The Work Agenda podcast by Lewis Silkin: In-House Employment Lawyers Coffee Break

Episode 21:

In this episode, Lucy and Colin discuss how the ban on maternity returners might work in practice and why you do need to know about the trade union reforms (even if you think you don't)!

Lucy

Hello and welcome to Coffee Break, our monthly podcast for in-house employment lawyers, in which we talk you through the latest developments and practical takeaways that you need to know. I'm Lucy and I'm joined today by Colin.

Colin

Yes, hello! I was also here for last month's coffee break and I can't quite believe that the first update is all about the parliamentary ping pong - which is a lot of Ps - as the Employment Rights Bill continues to go through its final stages. Yes, don't worry, you haven't clicked onto last month's episode by mistake, we're still waiting to see what happens with the Bill which the House of Lords has now sent back to the Commons for a third time.

Lucy

I know, crazy isn't it? Unfair dismissal and guaranteed hours - those remain the really big sticking points and the numbers voting against the government are roughly the same, so there's no signs that the Lords are weakening in their resolve on that. So yes, you're right, back to the Commons it goes.

Colin

There was some unexpected news this month, though, wasn't there? I don't think anyone had on their bingo card that the government was going to suddenly double the Acas early conciliation period to 12 weeks?

Lucy

Yes, no, it sort of came out of nowhere. In some ways, it shouldn't be that much of a surprise - lots of us are experiencing just how difficult it can be to get hold of a conciliator. The government has said they're recruiting - wait for it - 29 new conciliators to help with the demand.

Colin

29 new conciliators, that'll make all the difference, won't it? With the current strain on the tribunal system, the latest figures we have available show there were 491,000 open cases at the end of March this year - I'm not sure how many that is when you divide by 29 - but while the system really could deal with as many cases as possible settling at an early stage before they even get into the tribunal system, I'm not sure this is really going to change all that much, is it?

Lucy

Definitely not the 29 conciliators but to try and address that, the government have said that with effect from 1 December, they will increase the amount of time Acas have to conciliate from six weeks to 12 weeks. So what does that mean for in-house employment lawyers? The first and the most important thing to remember is that obviously when somebody contacts Acas to start conciliation, the clock on bringing a tribunal claim pauses, so that means claims will be able to be submitted at a later point.

Colin

Yes, so it doesn't change the underlying typically three-month time limit that someone has to bring a claim, although it will have a practical effect on time limits. It's also a really good reminder to check any data retention periods that might have been put in place based on a three-month time limit to bring a tribunal claim. And you'll need to do that anyway in due course, because the Bill is going to increase time limits up to six months for all claims, if and when it's finally passed.

Lucy

Yes, so if you've got HR or legal teams that are dealing with tribunal litigation, it's worth making sure that they're aware so that you're not mistakenly making out of time points that may not be valid.

The other ERB developments we've had over this month are five new consultations - two of those cover family rights and three of them are to do with unions.

Colin

Let's start with the family rights consultation, the government have finally shed some more light on their plans to enhance protections for maternity returners. It looks like they really do plan to make it a lot more difficult to dismiss anyone who has that protection.

Lucy

Yes, definitely looks that way, doesn't it? I think that's the most interesting one. We were so light on detail before but to some extent, we've ended up in a position where we've got the consultation but we've got more questions than answers. Part of that is because the government don't express an opinion on the options that they've put forward. Basically, there are two options they're seeking views on.

The first is a new fairness test, so if you dismiss somebody who's pregnant, on maternity leave or within six months from returning from maternity leave, you'd have to show a fair reason for dismissal and show that the dismissal was necessary. Now what does “necessary” mean, you might very sensibly ask? Well, the example that is given is that it might avoid serious harm to the business or to other staff - and that's it! You know, no real information about what that means and no clarification about how we define serious harm.

