

FortyTwo Talks – A New Landscape for Employment Rights

Jamie Fireman: Hello and welcome to *FortyTwo Talks*, the podcast which takes a deep dive into legal world led by the experienced members of 42BR Barristers.

I'm Jamie Fireman, a member of 42BR Barristers, specialising in employment, and I'm delighted to be joined by Alex Adamou to discuss the Employment Rights Bill.

Good afternoon, Alex.

Alex Adamou: Good afternoon. Lovely to be here.

So the Employment Rights Bill, let's shake up the world as we know it for employees.

JF: Yes, so obviously this is just a Bill at the moment.

So, we are talking about the prospect of a future Act or an Act that's going to amend existing Acts. So we can't talk about the entire Bill and it would probably be quite boring to go through it line by line.

So I've picked out a few things that I think would be quite useful for us to have a chat about and I'll ask you a couple of points if you don't mind, Alex, and you can let me know what you think and of course I'll let you know if I agree or not.

AA: Of course!

JF: But the first thing and the thing that jumps out the most, I think when you look at this Bill, has got to be, as the headlines have already covered, *'The removal of the two year qualifying period of the right to bring an unfair dismissal claim'*.

Would you agree that is the headline point?

AA: I agree. I think it's one of the main selling points of the Bill it is one of the main things that government bodies are progressing and trying to sort of encompass in their forward planning because the number of people that effectively don't bring a claim or are precluded from bringing a claim that are under their two year

qualifying period is, is rather significant. I think it really is going to be a marker for a number of businesses to expect them to have to deal with employees a certain way from day one.

We sometimes hear horror stories of employers being more callous or just less attentive with those on probation because they know that there is an element of, well, 'if we don't like them within a year and nine months, we can fire them before the end of their probationary period. Great, absolutely fine, they can't bring a claim against us unless it's for an Equality Act claim or an automatic unfair dismissal.'

And I think that's really going to encourage a lot of them to really take this seriously from day one. The idea that we can't just fire people because they have been there less than two years.

What do you think?

JF: Well, you touched on a point there about the automatic unfair dismissal provisions because at the moment, you can bring a claim if you have less than two years qualifying service, if you are bringing in automatic unfair dismissal claim and that would involve a claim that is in some way related to whistleblowing in terms of the principle or main reason for the dismissal or a series of other potential reasons, but generally speaking, a discriminatory dismissal would also fall into that category.

So, we generally come across those two types of automatic unfair dismissal on a routine basis. What can often happen is, in my experience anyway, you have claims that have been shoehorned into one or other category in order to qualify as automatic unfair dismissal on the face of things and get round that two year period.

And so what we might see in, in my view, I think, is perhaps a fewer of those claims because they're not necessary in order to bring an unfair dismissal claim, but obviously as you say a greater proliferation of just ordinary unfair dismissal claims that can be brought in the ordinary way. In some ways, making tribunal's jobs potentially more straightforward because they don't have to deal with the plausible, but unmeritorious discriminatory dismissal claims or whistleblowing dismissal claims.

AA: I think that's exactly it, because the difficulty with, and this is a slight tangent, but very briefly, the difficulty with a lot of whistleblowing claims is that establishing that causal link between what they say the protected disclosure is and the detriment or the ill treatment that the employee often alleges they've suffered, but if the option is for an employee to bring an ordinary unfair dismissal claim and to simply say 'my employer has not followed a fair process' or 'does not have a fair reason for dismissing me', hopefully that might streamline a lot of cases because people won't be trying to, as you've said, crowbar in an automatic unfair dismissal claim. So that might be very interesting to see.

I think the interesting bit that might also be worth commenting on at this stage is what about the potential implication of a statutory probationary period?

