HR insights podcast

Series 9 | Episode 8

PSA: This transcript has been written with assistance from AI.

The new employment law landscape – Part Two

Stuart (00:30)
Hi Paul, welcome back to the show. How are you?

Paul Burton (00:33)
I'm good, thanks. Yeah, good to see you again, Stuart. You good?

Stuart (00:36)
Yeah, likewise, likewise. yeah, it's always funny when you record in two parts 'cause obviously we record on the same day, so it's funny going through the niceties again when we were chatting about ten minutes ago. Yeah. But look, this I was gonna say that the weather hasn't and yeah, all the all the other things. But look, people that have listened to part one will know who you are. So I don't want to sit there and go through that again. But what I what I do wanna do is move us

Paul Burton (00:44)
Yeah, we already spoke a one. Yeah, nothing's really changed since we last spoke.

Stuart (01:03)
move us on in terms of I suppose what's coming next for HR. 'cause 'cause in the last episode we looked at I suppose the changes that would have already been introduced. But from what I understand, I correct me if I got this wrong, but there's still quite a significant amount of changes to come, correct?

Paul Burton (01:06)
Yeah, you're right Stuart. I'd say we're not even a third of the way through the changes and some of the changes to come are a lot more impactful than the ones we've spoken about. So yeah, there's a lot we could talk about.

Stuart (01:26)
Wow, that much. Or that little, sorry.

Yeah. Do do you want to t touch on what some of those I suppose an overview of what's still to come?

Paul Burton (01:43)
Yeah, yeah, it'd be very brief of you to start with because I there's a lot. first of all, coming up very briefly in August, there's some more trade union changes, but really it starts in October. I mentioned in last, part one about sexual harassment becoming a protected disclosure. There's another change in October where it's, one word makes a lot of change. We can talk about this if you want later, but.

Stuart (01:49)
Yeah.

Paul Burton (02:13)
In terms of a defence for an employer, if someone brings a sexual harassment claim, it's now where it used to be that employer had to take reasonable steps. They will from October have to take all reasonable steps. So that's quite a big one. And also alongside harassment generally, is third party harassment is now coming back into play. So if your staff are harassed by a third party,

So a client or supplier or something, then again, as their employer, you may be liable. So that's another big change. There's also going to be a contractual change whereby again, to do with trade unions, but this is important and will affect everyone because of course all workers and employees should have a contract in place. You're going to have to put into that contract if you haven't done already.

Actual wording that says the employee has the right to join a trade union. So you have to inform them within the contract. And then another big one, and this is on the employment tribunal side, the vast majority of claims currently have a three month time limit. There's a couple of exceptions, but generally three months. They're virtually all going up to six months, which is a big change. So that's the October changes.

Then in January, so from the 1st of January, we have two big ones. The qualifying period for unfair dismissal is coming down from two years to six months. And the cap on what's called a compensatory award, if someone is successful with an unfair dismissal claim, is being removed. There's actually two caps, but that's been completely removed. So that's a big change. Then it becomes a little bit more sort of crystal ball gazing.

So, I can tell you some other changes that are planned, but we don't have exact dates. So first of all, there's some people may have heard about a ban on higher and refire. Again, it's not quite an absolute ban, but that's coming into force probably from January. It was originally October. It's been pushed back. It may get pushed back again. And with all these changes, of course, with a change of regime in the last week, change of prime minister, all of this could be up in the air again.

Paul Burton (04:37)
I suspect not, but things may slip naturally. But other things we're expecting from next year are big changes to zero hour and low hour workers rights, guaranteed hours rights and to do with around shift work as well, compensation for cancelled or change shifts. There's going to potentially be some more changes to flexible working. There already has been over the last few years.

Stuart (04:38)
Yeah.

Paul Burton (05:06)
There's going to be a new enhanced statutory bereavement leave, enhanced pregnancy, family leave protections when it comes around dismissal, and there's going to be gender pay gap and menopause equality action plans for large employers. Now, a lot of those are all up in the air. The dates are to be decided by the government. Some of them are quite vague in terms of what the detail is.