Colin

Yes, and if you're thinking you don't like the sound of that option, which I can understand, let me tell you about option two. This would result in either removing some or all of the five potentially fair reasons for dismissal altogether or narrowing them. I won't go through them all, I'm sure you mostly know what they are, but the consultation does take each statutory fair reason in turn. So, for example, if you take conduct, the suggestion there is that conduct would only be a fair reason for dismissal in cases of gross misconduct only.

Lucy

I can see that one really causing a lot of issues. You know, the consultation itself notes that the real challenge here is dismissals that follow cumulative lower-level misconduct. What happens if the conduct occurs before the protected period or where it began before the protected period but continues after it? Are we really ready for a situation where you've got two employees, both of them do exactly the same thing, you dismiss one of them fairly and the other one is treated differently, keeps their job because of their pregnancy.

Colin

Yes, and the detail given around capability is another example of something that's quite light. The consultation suggests that, again, one option is to remove “capability” altogether as a fair reason for dismissal. Both of the real-life examples that the consultation talks about were health related scenarios, with no examples related to under-performance which is perhaps the more common everyday capability management scenario.

Lucy

Yes, I think so. Capability in relation to performance is actually one of the really difficult areas. Certainly in the cases that I've been involved with, you've quite often got somebody that isn't performing over a period of time, generally a period of time that will predate the pregnancy, but maybe it hasn't been managed very well. In those circumstances, are we in a position where the individual might not be able to be dismissed because of a continuation of poor performance because the poor performance continues during the protected period? Other options the government are seeking views on are only allowing dismissals if continuing employment at all would harm the business or if there's no suitable alternative role available.

Colin

Yes, I do think the consultation has failed to grapple with some of the harder issues.

Lucy

I think the only thing that's clear is that dismissing individuals with this protected status is going to require some really complex legal analysis, and maybe that's the point.

I wanted to briefly mention the bereavement leave consultation. In the whole it's pretty straightforward, it covers how long the leave should be, what notice and evidence is required, but there are a couple of interesting points. One of the things that the consultation asks questions about is what type of relationship with the deceased will qualify for unpaid bereavement leave. One of the options being considered is actually, do you need any set list for eligibility to be determined? Could it be based on how you feel about the deceased, how important they were to you? It could be that instead of using the same definition that we're all familiar with for time off for dependents, we get something that perhaps better reflects modern society and different types of families. I think that is interesting because it might send a signal about what we can expect when the wider family leave review that is ongoing at the moment, when we get the findings from that.

Colin

Yes, absolutely. I thought it was interesting that one of the questions is about whether in the circumstances of pregnancy loss, bereavement leave should be available to both the mother and the partner. We thought that was already agreed, as all of the messaging so far has been about families who experience pregnancy loss but it's interesting that the government is seeking views on that.

Lucy

Shall we move on to trade unions? You might be thinking, you might be sitting there thinking this won't affect me, but if the reforms go the way that the unions hope and expect, I do think it's something that's going to affect all of us. There are three consultations - one about access to workplaces, one about the duty to inform employees of their right to join a union, and then one about electronic balloting.

If we take them in order of impact and start with the unions' new right for access to workplaces for the purposes of organising and campaigning, we know that can be physical access to premises but it can also be digital access to workers. The big new feature from the consultation is the structure of the process: unions can request voluntary access but, if that fails, they'll be able to apply to the CAC for an access order.

Colin

Yes, and the proposed timelines in the consultation are pretty tight. Employers would have five working days to respond to a request for access from a union and then 15 working days from there to negotiate terms. Critically, unions would have a hard deadline - 25 working days from their first request - to apply to the CAC if the parties haven't been able to agree on the access request in that time. That cut-off is meant to give employers certainty, but it's likely to push unions to issue CAC applications more quickly to protect their position, and that could really increase the caseload that the CAC has to deal with.

What's really interesting I think, is that where a union is already recognised, that won't automatically block another union seeking access. Instead, the presence of a recognised union will just be one factor the CAC considers when deciding if it's reasonable to refuse access. So that does raise the prospect of inter-union

competition and maybe some instability in industrial relations and I think that's particularly true in multi-site or multi-union environments.