JF: Yes. I imagine that the purpose of this, so going back to the principle behind the Bill, one would imagine that the reason that, that has been proposed is to try and soften the blow slightly for employers because it gives them an opportunity to say 'all employees are going to be subject to this statutory probationary period', and, that will then potentially lead, I suppose, to a more structured probationary experience where there is a clear framework to sign someone off as having passed their probation because clearly the consequences of doing so is far greater than the circumstances that we see regularly where someone may theoretically pass their probation at three months, for example, but by six months the company has realised actually we don't want you. And so, we are going to have to worry about, as you say, an automatic unfair dismissal claim or an unfair dismissal claim because you don't qualify for any of those particular claims, so we'll just get rid of you.

So it remains to be seen, obviously, the details of that, exactly how long that will be and what the requirements will be, but I think it's a way of trying to soften the blow from removing those two year qualifying entitlement, for employers because I think removing it rather than maintaining it is going to obviously be an obvious benefit for employees and there will be some employers who feel that it's very unfair.

AA: I agree, I think there are going to be many employers, particularly employers of large numbers of people that might well feel rather hard done by, by this effect. Especially, quite frankly, those that experience a high degree of turnover are also probably going to feel very hard done by because they may take a view, they're being effectively opened up and subjected to potentially a lot more claims.

I think the other thing that employers may, quite rightly, consider themselves hard done by if the Bill maintains its current formulation is some of the hidden costs that are associated with the removal of this qualifying period, because if it's a case of it's a statutory probationary period and employees have a unfair dismissal protection from day one, then there is really going to be an onus on employers in terms of training, conduct, management, inter parties dispute management within cohorts.

And I consider there's going to be a lot of potential grumbling about sort of the extra cost that might be involved with the training, the mediation of disputes, because it's not going to be as simple as, let's just say one employee has been working in a company for six months, they end up having a persistent dispute with their line manager who has been there five years. Not to say who is right, who is wrong because we don't know, it's a purely hypothetical scenario, but in theory, you can see how an unscrupulous employer might say, 'well, rather than have the argument and investigate it properly and see where we go, let's just fire the person on probation, keep the person that's been with us, and if they happen to try and bring a claim, well we'll deal with it'.

Whereas now if we say, 'well, actually, they have unfair dismissal protection from day one', that is suddenly a much less attractive prospect and I think the point is then you're sort of saying, well, you have to have made sure you've trained people properly, otherwise again you potentially open yourself up to a liability, don't you?

JF: And I think that's why, without wishing to avoid permitting to an interpretation at this stage, I think we have to recognise this is just a Bill and until we can see specifically what the terms of the statutory probationary period are, we won't really be able to go much further than that, but certainly, it's an interesting point.

It's going to completely potentially transform employment rights and employment tribunal work. And so we will be waiting extremely keenly to find out what happens in that particular regard.

But moving on from the removal of the two year qualifying period onto some of the perhaps less publicised aspects of the Bill, which are still particularly important, and if we could just go through a few of them.

I'd like to know what you think, for example, about the proposal to remove zero hour contracts.

AA: So when it comes to removing zero hour contracts, I think there are many arguments on both sides and that's not me trying to sit on the fence.

In general, I consider it's a good move, my completely personal opinion was that elements of how zero hours contracts were implemented, not necessarily the concept itself, were slightly exploitative, particularly on those in some of the tertiary industries, the service industries and the gig economy. And I considered that there was an element of whilst it allowed people more flexibility in being able to potentially work for multiple people and almost giving them a self-employment esque way of managing their time and their finances, there was the other side, which you could see from some of the contracts, which is, well, 'we don't guarantee you any work and therefore we don't actually guarantee you any payment either. So the reality is if we don't have the work or someone else beats you to the punch sorry, your shift's gone' and that's all that's said.

So I think that is overall, I'm waiting to see the impact, but I think it's going to be a good thing. The bit that interests me, and I'd love for your take on this, is those that were on zero hours contracts, well they don't just disappear, do they? So what are they, and they might be individual, but are they agency workers? Are they contractors? Are they short term employees? I think that's a question that needs to be asked.

