

## Employment Rights Bill – trade unions and workers' rights

Transcript prepared for HR & Compliance Centre by Callisto Connect.

**Shantha David:** Unison is extremely proud of this piece of legislation. It seeks to assist the insecure and low paid sector and exploitative work practises which you will know have mushroomed.

**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 current direction of travel of employment law. To do this, I am delighted to be joined by my colleague Laura Kimpton. Hello Laura.

**Laura Kimpton:** Hi Robert.

**Robert Shore:** And a very special guest, Shantha David. Shantha is head of legal services at UNISON, which represents a very large number of people. Shantha, can I bring you in at this point? How many?

**Shantha David:** We represent 1.4 million members in the public sector.

**Robert Shore:** Right, yeah. So, working in local government, education and health, among other fields. And Shantha has been involved in, and also won, many key employment law cases in the highest courts, among them the ultimately successful four-year battle to eradicate employment tribunal fees. That went all the way to the Supreme Court. She was named Liberty's Human Rights Lawyer of 2017 and won the Halsbury Rule of Law Award in 2018. Shantha, you've already spoken but I'm going to say hello and welcome again anyway.

**Shantha David:** Hi there, and thank you for inviting me.

**Robert Shore:** So, we're going to be focusing on the trade union legislation in the Employment Rights Bill first. But before we sort of start on there, I

just wanted to ask what an average day looks like to you as head of legal services at UNISON with 1.4 million members, 80% of whom I think you said are female – is that right?

**Shantha David:**

That's correct. I would say this, but as any other in-house lawyer will know, no day is the same. So I am an in-house solicitor and the head of legal services at UNISON. And our members are from all sectors of the public sector. So we have, as you said, you know, people from the health service, the NHS. We have nurses, paramedics. We have people from local government, including the prisons, meat hygiene inspection officers, police staff, people in NGOs and the charity sector, other voluntary sectors as well as the environmental sector, school support staff...the list is long. We can go from...you know, we have members who are CEOs, we have members who are cleaners, caterers etc. So we cover a wide array in our membership, and our role is to represent members and organise members. But within my role, my role is to provide legal services for those members who need them. My colleagues will do the task of negotiating employee terms and conditions, particularly with the larger employers, and seek to avoid large-scale redundancies or organise and take part in last-resort industrial actions such as striking when there is no alternative.

My team is a small team. As I said, in-house. And the sort of thing that we do is to oversee and monitor our panel of lawyers that run our...what I call our 'bread and butter cases' for our members. But we also – internally, in-house – run strategic cases like the employment tribunal fees case you mentioned, or indeed all the holiday pay cases we have won, such as Agnew, Brazel, Lock and British Gas etc. that we have run over the years.

I have to tell my colleagues often that it's not normal to have a Supreme Court case every year (we don't have one this year), but we have had one for the last six or seven years. So what that means is that these are cases that have been in the pipeline for years and take a long time, perseverance and patience to get through.

So that's just in a nutshell!

**Robert Shore:**

So, trade union rights. After a fourteen-year absence, the Labour Party returned to power in the UK last year, published this very wide-ranging Employment Rights Bill in October 2024, and the contents of the bill have been chewed over a lot. I think what we haven't certainly discussed so much at Brightmine is the elements relating to trade unions and collective rights. And obviously there are some very important elements there. So, I think one thing that it would just be great to ask you about in the first place is possibly to summarise

for us what those are. I mean, let's talk a little about what impact you think that might have afterwards.

**Shantha David:**

Sure. I mean, you wouldn't be surprised for me to say that UNISON is extremely proud of this piece of legislation. There was a lot of lobbying prior to this coming into force. And as a union dedicated to tackling exploitation and protecting working people and promoting pay and good working conditions, this piece of legislation seeks to tackle some of that. And in particular, it seeks to assist the insecure and low-paid sector and exploitative work practices which you will know have mushroomed.

Also, trade unions over the last two years have been held back from their essential work to negotiate and bargain for better work. So this act, when it comes about, is seen to strengthen and modernize the industrial relations framework. I'm sure we'll talk about this more later, but it's a move to work with employers and share in their success. A happy workforce will automatically result in a happier employer as well because of outcomes.

Now, you asked what has been introduced in this act, and just to remind your listeners, the Employment Rights Bill is still in progress. It's not yet law. It's undergone multiple amendments. It is expected to come into force in a few months but not all of it will become law straight away.

The collective rights in a nutshell – there's quite a few but I'll tell you what they are briefly – employers need to give workers a written statement of their right to join a trade union when they provide that Section 1 worker notice, when you start you work. There is access rights to workplaces for recruitment and collective bargaining purposes, including digital access given that we are now a modern workplace. Union recognition is to be made less onerous and various thresholds for recognition have been reduced. There is improvements to facility time, so representatives can have time and can be paid for representing members. There will be improved collective redundancy provisions. There is the repeal of the Strike Act 2023 which, you know, was largely disregarded. And quite a bit of the Trade Union Act 2016 will also be repealed. There is to be a modernization of the industrial action processes. So this will allow for electronic voting, whereas currently, in fact, voting can only take place by post using paper. There are protections from detriment for taking part in unfair dismissal and unfair dismissal rights when taking part in industrial action, sorry, has also been strengthened. There will be a new Fair Work Agency to help enforce these rights, and we need to see what that will look like, and in order to resolve disputes.

So that's my very quick foray through the collective rights. But just a couple of other things. There is to be an adults' social care negotiating body and a new school support staff negotiating body, both of which will deliver a fair pay in those sectors for care workers and school support staff respectively. And that is important because we're talking about low-paid staff who haven't had much of a look in, and as you know, there is a care crisis in the country at the moment.

There is also to be this restoration of the two-tier workforce to stop outsourcing driving down terms and conditions, which has resulted in terrible practices for these low-paid workers as well. In a nutshell!

**Laura Kimpton:**

That's an awful lot for employers to be grappling with in the future. Do you think that organisations should be worried about the breadth and scale of these changes that are coming into force?

**Shantha David:**

As you know, employee engagement is a buzzword for most organisations, and that's exactly what joining a trade union is. It is about employee engagement. Trade unions are made up of members. They don't stand alone. They are part of a membership organisation. So this is simply allowing for greater engagement, clearer lines of communication, and it is somewhere that employees can go if they don't feel they're being listened to or, worse, they're being treated badly or unlawfully. It is not something that employers should be afraid of. And the greatest impact will be in the low-paid sector and in sort of accommodation, the arts, agriculture. And what this means is that these workers will get paid fairly. And I think that the focus should be on fairness and parity. Where there are organisations who do that well, they don't have a problem because they do have employee engagement. It is where that's lacking that this gives a right for those people who have no voice to have a voice, and I think that's what's important to note here.

**Laura Kimpton:**

And how can organisations engage in a meaningful way to bring about positive change in their organisations?

**Shantha David:**

I don't think it's anything more than what they already do. So, if they don't have access to trade unions, if their members of staff want to be able to join a trade union they have that right. It doesn't mean that anything will dramatically change. It's all to do with lines of communication and the strengthening of lines of communication. As I said to begin with, if those are already established then those sorts of organisations have nothing to be afraid of.

There are individual rights which will need to be looked at, and which will need to be catered for. But most good HR practices within employers will be ahead of that and on top of that anyway.

**Robert Shore:**

So, we ran a Round Table recently on the changes to the harassment, sexual harassment law that came in in October, and obviously there are further ones carried in the bill. And there was tremendous positivity, actually, about the changes that were proposed. I think the phrase 'death by training' was used.

I wanted to ask you really about the changes. So let's talk about the changes to the harassment law.

**Shantha David:**

If you think about the #metoo movement and the sort of changes that that has brought about, this is simply carrying on in that trend. So employers will be liable for third-party harassment in relation to all relevant protected characteristics. And so that that is important so that employees feel protected at work. And employers have a duty to take all reasonable steps to prevent sexual harassment. These to me sound pretty common sense. And if employers are doing their job correctly then they'll be doing all of this anyway.

Something that has changed is that a complaint of sexual harassment at work will be treated as a protected disclosure under the whistleblowing legislation, which again gives voice to those people who are treated badly. You suggested that the people in the Round Table welcomed these changes.

**Robert Shore:**

Absolutely, yeah.

**Shantha David:**

And I can see why. It's because it goes to the changing environment, I think, in society. And it also goes to correcting wrongdoing when it happens. And that definitely is not something to be concerned about, as the people you mentioned were not.

**Robert Shore:**

Yeah. I mean, one thing that came up at the Round Table was about how to do a really good risk assessment (and we have a very good template for this on our website, I have to say), but that actually...and again, when you were describing the various sort of areas that you represent workers in, actually beginning to think through the kinds of scenarios that present themselves, so you're thinking about, say, third-party liability, which is obviously one of those things that's been discussed a lot in public and has sort of gone into the mainstream...

**Shantha David:**

Yes.

**Robert Shore:**

...media. But actually there is a degree of sort of complexity of thinking through actually the various ways in which you now have people who work obviously remotely and online, and the way in which you are exposed to the public or third parties in different ways, and actually just that it's actually quite a hard thing to do. And

obviously it's something that HR and organisations need to do. I mean, they have to do it and they should do it.

**Shantha David:**

Yes.

**Robert Shore:**

But that it is actually sort of complex in that sense. And so could you say something about actually how to think about what the practical limits of that are? Because I think there was a sense that it could be limitless.

**Shantha David:**

I mean, that's the doom-mongering aspect of it, isn't it? So, I think, you know, again I'll go back to what I said to begin with, which was communication and engagement, and I think sometimes you have to ask your workers, you have to ask your employees, you know, 'What makes you feel unsafe at work? What's going on? Are you a lone worker? Is there a lone worker policy? And if not, why not?'

For example, in the NHS there was a recent report into sexual harassment during surgeries. Now, none of us would have ever thought or expected that to have been a reality, but it is, especially in this day and age. But the fact that people can now have a voice and be protected under the law, while not a complete protection (because nothing is in life), that will allow those individuals to stand up and say something and to be listened to. And I think it's really important to understand, I suppose, that these things happen in particular workplaces and there are problems, and tackling them and giving HR as well the tools and the ability to target managers who don't want to have those difficult conversations or other people who made decisions who say, 'Well, this is not a problem for us,' but are not actually looking to see if this is an actual problem for them, is really important.

**Robert Shore:**

Yes. Something else that came up at the same Round Table was really about data collection and sometimes a resistance on management's part, actually, to know about certain things, but to collect data and then also to publish it. And I just wonder whether you're sort of seeing, in the organisations that you have members, a sort of move towards doing that? The digital world facilitates all sorts of things that were not possible, much less easy, twenty years ago.

**Shantha David:**

Yeah. I mean, things have changed, haven't they? There's more transparency generally. There's more of an openness to discuss these things. And I think in the past with non-disclosure agreements, you know, you would hide away nasty practices and sometimes protect the perpetrators. It's a societal change that is changing, and this goes hand in hand with that.

Look, there will be people who have predatory behaviour who need to be dealt with but this allows HR practitioners in particular the

ability to go and say, 'Look, this is now against the law. You really need to tackle this otherwise you will have all these claims behind you. You can't simply ignore this particular person because they're a high earner or whatever the excuse may be.'

The way I see this is giving people tools to target and deal with people who are difficult or who have not been managed in a positive way before.