There's consultations still going on with both employer and employee sort of organisations. So it could, you there could be quite a lot of change on those later ones I just mentioned. So, but a lot there, as you say, just giving you an overview there has taken me several minutes.

Stuart (05:53)
Yeah, there's tons. It's one of those I have to say, like when I when I knew we were talking about it's had look at some of this stuff, and again, the bullet points of the amount that pop up, like stick it into

Chat GPT and it comes up with a huge raft of them. So, it is kinda I wanna I wanna rewind, I wanna go back to the qualifying period for unfair dismissal in terms of the reduction from two years to six months. How significantly does that change the risk landscape for employees?

Paul Burton (06:02)
It's a very big change. Just a little bit of history. We've gone right back to when unfair dismissal first came in in the early 70s. It was six months then. It then went up to one year many years ago before I came into the practice. It then went up to two years, quite a few years ago. And so this is a huge change.

Stuart (06:29)
Yeah.

Paul Burton (06:46)
It means the reason the risk level has completely gone up is because it now means that employees don't have two years to think, you know, how's it going? You know, is this employee working out within two years? long as the individual hasn't got some other sort of claims like discrimination or whistle blowing and that, then up until 1st of January, you had two years to decide.

You're only going to have six months now. And actually, because it comes in on the 1st of January, anyone you've employed from 1st of July is going to get that right after six months. So already people you're employing...

Stuart (07:25)
Of course, because I suppose, yeah, as soon as that that law comes in, that it in anybody that started on the first of July will falls into that that category. Interesting. Interesting. Does this change I suppose the way companies use probation periods at all?

Paul Burton (07:44)
It will do, I think. Again, back in the days when it was three months, sorry, one year's unfair dismissal rights, probationary periods were often three months. In more recent years, it's been much more common for it to be six months. But I think, yeah, yeah, but because now the qualifying period is coming right down, I think it's actually going to be much more sensible for...

Stuart (08:02)
Yeah, it's increased, isn't it?

Paul Burton (08:11)
for lot of employers to bring the probationary period down to three or four months. So, I think that will be quite a common thing.

Stuart (08:21)
So you don't think they'll keep a probation period for like, I don't know, six months and then let this kick in? You think they'll have to reduce that further than that?

Paul Burton (08:30)
It's choice to be made. I think some employers will keep it at six months. But whether you do reduce it or not, and it's probably more important in some ways if it's six months, you're going to have to be really proactive during the probationary period. again, historically, it's very common for a lot of employers to have the probationary period in their contracts. But actually they don't really do much about it until suddenly the six months has come around and it's, oh, we've got an employee here now who's gone past their probationary period and we haven't done really anything about it.

You're going to have to decide at a much earlier date whether someone's right for the business and therefore you're going to have to be a lot more proactive. know, monthly meetings, you know, feedback from colleagues, et cetera, finding out, you know, whether the person is a right fit for your business.

Stuart (09:29)
So to to your to your point, the reason you're saying three or four months is because that's a kick start to have a conversation. Whereas if you leave it to six months, they fall straight over and therefore you've got no you can't have you haven't got time to have that conversation.

Paul Burton (09:42)
Exactly. Often people forget. Yeah, yeah. And often you'll see an ability to extend probationary periods. So at the moment, a lot of people will have six months probationary periods with the potential to extend by say another three. That will in a legally won't really make much difference now because the person will already have full unfair dismissal rights after six months. So you perhaps want an initial probationary period of three months with perhaps the extension of one or two months.

If you're still not quite sure, because then you can still bring it to an end within the six months. And therefore, as I say, as long as they haven't got any other types of claims, then you're much lower risk of a claim, a successful claim against you.

Stuart (10:11)
One, yeah, so it's so intra like it just hearing that, it's so interesting, just sort of listening to that and l listen to potential changes against sort of contracts, et cetera. So if we then I wanna move us into the compensation cat from fair dismissal. So that that's being removed. Do we think that this then means that we're gonna see settlements that are significantly higher? Like, do we think that's gonna just automatically fall into play?

Paul Burton (10:30)
Potentially, I'd certainly, I think there's a risk of that. So just to tell listeners, at the moment there is, if a person succeeds with an unfair dismissal claim and they haven't sort of succeeded with other claims like discrimination, then there is a statutory cap, which is the lower of either one year earnings, so 52 weeks earnings gross, or there is an absolute statutory cap, which is just under £125,000 at the moment. Those caps are going.

Stuart (10:55)
Yeah.

Paul Burton (11:23)
So theoretically, it means that someone has an unlimited claim in terms of loss of earnings, compensatory award, as we call it, going forward. So this will particularly be serious for your senior executives, your senior employees, the highly paid professionals or employees with long notice periods or significant bonuses. I'm thinking that there's lots of categories whereby whilst

Stuart (11:32)
Right.

Paul Burton (11:53)
In practice, when they go to a tribunal, they have to do what's called mitigate their loss. They have to demonstrate that they can't get another job for a long period of time. There's lots of deductions at an employer without getting into technical detail now because it's sort of outside of what we're talking

about. But there are ways you can bring... Don't get me wrong, most unfair dismissal claims are way below the statutory cap. The average is about £14,000. But...

What it does mean is when it comes to negotiations, and to answer your point directly, there can be a higher expectation by an individual, well, I can claim, I can say, I could get two or three years losses of earnings or something, and their legal advisors might be arguing that as well. And so suddenly there's a lot more pressure and it may be more difficult to successfully reach a settlement, you know, for as low a figure as potentially now. So I do see that there is the potential for, you know, those settlement agreement costs to rise.

Stuart (13:03)
Yeah, interesting again, I suppose just greater risk and yeah, to your point, greater cost to business as well. yeah, interesting. Yeah, I I was gonna say everything seems to be an added cost or risk to it.

Paul Burton (13:11)
But all these changes combined, yeah, yeah. The unpaid dismissal qualifying periods. And people got longer now, as I said, with the change to the time. So everything, I can see why lot of employers are nervous about all these changes coming into force.

Stuart (13:30)
Yeah, co com completely. again, we're sort of going through a few of these as we go, but you mentioned earlier on fire and rehire. now tell me more about this. Like I don't know much about maybe this practice, but I suppose it'd be good for you maybe to explain a little bit more what that means and I suppose what it means again for employers. Like it'd be good to just understand that a bit more.

Paul Burton (13:38)
Yeah, so fire and rehire at first is what you hear in the media and it came to real sort of notice with the P&O case whereby they got rid of loads of employees and bought in loads of... So you probably heard that in the news a couple of years ago.

Stuart (14:09)
yes. I remember do you want to explain that a little bit? D do you wanna explain that for the audience a little bit what that case was, just to just so people were aware.

Paul Burton (14:16)
Well, basically without any sort of consultation and process, they literally dismissed a load of directly employed staff and then employed, well, either offered to the same people, sort of self-employed sort of contracts or brought in agency workers and stuff. So that's where the phrase fire and rehire because, some people were offered to job back, but essentially took on other people.

Actually, in legal terms, we call it dismissal and re-engagement. And what is in practice is, and the reason P &O did it is because they wanted to it less expensive, they wanted to change the terms and conditions that people were working under. So actually, it is a practice that's quite widespread, dismissal and re-engagement.

Stuart (14:49)
Right.

Paul Burton (15:14)
But only I would argue it should be used in a fair way. So historically, now I'm with advice clients in this, you consult with your employees and etc. about changes in terms of conditions. So it could be,

unfortunately, you want to lower their salary or you want to change their hours or change their location of work, whatever that is. A significant change, though. And. You consult with employees and that.

And if a few of them said, well, no, I'm not doing it. I'm not agreeing to the change. