

Employment Rights Bill

Transcript prepared for HR & Compliance Centre by Callisto Connect.

Darren Newman: It's almost a mistake to think of it as one single piece of legislation, right? What we've got is the Government is being given permission over the rest of its term in this parliament to implement 30 or 40 different changes to employment law.

Robert Shore: Hello, and welcome to the Brightmine podcast, formerly known as the XpertHR podcast. Brightmine is a leading provider of people data, analytics and insight, offering employment law expertise, comprehensive HR resources and reward data to meet every HR and organisational challenge and opportunity. You can find us any time of the day or night at <https://www.brightmine.com>.

Hello everyone. My name is Robert Shore, and today we're going to be talking about the Employment Rights Bill, regularly referred to as the Workers' Rights Bill in the wider media. To do this, I am joined by Darren Newman, employment lawyer and consultant editor at Brightmine. Hello, Darren.

Darren Newman: Hi Robert, how are you doing?

Robert Shore: Very well, thank you. Now, everyone in the UK who runs a business or helps to run one will already know a thing or two about the Employment Rights Bill, which at some point in the coming months will receive Royal Assent and become the Employment Rights Act.

So we're talking today on 23 September 2025. Last week the Commons looked at the amendments proposed in the House of Lords and said no to them all, essentially. Is that right, Darren?

Darren Newman: They said no to all the difficult amendments that the opposition had put forward. They said yes to all the amendments that the Government had put forward...

Robert Shore: Ah!

Darren Newman: ...which is what we expected to happen.

Robert Shore: And so various things have happened recently. Let's begin with Angela Raynor stepping down. Now, she was one of the principal sponsors of the bill, and obviously some of the other principal sponsors of the bill have also exited their posts at this point. So there's been speculation that changes to some of the sort of sharper

edges of the Employment Rights Bill might follow. What do you think?

Darren Newman:

Well, I think if all that had happened was that Angela Raynor had been replaced, I'm not sure I'd have attached a great deal of significance of that for the Employment Rights Bill. I did raise my eyebrows when I saw that Justin Madders, who was the Minister for Employment Rights, had also left the Government, as had Baroness Jones, who had shepherded the Employment Rights Bill through the House of Lords. And that did make me think that first of all it's odd timing to lose those two ministers who have been working in such a detailed way on the bill just before the work really starts taking off.

Justin Madders has been replaced by Kate Dearden, who's the MP for Halifax, is a new MP. She came in in the 2024 election. And she's got quite a lot on her plate now, 'cause she's got to supervise the implementation of this huge bill, and you do wonder whether Downing Street was not happy with the direction things were taking. And certainly if I was an employer I'd regard the change in guard as an opportunity for some fresh lobbying and maybe some fresh thinking about how these measures are going to be implemented.

Robert Shore:

We're not entirely clear on what happens there but we do have the roadmap because as you say...

Darren Newman:

We've got a roadmap, yeah. Well, if you've got a roadmap what can possibly go wrong?

Robert Shore:

Yeah. I mean, most people use...you get your data from satellite instead now, don't you? I don't know. Is there a satellite bill?

Darren Newman:

I'm trying to think whether we can come up with some sort of modern analogy for what... But I'm looking at a PDF document so I think we can still call it a roadmap for now.

Robert Shore:

That's right. So, as you say, this is a bill that contains a lot of different elements. We have a roadmap which tells us essentially some things will happen immediately at Royal Assent. Other things will happen April 2026, other things autumn 2026, and then 2027 for other things. So there's sort of a way of thinking about this really large array of changes. What is...if you look at the roadmap now, what's a good way for a business to think about organising itself in terms of taking all of this on? And then we'll get into some of the detail of the bill.

Darren Newman:

Well, as you say, sort of there are some aspects of the bill that come into force automatically, and they're largely to do with repealing the Trade Union Act 2026, or effectively repealing it. And certainly repealing the strikes minimum service levels legislation, which never

really got off the ground and no one has actually used. So no one will...

Robert Shore:

It's not going to make much difference, is it?