**Robert Shore:**

So actually there, Shantha, you mentioned non-disclosure agreements and tackling people higher up organisations. I think we did a podcast around the changes to sexual harassment in October last year, and I think what was sort of said there was that actually what remains hardest is still tackling problems at the top of organisations, whether it's power rather than lower down. And I just wanted to ask whether really that was your experience, and also whether there are positive ways of tackling that that really work? [0:16:45.8]

**Shantha David:**

Joining a trade union is my first answer! Because it's easier in numbers. It is easier to tackle something when you have the force of an organisation behind you. It's always easier. But you know, we've seen the world changing. We've seen dictators across the world behaving in way that are...you know, we would never have expected in our lifetimes. And I suppose that the moderate voice against all of that saying, 'Look, you can't allow people to get away with things in the way that they are trying to do.'

And I think having the tools to be able to do that is really, really important. So how you tackle management who are tolerating things or are the problem is a difficult one. And I think that's why HR practice need to be emboldened, the law needs to be strengthened – which it is being – and you know, having employee organisations or trade unions to support an individual to...you know, when you have that David-Goliath type of situation is really, really important.

**Laura Kimpton:**

Okay, Shantha. So what are the changes coming in around fire and rehire that organisations need to be aware of?

**Shantha David:**

I mean, you'll remember in March 2022, during the pandemic P&O ferries sparked a massive controversy by dismissing something like 100 employees, and they replaced them with agency workers on lower terms. And that's the practice referred to as 'fire and rehire'. And it led to an absolute public outrage and action from the previous government, who introduced this code of conduct to stop this happening again.

Now, under current law, where an employer proposes to make large-scale redundancies of 20 or more employees in one establishment



within a period of 90 days, it must consult on its proposals with representatives of the affected employees and notify the Secretary of State. As originally published under the employment rights bit, they wanted to omit the words 'at one establishment', and this was intended to implement the current government's pre-election pledge to make sure that this right to redundancy consultation would be determined by the number of people impacted across the business rather than in just one establishment. And that would have reversed a decision in the Woolworth's case, if you remember from some time ago.

But there was a bit of backlash to this suggestion, and the Government listened to employers' organisations such as the CBI, and on 5 March of this year abandoned that proposal to remove the 'at one establishment' wording. So what this means now is that there still must be 20 or more employees at one establishment, and what they say is the new bit is 'at least the threshold number of employees', and what this threshold is will be decided later by regulations, and we don't know what that means as yet.

But there is also this new section under the Trade Union and Labour Relations Act that will come about, and that is an obligation to consult which won't require an employer to consult all appropriate representatives together, nor do they need to undertake a consultation with a view to reaching the same agreement with all the appropriate representatives.

Now, why that's important is you can make decisions at different places that are relevant to each part of the organisation which employers, I understand, have been quite keen about.

So, that's one of the things that's changing. But the big thing that's going to change to get around the whole P&O situation is that the award that you get is going to be increased as well, from what was currently if you fail to inform and consult there is an award of a maximum of 90 days of pay, and that's to be doubled to 180 days' pay. So that's hopefully going to act in some sort of way to stop employers who don't wish to comply with collective consultation obligations by making it a lot more expensive for employers and hopefully stopping situations like P&O. And the code of practice that was introduced previously will also be updated to allow tribunals to award a 25% uplift where there's non-compliance. So yeah, quite a few changes there.

**Laura Kimpton:**

So organisations that used to potentially shy away from collective redundancy consultation might not be able to avoid it in the future?

**Shantha David:**

Yes, exactly. So in the P&O situation, that was purely someone who just wanted to get around the legislation. But you know, cost is a big



thing and so, you know, doubling the cost of them fixing the situation – that they pay people off, essentially – might hopefully act as a disincentive to sacking people in the way that they did.

**Robert Shore:**

Another element of the bill that's drawn a lot of discussion in the mainstream media again is about zero-hours, the gig economy, the various bits that affect that, and quite how far the legislation will go. I think there was an idea of an outright ban on zero-hours contracts that was discussed at one point. That's not...?