JF: Well, I think that that's a very good question. The truth is it's not possible to answer in any sort of complete sense. It's going to depend entirely on the circumstances of the business that was contracting with them and the individuals and the type of service that they are providing. You could see an opportunity for agencies to acquire a whole load of further agency workers and rely on agency workers providing the services that were previously provided by people on zero hour contracts, albeit of course, the rights would be slightly different and significantly different if the Bill comes in, in the way it's proposed to those who were on zero hour contracts and there will probably be clear terms as to guaranteed hours guaranteed work shifts and payment if there is no work offered, but a contract has been signed up to, so it's going to change the nature of those contractors work.

But, how they actually engage with those who are contracting them, that remains to be seen but one would expect that there'll be a variety of different ways in which those individuals come into the workforce or businesses are going to have to completely reconfigure the way they operate.

AA: I think that's it and it's whether we end up seeing effectively a broad spectrum re-categorisation of significant numbers of people. I'm sort of drawn to the concept of those that work, for example, more seasonally, whether that happens to be at your average seaside resort, whether it be vegetable picking or anything that is season based. Because, the reality is, elements of zero hours contracts were made for that, in the fact of when times are good, the work is good, we bring you in, when it's not, we don't have to give you anything, you don't have to give us anything, and that was sort of the underlying understanding

But now it's a point of if someone, hypothetically is an employee, are they employed for the year but they only work six months of it, hypothetically, and does the salary then reflect that? So I think it's going to be very interesting to see more than just a labelling exercise, how do people manage that mutuality of obligation that we really see that is the bedrock of an employee/employer relationship. It's going to be very interesting.

JF: How do you think in a hypothetical scenario, where an employer comes to you, Alex, and says, 'I've got all these workers on zero hour contracts, I need **some** workers, I probably don't need all of the workers that are currently on zero hour contracts, but I need **some** of them but I only need them for three months of the year because my business is a seasonal business'.

How would you go about trying to advise a company in that situation? Do you think it's something that you are able to say at this stage, or do you think we will need to see the full detail of the Bill before we could commit to any sort of proposals in that regard?

AA: I think it is very difficult to say at this stage, and I would always prefer to see the full content Bill. And also I'd love to see the individual circumstances of the prospective employer, what their financials are like, what is their demand in terms of work. But in terms of general principles that I'd be looking to employ, the first thing I'd be saying is this is all about planning, in the sense of this is really going to, I think, put an onus on particularly small to medium enterprises to really make sure their internal stock taking, accounting, price forecasting is done and managed properly because if you as accurately as possible anticipate what your needs are going to be, the more accurately you are going to be able to assess what you are going to need from your workers.

You're not going to be able to get that right every time, unexpected things happen, things change, that's not necessarily the problem, but it's about having it as accurately as you can from the start.

The second thing, and it really depends on your perspective, but from an employer's perspective, there may then also be a push to effectively try and shift the burden towards the employee. So for example, if I had a business like the one you described where you only need employees for three months of the year, but you are going to need 10 people, for example, and they're going to need to work 40 to 50 hours a week. That can on average be costed out. What you might then do is say, 'Well that is what you would then do I'm then going to give that to you as an annual salary and effectively give you the rest of nine months of the year off. And say that is what your work is, but you are a salaried employee'. This is hypothetical, that might not and probably won't work in practice, but it's a theoretical concept.

JF: Just one of the options that's available. It's not necessarily the appropriate one. It may be for certain companies. It may not for others, but it's something that is theoretically on the table.

AA: Theoretically on the table. To be honest, that might work for some people. They might say, 'Great, I get nine months off. I get to spend the time with my family I get to do whatever I want, but then I have three months of very intense work'.

I draw an analogy as my very limited understanding for those that, for example, work in oil drilling off sea, their shifts are long, they're intense, but they're not persistent.

JF: And it is dangerous work.

AA: It is, dangerous work.