Darren Newman:

So yeah, so that all goes automatically two months after Royal Assent. And we're expecting Royal Assent probably sometime in October, towards the end of October maybe. So probably in time for Christmas those things will change. From a practical point of view, I think most employers won't notice a difference as a result of those repeals.

What we've then got to look out for is when the Government starts to bring in the more substantive measures, which it's got discretion as to whether to bring them in or not, and when to bring them in. And as you say, we've got this roadmap that talks about some things coming in in April 2026 (like for instance electronic balloting for trade union matters, including strikes), some things coming in in October 2026 (like the ban on fire and rehire), some things coming in in 2027 – they're not committing themselves to a particular season of the year in 2027 but that's the Day One rights for unfair dismissal, zero-hours contracts. And there's about 30 specific measures that are spread out over that period.

What I'm going to be watching for, though, is not the things coming into force but the things they start consulting on. Because the roadmap does say that they will start to consult on things really quite quickly. And I wonder whether the very ambitious timetable they've given themselves for consulting is actually going to be met.

Robert Shore:

As you say, there is also that in the roadmap, isn't there? So the consultation, so what we're looking at at the moment, we are supposed to be going into fire and rehire...

Darren Newman:

Yeah.

Robert Shore:

...umbrella companies' regulation, bereavement leave, rights for pregnant workers, end of exploitative use of zero-hours contracts. That's all supposed to happen this autumn.

Darren Newman:

That one's going to be a real key thing for me because I think people have underestimated just how complicated the measures on guaranteed hours, which is what's dealing with zero-hours contracts and people on non-guaranteed hours or on a low number of guaranteed hours. There is a huge number of political decisions that have to be made to get that measure into shape so that it can be brought into force to regulation. So that consultation is going to be a very big project. There are something like – I tried to count them the other day – there are something like 17 or 18 specific political

decisions that have to be taken about how that right is going to work, some of which are going to be politically difficult, some of which are incredibly technically difficult and I struggle to envisage exactly what they're going to say. Is the new minister, who has just come to her post, really going to be able to sign off a detailed consultation during the autumn of 2025? I'd be surprised if she could, to be honest. I'm going to be watching to see if the timetable on consultation starts to slip.

Robert Shore:

So just to sort of go back over that briefly, what we're saying really is that the bill is going to be passed and then it becomes the act, but actually that's not the end of it by any means, and actually...

Darren Newman:

It's the beginning of things, yeah.

Robert Shore:

...a lot of the key details that employers are going to be looking for will still not be evident at that point, or there will be lots of big decisions to be made after that.

Darren Newman:

Yeah. I mean, there are some measures that are ready to go. So they just have to be brought into force. So for example, third-party liability for harassment is an important measure in the bill. That's slated to come into force, I think, in October 2026. But nothing has to happen in order to let that come into force. There are detailed regulations that have to be written.

Fire and rehire, currently slated for again October 2026, we might expect some guidance on that. Maybe there'll be some amended code of practice. But fundamentally the law is ready to go once it's passed. It can be brought in at any time. That's not in itself going to be difficult.

But the ending of zero-hours contracts and guaranteed hours for people on a small number of contracts, that's nowhere near ready. There's fundamental decisions have to be made about technically how that would work, and that's going to be a huge ask to get that ready in time for 2027.

Robert Shore:

There, with third-party harassment, by the way, let's just look at that for a second, 'cause obviously third-party harassment was one of those things that was originally envisaged for the law that came into effect in late 2024.

Darren Newman:

Yes, there was an amendment that was originally proposed for the Equality Act, that was a private members' bill backed by the Government. It had a very un-catchy title, which I can't remember now. But it basically amended the Equality Act, and what it ended up doing was creating a duty to take reasonable steps to prevent sexual harassment. But it dropped its provisions that would make

employers liable for harassment from third parties. So people who aren't fellow employees, so members of the public harassing your employees. There are going to be circumstances where you'll be liable for that.

Robert Shore:

And we think that this time, although there is always some anxiety obviously from organisations about this because it just extends their liability, we think that this time that's going to happen, don't we?

Darren Newman:

Well it's certainly in the bill. I mean, if that got abandoned you'd have to worry about...well, you'd have to wonder at least about what is going to go through, if that doesn't come in. I don't see any reason why that shouldn't come in pretty much on schedule, and it's certainly something that I would be pointing to if I were a Labour minister trying to persuade my backbenchers that we're making progress. I'd be able to say, 'Well look, we may not have got the zero-hours contract thing done yet but look, we can do this with protecting workers from harassment.'

Robert Shore:

And I mean, I know from events that we've done that a lot of organisations have taken a lot of measures in the interim to make sure that they're ready for that, although it's obviously quite challenging.

Darren Newman:

Yes, but all it's asking you to do is to take reasonable steps to protect people from being harassed by the people they're going to come into contact with as they work. And as an employer you'd want to do that anyway. So it should be going with the grain of what employers want to do.

Robert Shore:

Yeah. And "all reasonable steps", of course Darren, I think it is, isn't it? That's the added word?

Darren Newman:

Let's do an entire podcast on whether we think the word "all" adds any meaning to a duty to take reasonable steps. I think if you're under a duty to take reasonable steps, that means all reasonable steps, but I have had long arguments with people about that. So let's not fall out over that one.

Robert Shore:

I agree with you anyway – I'm only going with you! So, let's talk about some of those where the detail is very much up for debate at this point. So, obviously unfair dismissal, the probationary period sort of related one. So, a Day One right to claim unfair dismissal. This is one of the key areas in the bill that...

Darren Newman:

Clear manifesto commitment. Not something the Government can resile from.

Robert Shore:

Okay. And so we still don't quite know, though, what it means because "Day One" doesn't quite mean day one, does it?

Darren Newman:

Oh, they've made a complete hash of this, to be honest. It's relatively straightforward to just cut the qualifying period. You could do that by regulations. You could abolish the qualifying period by regulations. What the Government wants to do, though, is to have an initial period of employment during which special rules will apply to allow you to dismiss somebody in circumstances where there will be a light touch to the question of reasonableness. And if that sounds a bit vague to you and it's not very clear what that means, join the club because I have no idea what that means. And I genuinely think that there's a danger that the Government will end up writing a procedure that you have to follow in order to dismiss someone in their probationary period, however long that is – whether it's 6 months, 9 months or even 12 months – that you'll have to follow this procedure, and on paper at least it will actually look more onerous than normal unfair dismissal, 'cause there'll have to be a meeting, there'll have to be an invitation to a meeting. You know, people of my age will remember the statutory dispute resolution procedures of the early 2000s and what a complete disaster they were, and we can see shades of that in the way the Government is setting up this initial period of employment. I think it's a potentially really tricky thing, and I look forward to seeing what the Government actually proposes when they get around to proposing something.

Robert Shore:

So, I mean, just again to make sure we all understand all of this in the same way, currently it's two years before you can bring an unfair dismissal claim. However, there are various heads under which you can bring a claim nonetheless if you are dismissed before you've been in employment for two years.

Darren Newman:

Absolutely. I mean, we've always had...I mean, there are two basic categories. One is discrimination. If your dismissal amounts to discrimination you don't technically claim unfair dismissal but you claim discrimination and that's better 'cause it gets you better compensation. And that doesn't need any qualifying service. In fact, you don't even need to be at day one. You can claim that about the recruitment process. But automatically unfair dismissals would be things like if you have made a public interest disclosure, whistleblowing, if you're dismissed because you're pregnant or a trade union representative, or because you've acted as a representative in a disciplinary hearing or you've asserted a statutory right, or frankly there's a list of about 30 of them, including if you've acted as a pension fund trustee it's automatically unfair to dismiss you for doing that, though I've never come across a case of it.