Lucy

Yes, I really agree with that. The CAC will also weigh proportionality. The consultation suggests that employers shouldn't have to “allocate more resources than are required” to facilitate access - for example, no obligation to build new meeting rooms or install new IT systems. That's helpful, and I'm sure employers will be pleased to know that, but they're quite out there examples and it does imply that some actual real costs and operational planning will be required by employers.

Colin

Yes, so when you get an access arrangement, what does that look like? Well, we know they won't be longer than two years but two years sounds quite long to me. Okay, good, you've got some certainty about that, it avoids legal obligations to carry on with outdated access arrangements. We're told we can expect a “model agreement”, which the CAC won't impose automatically if parties can't agree but it will be relevant when deciding whether to grant access. Realistically, we think that model will become the anchor point in negotiations.

Lucy

And I think one of the really key points here is the model terms are expected to provide weekly access - whether physical, digital or both - with at least two working days’ notice each time. Weekly access for up to two years is actually quite an operational task, particularly across multiple sites. Even with notice, two working days may be quite tight to organise space, cover for workers that are going to be out speaking to the union and then obviously appropriate management oversight, which you're definitely going to want.

Colin

Yes, and digital access is the other big practical unknown at the moment. Will it be enough for an employer to forward union content on, or will unions need to be given direct access to Teams channels and equivalents and employee contact details? Data protection, cyber security, internal comms governance - that all comes into play there too.

The second union consultation covers the new obligation to give workers a written statement of their right to join a union. Now, that's not as big a deal by any means as the right of access, but it is an administrative burden for employers. The government says its preference is for a standard template statement, which it says should include a neutral overview of the functions of a trade union, a summary of statutory rights around membership, a list of recognised unions and a signpost to the government's webpage on trade unions.

It's worth remembering that this won't apply just to new workers, so this isn't just a case of amending your employment contract template (although that's something you may need to do) and forgetting all about it. That's because the regulations also state that you'll have to reissue this statement at other times. The consultation suggests three options for that - either every six months, annually or a sector-specific approach.

Lucy

Yes, I know we don't know what it will say, but broadly, I think that the template statement is probably sensible but reissuing it - that's effectively a mass email to your entire workforce, potentially every six months, telling them that they’ve got a right to join a trade union.

Colin

Yes, that’s pretty onerous - legally mandated free advertising for trade unions when you think about it.

Lucy

Yes, it feels to me like a bit of a world first. Let us know what you think if you think otherwise. Definitely in the UK, we don't really have anything that compares to that – you might email your workforce towards the end of

the year about holiday allowances or remind them that they need to behave responsibly at the Christmas party but none of that is legally mandated.

Colin

Yes and if you don't do that, what will the consequences be? Well, the enforcement regime is mirroring the statement of particulars regime, meaning there's no freestanding claim but if a worker brings any other claim and tacks that on alongside it, the tribunal can award two to four weeks' capped pay for any breach. So this is definitely one to bake into your day-one onboarding packs and consider your comms to deliver this message to the workforce at whatever frequency the government decides.

Lucy

Yes and the bigger question, of course, is what is all this going to achieve? Is it really going to move the dial on union membership? The long-term decline in trade union membership in the UK is likely more of a reflection of unions' reduced relevance in the modern workplace than necessarily a lack of awareness of their existence amongst workers.

Colin

Yes, it's going to be really interesting to see where this takes the unions. That's just about all we have time for this month, but a stop press because on the day of recording, the government has just published another draft code of practice on electronic and workplace balloting in the context of strikes and voting by trade union members in support of going on strikes, so another important union measure related to the ERB. Details of that are starting to come out and no doubt we'll be returning to that on another occasion soon.

As I say, that is all we've got time for this month. If you're not already part of our in-house employment lawyer's community, which provides you with access to our market leading, Lewis Silkin and member-led training and materials, we always welcome new joiners so please do just get in touch. Thank you for joining us today.