

Is There a Storm Brewing? Unfair Dismissal – A Day One Right In the UK

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The Employment Rights Bill is currently working its way through Parliament and is expected to be implemented in 2025.

One of the key changes our clients are most concerned about is the plan to make the right not to be unfairly dismissed applicable from day one of employment. This will make hiring and firing staff somewhat more challenging.

Unfair Dismissal Qualification - Here's What We Know

- **Day one right.** The qualifying period to benefit from unfair dismissal protection is currently two years. This period will be abolished, making it possible for an employee to pursue a claim for unfair dismissal from their first day of employment.
- **Initial period of employment (known as the IPE).** The IPE will begin on the first day of employment and will last for a number of months. The length of the IPE is subject to ongoing consultation; however, a six- or nine-month time frame has been suggested. What does it mean? The IPE will act as a statutory probation period, meaning it should be more straightforward to terminate employees' employment during their first few months. During the IPE, the standard of reasonableness for dismissals will be less stringent, allowing employers to carry out a "light touch" dismissal procedure.
- **"Light touch" procedure.** To lawfully carry out a 'light touch' procedure during the IPE, the employer will need to show that the reason for dismissal is related to the employee's performance, conduct, capability, statutory restriction or some other substantial reason (known as an SOSR) related to the employee as an individual. Note that redundancy or reduction in force isn't featured on the "light touch" procedure list.
- **Pre-work dismissals.** Any dismissal made before an individual commences work will be unfair in defined circumstances.
- **Automatic protections.** The government has introduced new statutory rights for auto-unfair dismissals in cases of (i) "fire and rehire;" (ii) dismissal for political opinion; and (iii) dismissal

for a spent conviction.

What Remains Unknown

- What will the length of IPE be? Will there be an extension? We don't know yet. Consultation is ongoing.
- Will there be lower compensation for dismissals during the IPE? One would assume so, but it's not been confirmed.
- Will the IPE change normal contractual probation periods? It seems sensible that the new IPE concept would match contractual probation periods.
- Can a payment in lieu of notice clause be used to ensure longer contractual notice expires within three months of the end of the IPE? Yes, there does not appear to be any prohibition on that, at least at the moment.
- What does a 'light touch' procedure consist of? It's anticipated that it will involve a meeting, but what happens if the employee is off sick for the last few weeks of their IPE, so a meeting cannot be held? Knotty issues like this are yet to be addressed.

Comments

What are employers thinking about? The current two-year qualifying period allows employers more flexibility in managing and potentially dismissing poor-performing staff in their first couple of years of employment. The new day one right means more time, effort and (money!) will be required to effectively performance manage new joiners. Of course, this escalates the risks associated with hiring new employees.

Another concern is the likelihood of employment tribunal claims. Given it will remain free for employees to lodge employment claims, it seems likely that the number of employment tribunal claims will only increase. More congestion in the system means cases will probably drag on (even more than they already do).

What might employees be concerned about? While employees will have increased job security, they're likely to be concerned about longer notice periods potentially being introduced. With the IPE suggested to be six or nine months, notice periods of this length could become the norm. Longer term, employees will have concerns about the more rigorous hiring processes (or even reticence to hire at all) and increased temporary working arrangements.

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