Robert Shore:

So there's obviously a change but actually it is already an area where there are lots of challenges that are possible anyhow. And

then it becomes potentially very complicated and a lot of businesses then will be looking at their recruitment process as a result of this. 'Cause in a way, is that what it addresses, that actually it's about making sure that employers are serious when they actually take people on in the first place? I can't imagine why they wouldn't be but...

Darren Newman:

Yeah. I mean, I guess the key question is, 'When an employer takes somebody on, when they go through a recruitment process, how many of them are thinking, "Well, I can be relatively casual about this because I can dismiss them unreasonably inside this first period and they can't challenge the fairness of that," and therefore I'll take a chance on someone I might otherwise not employ'? And if that is a significant thing – and I'm not a labour market economist so I'm not going to claim one way or the other – but if that is a significant thing, are they going to be deterred from doing that by the prospect of having to go through this statutory probation period procedure, whatever it ends up looking like? And will that affect, you know, their willingness to take on people who potentially might otherwise struggle to find a job?

Now you know, that's a political question, it's an economics question. Certainly something that people are arguing against the qualifying period being reduce to day one are certainly pointing to that as one of the key reasons. But in the world of politics that's sort of how you frame those arguments, isn't it? You want to say that Labour wants to protect workers but in fact what it's proposing will harm workers. That's how you attack a proposal.

Robert Shore:

And there are obviously two aspects to that. One is employers not being serious enough about their duties to employees when they take them on in the first place, but then having that sort of freedom to take a chance on somebody which could be good for that person who is otherwise struggling to find a certain kind of work.

Darren Newman:

I mean, that seems to be the way they're going. And that's why at the moment they're proposing an implementation sometime in 2027. And even that assumes that they'll get a consultation out this year, they'll get the consultation out in autumn. Because one of the things that will have to happen, if we've got a detailed probation period, ACAS will have to rewrite its code of practice on discipline and grievance. Because of the way ACAS is structured, and because of its council governance and the various hoops that it has to jump through, it takes them a while to rewrite a code of practice. It can take them a year to rewrite a code of practice. And so if we imagine a consultation which results in an outcome that gives us regulations that will describe how the initial period of employment will work, and then ACAS has to have its time to develop a code of practice and

consult on that, and then we all have to get used to what the code of practice says and what the new regulations say, it starts to look like 2027 is optimistic for getting this done. They really have made more of a meal of this than was needed.

Robert Shore: Right. So that's unfair dismissal as a Day One right sort of dealt with. Let's set that one aside.

Darren Newman: Yep.

Robert Shore: What else is interesting in terms of what's a bit unpredictable at the moment and what has to happen next?

Darren Newman: Well, we may have different views about what counts as interesting, but the thing that I'm currently working through is...Clause 1 of the bill is very exciting. Clause 1 is 18 pages long, and it inserts provisions into the Employment Rights Act 1996 about guaranteed hours. So this is about tackling zero-hours contracts. Not just zero-hours contracts; people on a limited number of guaranteed hours. And we don't know what that limit is. That's one of the things they've got to sort out. And the basic structure of the new right is going to be, over a reference period you will count the hours that somebody works, and if they work in excess of their guaranteed hours then you may have to make them an offer of a guaranteed-hours contract that reflects the work that they've been doing over the reference period. And I've been reading this more closely in the past few days and I have to tell you, it's the worst thing I've ever read. As a piece of legislation, it is the most obscure, technical, difficult piece of legislation I've come across. And it doesn't answer fundamental questions about how the right will work. And it seems to me to be wholly disconnected with how businesses will actually operate. I just...I really struggle to see how they're going to make something workable out of this, but a consultation is due this autumn. I look forward to seeing what the new minister comes up with.

Robert Shore: So this is an area where there was a sort of report that the Government was going to outlaw all exploitative zero-hours contracts. Or is that where we are now? And that's not quite the case, is it?

Darren Newman: Well, the word "exploitative" is not in the bill.

Robert Shore: Yes.

Darren Newman: But it's a way of the Government saying, 'Don't worry, we're only outlawing the bad ones. What we're leaving aside is how you tell the difference between the two.'