**Shantha David:**

No, that's not happening now. It's more to do with exploitative contracts. The provisions within the Employment Rights Bill are pretty complex, and again it remains to be seen how all of this will work. Zero-hours workers will gain rights to guaranteed-hours offers based on a 12-week reference period, although people have commented that perhaps it's easier to align with the holiday pay provision and look back at a year's reference period, say.

There are protections for unreasonable shift cancellations or curtailment of shifts for agency workers. I suppose these are important provisions. How they sort of come about is a question for the consultation process, and I think it's really important that everyone engages in that consultation process, just to explain to the Government about what should, you know, what can work and what can't work. But the reality is that there are over a million people working on zero-hours contracts. 75% of them are part-time workers and about 900,000 are agency workers. So there is an issue here, but how it's addressed, I think the devil will be in the detail.

**Robert Shore:**

A lot of material in the Employment Rights Bill is trying to address a significant shift in the way people work in the country, because actually things have changed a lot, haven't they? When I first entered the workforce nobody talked about the gig economy.

**Shantha David:**

No.

**Robert Shore:**

Whereas it is a very commonplace way now of earning a living.

**Shantha David:**

That's right. Jobs for life are not a thing, secure working is harder to come by. But I also think that it's perhaps generational because, you know, the current generation are happy to move around in jobs in a way that perhaps my generation was not...is not.

**Robert Shore:**

Yeah. That was another thing that emerged at a Round Table I was at recently, was actually trying to manage a workforce where...how many generations is it we're supposed to have at the moment in the workplace? Is it four or five? And thinking forward 30 years if people live longer and longer it might be seven or eight generations. And that obviously, although that's to generalize, there are broadly

attitudes that go along with generations because you're born into different situations and, as you say, come into the workforce at a certain moment, you have expectations set in a certain way, I think particularly around harassment, actually. It was quite an interesting conversation, that there is such a different understanding among the generations of what harassment is, what can constitute an act of harassment in the first place. And the conversation was quite interesting in terms of just actually trying to explain to everybody so that they had the same threshold.

**Laura Kimpton:**

Interesting.

**Robert Shore:**

And I wonder whether actually you've got any sort of thoughts on actually how you communicate that kind of thing, so that you'd have a workforce that just really knows, that understands these basic things and they understand the same thing by a term that, you know, gets sort of thrown around but you might have a very different understanding of where that begins, as a sort of legal issue?

**Shantha David:**

That's right. So exactly that. Work terms that are thrown around. The misuse of language is problematic because, you know, you can call something quite innocuous something quite, you know, use a term for it that means a lot more in reality than should be used for that. You know, for example identifying something as discriminatory when it's not, or some such. And I think the legal tests say the same. Nothing has changed there. But society needs to be cautious in the way that they throw terms around because what it does is it allows actual acts of discrimination (in the example I'm using) to lose their credibility and their importance and the ability to fight against those acts of discrimination.

So, discrimination exists; it hasn't gone away. And we all know that. But I think it's important that the threshold for that is much higher under the law than the ways in which some people might use the phraseology.

**Laura Kimpton:**

Equality and diversity has been in the news recently for lots of various reasons. What impact do you think this will have on organisations in terms of their priorities around equality and diversity?

**Shantha David:**

There are to be some family-friendly rights which will be enhanced. So, strengthening protection against dismissal for pregnant women and day one rights for parental and paternity leave. There's to be extended bereavement leave. So it currently applies to parents but it'll apply to a wider group of people. We've spoken about harassment. There is to be quality reporting, so employers have to publish menopause and gender pay action plans and also publish

ethnicity and disability pay gap figures when employers are of a particular size.

The impact hopefully will be a positive one because it'll get employers to engage – and employees, indeed to engage – with issues. Social inclusion, you know, is not something that's within this piece of legislation but, you know, it is also...I imagine it'll be considered, as people currently do within their EDI practices.

Of course, EDI has had a bad name, especially from the United States, if you believe the rhetoric. The law hasn't changed to such a degree that there are unfair practices around discrimination favouring one group of people over another. What the law does is to try to protect against that and create a level playing field and parity.

And so I think our laws in the United Kingdom are consistent with that approach, that the negative process I would suggest speaks to a situation that doesn't exist in the United Kingdom. I think it goes back to what Robert was saying earlier about the use of language, and I think it's really important that employers don't engage in incorrect uses of language to make sure that everybody knows what they're talking about. It's too easy to bandy phrases about, you know, being treated differently etc. It means something in the law, and it should be used for serious problems by serious people.

**Robert Shore:**

So you wouldn't foresee any great reversal? I mean, because...so the strands of the Employment Rights Bill that you've just mentioned there, you know, they're sort of likely to come into force at the moment where there's this sort of sense of a change coming from the United States.

**Shantha David:**

Yes.

**Robert Shore:**

But actually, there's no particular reason why organisations should think that these things are not going to happen as a result. It's just, you know, it is something that's being said a little, isn't it?

**Shantha David:**

I mean, I understand that within some organisations that have links with the United States they're pulling some of their policies etc. They still have to comply with the law of the United Kingdom if they're operating in the United Kingdom and in Europe. So that doesn't change for them, and they will be a subject of legal cases if they don't follow the laws of this land and of the European Union. So I suspect most sensible employers and HR departments will be fully aware of those issues and act accordingly. I can't speak for American organisations who are currently pandering to their president.

- Robert Shore:** And of course if anybody needs legal support, they could join UNISON and...
- Shantha David:** They can indeed! They can indeed!
- Robert Shore:** Or other unions are available, I should say, shouldn't I, in the spirit of openness! So Shantha, just one more thing on the Employment Rights Bill. In terms of just the feedback that we've had obviously, where we hear a lot from HR departments, the day one unfair dismissal element. I think there's just quite a bit of confusion about what that's going to mean. So that's a question really about the drafting of the bill at the moment. What do you understand by that? What's likely to happen?
- Shantha David:** It's interesting that when unfair dismissal legislation was first introduced, the limitation period was six months. And that went up to a year, then went up to two years, went back to a year, and is currently two years depending on the hue of the government. The current provision is a policy position of the Labour Party, and they came into power on that, for these day one rights. And I think we still don't have enough detail about what that will mean. There is to be probationary periods of nine months with a light-touch process. Now, employment lawyers who remember the grievance and disciplinary procedures of the past will shudder a little bit by the phrase 'light-touch' because we don't know what that means. And I think that the important thing is to seek clarity in all of this. And I think with any good piece of legislation you need to be able to understand the concepts that it's producing and giving.
- So I think what the regulations say about what is a light-touch process is extremely important. Again, it will be subject to consultation. It is very important people engage with that process, identify pitfalls and issues. Inevitably most probationary periods are for about six months in most employers, so query whether there will be changes in that direction. I just don't know. But what I would say is, given the unknowns currently, it's important that people engage with the consultation process.
- Robert Shore:** How good would you say this sort of engagement with consultation process is? We try on our website to give links to this. We have a section called 'On Your Radar' where we say when consultations open, and we do encourage people to do it. Do you think there is good engagement with consultations?
- Shantha David:** I'm pleased to hear that actually because, I mean, I'm a member of the Employment Lawyers Association policy and legislative committee, and we respond to pretty much all the consultations. I was chair of the Law Society's employment law committee, and again we respond. And I respond via UNISON as well. And it's really

important. And there are certain things that exercise people a bit more than others. But engaging is so important because if you don't, then...this is an opportunity for anyone to actually raise their concerns, be they big employers, small employers, small trade unions, big trade unions, whoever you are. Individuals. So yeah.

**Robert Shore:**

Possibly it's a good place to end, and to thank Shantha for joining us today. Thank you so much.

**Shantha David:**

Thank you for having me.

**Robert Shore:**

And Laura, thank you so much for joining too.

**Laura Kimpton:**

Thanks Robert.

**Robert Shore:**

All that remains then for me to say is to look at our website, [www.brightmine.com](http://www.brightmine.com), and until next time.