I think the problem then might be, hypothetically speaking, is what then happens, and again, it might just be an exploration of individual circumstances, but you look at restrictive covenants, you look at non-competes, although obviously there's a lot of publicising around non-competes, I believe in the US there's also now been a move to make non-competes illegal or unlawful, so that they no longer affect workers, obviously that's not quite the case here, but there we are, but then does that mean people might effectively be employed by two or three companies? If in

my hypothetical scenario, if they're only working three months of the year, they have nine months off someone might say, 'well, if I got four jobs like that, I'm effectively doing my year's work, but I get four salaries'.

How does that necessarily work? Because obviously as part of an employer/employee relationship, there also needs to be that exclusivity element to it. So I think it'd be very interesting.

We would really need to see how to structure a circumstance for the individual needs of that particular business. And I think another option which, before we turn onto one of our third points, that might be an option, is to almost have sort of short term contract or even have people be as contractors as opposed to employees.

There are ways and means of being flexible about it, but it will certainly need some rethinking or need some reconsideration for sure.

JF: That's very interesting, Alex. I fear we may have gone down a rabbit hole there a little bit, but I enjoyed it very much.

So, perhaps we will go onto the third topic, which we are going to discuss, which is in relation to the proposals to enhance, as it's put, duties on employers in relation to sexual harassment.

There are a number of ways in which this proposed, but some of them include strengthening the duty that is already on employers by virtue of the new Equality Act, Section 40A, which says that there is a duty to take reasonable steps to prevent harassment of employees, strengthening that by requiring employers to take all reasonable steps.

So at a first glance anyway, that that's a particularly onerous duty that's being imposed upon employers. Bearing in mind there is already a duty as of very recently to take steps to prevent sexual harassment. What are the practical things that a law such as that imposes on an employer? Can you think of some of the things that you might want to do to prevent sexual harassment or what might count as a reasonable step? And then what do you think the additional impact of adding all before reasonable steps is?

So, sort of two questions there for you, Alex.

AA: Well, let's take them in order.

I think the first is sort of what can be done, I think there are many things that can be done, but the first point I would say is it always starts from my perspective, from infrastructure. So training, handbooks, seminars, discussions and culture within a particular employer. That's not to say individual bad actors can't spoil the bunch, that happens, and you can never control what every individual is going to do at every second or every day, that's just not possible.

But it's about fostering a culture in which that behaviour is not tolerated and it's about making sure that those that are within the business understand what is expected of them. So I would be saying some practical steps would be training, would be about monitoring, reporting, having a designated safe space for people to be able to report instances where they feel there has been harassment, particularly of a sexual nature. And when it comes to those trainings, it's not just a case of here is an online PowerPoint, read it and there we go, but for example, it might even be as simple as having a short quiz afterwards to say, 'have you read, understood, and digested the material'? Because we've all had those CPD trainings where we've gone click, click, click, 'have you read and understood?' 'Yes'.

And the reality is we've probably spent less time than we ought to have done. So there are certainly practical steps that I would say need to be introduced. The bit that does cause me some concern though, is the inclusion of the word **all** because the reality is, whilst I am completely in favour of preventing sexual harassment of employers having a duty to foster those sorts of cultures where that behaviour isn't tolerated and doing what they can to protect not only their client base, but other employees that work for them.

The idea of **all** is so encompassing that I think it poses too high a burden in my particular view, because by using the word **all** effectively, if someone comes up with a step that you haven't considered but is reasonable, which is perfectly possible, then by that definition, the employer is potentially liable. And the reality is, and I don't envy those that draft these pieces of legislation, it is very easy for me to be a critic, sitting in an office, not being the one that's doing the drafting, but from my perspective, it is a question of we have an extraordinary number of very creative, very intelligent barristers, solicitors, judges, individuals, across the country.

What are the odds that someone is going to come up with something that people haven't thought of, or that an employer hasn't thought of, before? It's certainly

possible, and I think that it really sort of opens a wide space because then your argument is not really about the steps taken at all. It's about whether it's reasonable, because in theory, if it's all reasonable, it doesn't really matter what the step is, it's reasonable. And that can get into a very finite and granular, factual argument.

JF: If this does become law and becomes a claim that is within the jurisdiction of the Employment Tribunal, do you think it may encourage claimants to sit back and think of as many different potential steps that could have been taken as possible in the hope that one of them is deemed to be reasonable essentially throw enough mud and hope something sticks strategy that is perfectly justifiable, where the test is, you need to take all reasonable steps and if you have failed to take one of those reasonable steps by inference, you have not taken all of them. And so do you think that's the sort of consequence you may be looking at if we are to see legislation that encompasses that language?

AA: I think that's exactly it and it might not be in the long run, but I think it will certainly be at the start.

I think at the start, people will be sort of giving a laundry list of, you could have done X, Y, Z, A, B, C, all the way down, because the reality is if one of them is successful, then your claim succeeds, well done you. What I think you might end up having to do, or what might end up happening, and this is complete speculation on my part, but is you might end up getting lines of case law that deal with almost specific categories of steps that are being suggested and we end up having almost rulings on saying, okay, in principle that is not considered a reasonable step.

So for example, we might say training is considered a reasonable step, providing annual training, is probably quite likely to be a reasonable step. I would be saying depending on the size of the business, depending on the individual, but fitting every employee with a body cam and GPS tracking software might not be considered a reasonable step.

But would that stop someone making that argument, hypothetically, in saying, well, in general if people know they're being filmed, they may be less likely to commit these acts that we consider very undesirable. So surely that's a reasonable step then because all it is, is a matter of money in paying for the cameras, hypothetically speaking.

So I can see very much how it might provoke some further judicial reasoning on where do we draw those lines.

JF: So taking a step back from the **all** for a second, I think you touched on what might or might not be considered a reasonable step, but beyond things like training, I think one of the differences it seems to me between this particular nature of duty and other duties that are already very much embedded in employment litigation is that there's a duty to prevent third parties from harassing employees as opposed to simply being vicariously liable or liable for the acts that the employer has done themselves.

So in terms of steps that can be taken, of course one can see how training individual employees not to harass each other is clearly a potentially reasonable step, subject of course to the regularity of the training and the size of the business in terms of how detailed it may need to be, but one could imagine how training employees in that context is reasonable.

When you are trying to prevent third parties from harassing members of staff, what sort of things might one expect an employer to do to take a reasonable step to prevent sexual harassment?

AA: So I think in terms of protecting from third parties, there are many things that are probably going to be done.

I think CCTV is probably going to be, one, is probably going to be considered a reasonable step but again, that opens up questions as to quality, camera placement, sort of thing, cost, frequency of viewing, and then you get into all sort of, which we don't have time for today, data retention issues and all sorts of other problems.

I think in terms of other bits and pieces, you're also going to probably need to be looking at, it could be anything as little as, for example, signage of saying, you see it for example, on the tube, 'We do not tolerate harassment and verbal abuse of our staff and others.' I think you might also be looking at potentially, again, if you're looking at public transport or large points, maybe even a designated reporting area, if something was to happen.

So I think there are things that can be done, but I think that's going to be for each individual business to sort of explore what it is and I think realistically, this is

probably going to be a place where businesses can learn from each other in sort of saying, 'Oh, okay, some very large conglomerate has been taken to employment tribunal, it's been alleged that it would be a reasonable step for this conglomerate to have a greeter at the door, to foster a friendly sense of comradery when walking into a business'. If the tribunal's gone, 'Yes, that's a reasonable step', then you might get other businesses read that decision and go, 'Okay, maybe let's implement it'.

So it might be something that normalises over time, but we'll have to see.

JF: Well, a great deal of uncertainty, clearly, but a landscape that is in front of us that is going to change considerably and within that context, we have the potential for excitement in terms of those practicing in employment, and of course some clarity, hopefully, as litigation develops as to exactly what is meant by each of the individual tests that will be implemented, no doubt.

That is all we have time for today, thank you very much, Alex.

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