Robert Shore: It sounds like a noble aim but, as you say, quite tricky to define it for everybody all the time. And then the other thing is the Lords, I think,

came up with an amendment for this, didn't they, which was that employers would only have to provide this guarantee if it was asked for by the...

Darren Newman:

Yeah, I don't think that's a serious amendment. That is what they did. They basically just inserted the words "if an employee requests it" at the start of Clause 1. And they didn't, for instance, define what a request was. They didn't say which employee had to request it. They didn't address the fact that an employee has to request it but the right applies to workers. It was a political amendment rather than a serious amendment that was really addressing the legislation.

So the Commons have rejected it. The Lords can't possibly insist on it. It won't be in the bill when the bill gets Royal Assent. It's not going to be based on a right to request.

Robert Shore:

As you say, although technically it does have to go back to the Lords, doesn't it?

Darren Newman:

It has to go back to the Lords, but the Lords have to, you know, deal with the fact that it is the House of Commons that got elected and not them. Ultimately, the House of Commons has to have its way. The stage we're at with Parliament now, it's technically called the "ping-pong stage", which delights me. And the House of Lords has to decide whether to accept the Commons' rejection of its amendment or whether to insist on it. And in theory the amendment can just ping-pong between the House of Commons and the House of Lords until one side gives in. But by convention, the Lords give in. And you know, whether they knock it back once, maybe, but ultimately they are going to have to accept that this is what the law will say.

Robert Shore:

Okay. So guaranteed hours, then. This is going to remain quite a complicated area. What's going to happen, do you think?

Darren Newman:

Do you know what? I wonder whether it's actually going to happen at all. 'Cause I regard it as such a complete mess, this clause. I'll wait and see what the consultation comes out with this autumn. If a detailed consultation doesn't come out this autumn and it becomes clear that the Government hasn't thought through the details yet and doesn't have a clear idea of how this right would work, I'd start to suspect that it might just get left on the back burner. If you think it's already scheduled for 2027, a lot can happen between now and 2027. I just wonder whether they'll actually get around to it in time for the next election but, you know, we have to work on the basis that this is what the bill is going to say and this is what employers are going to be required to do. But let's wait and see what the Government consultation says and whether they really do get that consultation out, 'cause I can see the timescale slipping.

- Robert Shore:** But again, just to be really clear about that, the act should pass at some point late October, early November. It gets Royal Assent, it becomes the Employment Rights Act. It will almost certainly, well it will contain this strand. But I mean, the...
- Darren Newman:** Yeah. I mean, it can't not...it has to be in the bill. It's too...
- Robert Shore:** But then the consultation follows and the Government has to write regulations, which is secondary legislation.
- Darren Newman:** Exactly. So in order to...
- Robert Shore:** In order to bring it into force.
- Darren Newman:** So to give you an example of what needs to be decided, we don't at the moment know who this applies to. I've been talking about it applies to people on limited hours. But we don't know whether it applies to everyone who's got fewer than 8 guaranteed hours a week or fewer than 35 guaranteed hours a week, and obviously that makes a huge difference.
- We don't know what the remedy will be if you haven't given the offer. Is it going to be two weeks' pay and not very much, or is it going to be potentially a lot more than that?
- We don't know how long the reference period is going to be. We don't know what working patterns will trigger a right to guaranteed hours offer. We don't know when the guaranteed hours offer will have to be made. We don't know what it's going to look like. We don't know how we're going to deal with seasonal work, for example, if somebody's got a very busy summer and for 12 weeks they work very busily over the summer – is the employer really obliged to give them guaranteed hours that reflect their summer hours over the autumn months? Is that sensible? How are the regulations going to deal with that?
- As I say, there's about 20 things that need to be decided. And I think when push comes to shove, the Government is going to find it pretty difficult to make those decisions.
- Robert Shore:** Yeah. I mean, as you say, it does cover an enormous range of scenarios, doesn't it?
- Darren Newman:** Yes, it covers an enormous range of scenarios. Exactly, yeah.
- Robert Shore:** And it's just very difficult to draft law that satisfactorily, you know, addresses those things with equal kind of clarity and rationality.
- Darren Newman:** Yes. Imagine, for instance, you've got someone who has worked long hours over the reference period, is entitled now to a contract that guarantees them 10 hours a week. How do we stop the employer

