and holiday pay arrangements, it's very easy to make mistakes, innocent mistakes about this because the provisions are, very, very, complex. So, shape up on that because I think one of the things that the Fair Work Agency may do more of is name and shame employers. We haven't had time thank god to discuss Zero hours contracts, but if any of you, have those, looked at those provisions carefully and as, Catherine has said, look at the implementation dates, they've already slipped, from what the government, initially set, this was all going to be implemented, a year following the election. I think personally, the day one rights might slip for, very close, to the next election if not beyond it. So those are the things to look out for.

Ellie: Thank you so much, all of you. That was a brilliant session.

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 any of our speakers, 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@rpclegal.com – we would love to hear from you.

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