from saying, 'Okay, I'm going to guarantee you 10 hours a week but they're all going to be worked between midnight and 10am on a Sunday morning. That's when I'm going to give you the hours.' So the regulations will have to say, 'No, you can't do that. The hours have to in some way reflect the working pattern that the worker had during the reference period.' But presumably these are people on relatively flexible contracts and it's a reference period of about 12 weeks, we think. How do you draft regulations that require a contract that reflects that? I think it's incredible difficult to do, and I haven't seen any indication that the Government's got an idea of that's to be done. I think that's something they're just waiting to think about later.

Robert Shore:

Any other similar areas where there remains, you know, a lot of light to be shed?

Darren Newman:

Well, I'm looking forward to seeing...another thing that's due to be consulted on this autumn is electronic ballots for industrial action. I think again the Government will find that that's a little bit more complicated to regulate for than they realised.

Next October we're going to get the ban on fire and rehire. And I've been talking about this for the past year now, but I really think a lot of people haven't grasped just how big a deal that is going to be. Because we tend to think about fire and rehire as a Machiavellian tactic that bad employers use, where they will decide to dismiss all their workforce and replace them with somebody cheaper. But in fact, it's really the necessary backup to a proposed change in terms and conditions. If you've got a set of terms and conditions and the economics change and you can't sustain those terms and conditions anymore and you need to change someone's pay, hours, holiday arrangements, time off arrangements, sick pay arrangements, anything that's going to affect the value of their contract to them, you can propose that amendment but if the employee says no, there is simply no way of making the change. Because if you dismiss them in order to...terminate their contract in order to reengage them on the new terms, that will be an automatically unfair dismissal. And I think that is going to have a bigger impact than many people realise it will have.

Robert Shore:

And this is sort of a classic thing that businesses do when they are restructuring. Is that right?

Darren Newman:

Yeah. So I mean, one of the things it might drive businesses to, in terms of unintended consequences, we're focusing on firing and rehiring but it's actually the rehiring that's being made difficult. Firing is going to be as easy as it ever was. So you can still make people redundant, but what becomes difficult is trying to avoid

redundancies by offering lower terms and conditions or a temporary pay cut or the various other tactics that we've seen or ways that employers have found to try and reduce the number of redundancies by getting agreement on what the terms and conditions should be. Because now, if one person objects to that, you won't be able to say, 'Well, 90 people have agreed. You're the only person who's objecting so we're going to have to dismiss you and reengage you.' That will be an automatically unfair dismissal. How can an employer get that process through? They're going to have to just straight to redundancies.

Robert Shore:

And this is presumably not really something that the Government was aiming at in creating the legislation in the first place. Is that right?

Darren Newman:

I think the Government did fall into the trap of thinking in terms of good guys and bad guys, and good employers and bad employers. And there had been some examples that we'd seen where employers had perhaps...we talk about the P&O case. That doesn't entirely fall within fire and rehire, although dismissing your employees and replacing them with people who are not your employees will also be automatically unfair. That was an amendment that was made as the bill went through. But there were also cases involving other employers where it seemed like a bit more of a flex, a bit more of a macho tactic to say, 'Right, we insist that we'll get this change through or we'll dismiss you all.' And it's easier to see how you would sympathise with the workers in that situation and think that the way in which they're being treated is very unfair. But there are many examples of employer who just need to get a change in their terms and conditions, and if they can't get an agreement, what option are they going to get? What option do they have? They're going to have to just bite the bullet and unfairly dismiss someone and pay the compensation for that. And I don't think that's what the Government had in mind when it proposed the change.

Robert Shore:

Again, it all comes down to the drafting. Is there an easy kind of clause that you could suggest they insert, Darren, so that they obviate that risk?

Darren Newman:

No, we're doomed on that one because that's one of the things that doesn't require regulations. That's all set out in the bill and it's too late to change that now. There are no more amendments on that. The bill will pass with that intact. They have slightly narrowed the definition of the kinds of changes to contracts that will trigger this right. So you will be able, for example, to enforce a change to location. So if you merely change someone's location but keep all their other terms intact and the employee won't agree to that and

you dismiss and reengage, that won't be automatically unfair. But anything to do with actual money or time or hours of work is going to be automatically unfair to dismiss if you can't agree the change. And there are no regulations needed to make that happen. So if the Government brings it in, that is what it will say.

Robert Shore:

Anything else catching your eye in the bill that...?

Darren Newman:

Well, it is such an odd thing because it is...it's the biggest single piece of employment legislation there's ever been. You know, when you look through it there are maybe 30 or 40 substantive provisions in it, some of which we've neglected when it's been going through or we haven't necessarily figured out what the significance is. There's going to be a consultation on new rights for pregnant workers in terms of redundancy, for example, and dismissal. I'm not entirely sure what that's going to say.

I think one of the things that trade unions are particularly excited about, and it'll be interesting to see how this goes, is the right of access to a workplace. So trade unions will be given a right to access a workplace for the purposes of organising and promoting collective bargaining, and that may mean electronic access in terms of being able to communicate with employees, but it certainly also means physical access. So they'll be physically allowed onto the premises. And we'll need regulations to govern how an access agreement will work to allow a union to do that. And it'll be interesting to see how much advantage the union movement can take of that to try and boost its membership and boost its footprint, if you like, in sectors that traditionally it's struggled to make its presence felt. We're thinking very much of, you know, those very large employers often with American owners who have, you know, seemingly an allergic reaction to any presence of unions. They are going to have to allow unions onto the premises to do their thing, and it'll be interesting to see how that plays out.

Robert Shore:

Do you think that the union legislation generally is going to have a large impact on businesses that are not currently higher unionised?

Darren Newman:

I mean, I don't know. I'm old enough to remember when the first recognition scheme came in. Not quite the first, but the one that New Labour brought in in 1999 in the Employment Relations Act. And that had less of an effect than the unions expected it to, and the statutory union recognition scheme is being souped up a bit to potentially, you know, make it easier to gain recognition. I suspect it probably won't have that big an impact.

A lot of the changes to industrial action are interesting. It's going to be much easier to take industrial action than it currently is, particularly when you allow for electronic balloting. But I think

industrial action is something that we tend to feel in the public sector and in infrastructure. We tend not to see it in, say, you know, private sector manufacturing, for example, or places where you can basically move to China if you need to, if things get too difficult here.

It is interesting just as we get into, you know, what might be a potentially tricky time for public sector pay, that the Government is going to make it quite a lot easier for public sector unions in, say, the health service or education or the unions in transport to take industrial action if they're unhappy with their pay deal. It's quite a courageous move on the Government's part, you might say.

Robert Shore:

All of this is going to require quite a bit of time – small changes, larger changes – for HR departments to deal with, and of course I have to say here that Brightmine will be available to assist anyone through this, producing excellent policies and documents in a timely fashion throughout the whole process. But it is quite onerous, isn't it, just...I mean, because as you say, this is a massive piece of legislation?

Darren Newman:

I mean, it's almost...it's almost a mistake to think of it as one single piece of legislation, right? There's no such thing as implementing the Employment Rights Bill. What we've got is the Government is being given permission over the rest of its term in this parliament to implement 30 or 40 different changes to employment law, some of which are going to be relatively straightforward, some of which are going to be massively complicated, some of which are going to be controversial. And we have yet to see exactly how they're going to approach that.

I tend to think that they've probably bitten off a bit more than they can chew because they had this manifesto commitment to introduce the bill within 100 days. So they've introduced this massive bill. They've taken up a full year getting that bill through Parliament without actually doing any of the things that they've promised to do. They've now got, say, four years left to implement these. It's going to take the rest of this parliament, if not beyond, to get these things up and actually working. And so what we really need to see from the new ministerial team is some progress on those consultations that indicate that they're doing the thinking and they're doing the work that will actually bring them in force, in line with their expectations. And we'll have to recalibrate as we go through the next year or as to when we think these things are actually going to happen.

Robert Shore:

One small piece of the bill I'd just like to raise briefly, because I wanted to think about, you know, what actually are its implications and how easy is it for any organisation to introduce this in relation, say, to flexible working, which is obviously an area where there's

been enormous change. And so the bill provides that employers can still refuse a request for flexible working on existing grounds but the refusal will need to be reasonable and they will need to explain why the refusal is reasonable. Discuss.

Darren Newman:

Yeah. I mean, in a sense you could look at this and you could say, 'Well, this is no big deal, is it?' Because currently, how many employers refuse flexible working requests in a way that they think is unreasonable, right? I think most employers think, 'Well, I already behave reasonably. I already deal with these requests reasonably. I already make reasonable decisions.' But at the moment your challenge to a flexible working request being refused is to look at the process that the employer's gone through. Because the employer has to behave reasonably in handling the request but its decision does not in itself have to be a reasonable one. And what's changing is the decision will have to be a reasonable one. What does "reasonable" mean? It probably means within the range of reasonable responses. So you know, is this a decision that a reasonable employer could make? But it doesn't explicitly say that, and tribunals will have to reach their own view about what "reasonable" means.

Remember these go alongside, normally, claims for indirect sex discrimination. So if you refuse a flexible working request you're unlikely to just face a claim that you've breached the flexible working requirements, 'cause you only get 8 weeks' pay for that. You're also likely to get a claim for indirect sex discrimination because women are more likely than men to need flexible working arrangements. Now there, your justification has to be, 'Well, our refusal was a proportionate means of achieving a legitimate aim,' which is quite a high threshold of reasonableness to meet. We've got caselaw talking about how you've got to establish that. Is "reasonable" going to be interpreted in the same way as "proportionate means of achieving a legitimate aim" or are we going to have two separate standards of reasonableness depending on what the claim is in relation to? I'll look forward to seeing what tribunals say about that, but given the current delays in the tribunal system we're not going to hear what the tribunals have to say about it until sometime after 2030.

Robert Shore:

Yeah. So it is one of those things that looks quite straightforward and like a small tweak but could...

Darren Newman:

It's basically changed a couple of words in the legislation. It's basically changed a couple of words. And we could spend an evening discussing what it is to be reasonable when refusing a flexible working request.

- Robert Shore:** But it is certainly something that employers will have to think about and look at caselaw decisions in order to look at their own processes and make sure that...
- Darren Newman:** I mean, I would expect as well to see a new ACAS code of practice on that, 'cause ACAS has a code of practice on dealing with flexible working requests. So that will have to be updated to reflect the new law. So I'd expect that to come through and probably, you know, tribunals will just be applying that code of practice as best they can. And you know, I think that's all we'll have to go on for the foreseeable future, I think.
- Robert Shore:** So Darren, is there anything else you want to discuss?
- Darren Newman:** No, I think those are the key things. We'll see what the Government comes up with in its autumn consultations. I'm always a little bit suspicious when government says it's going to consult in a season because I think people sometimes have very flexible ideas about what a season is. But I think we can all agree that autumn finishes at the end of November. So we'll look at the end of November and we'll see whether the Government has consulted on what it says it's going to. This is how consultations work. I've been doing this for 30 years and the number of times that "autumn" turns to "winter", turns to "early in the New Year", and "early in the New Year" turns to "by June" and then, you know, it's "during the summer" and before you know it another year's gone by.
- Robert Shore:** Anyway Darren, thank you so much for your time today. Obviously on the Brightmine website we have lots of resources and we will be keeping you apprised of the various steps as the various elements in the bill, and then the act, become law and enter into force. And so that's all I think I have to say today, and just to say, until next time.
- Darren Newman:** Thanks for having me, Robert. Cheers.

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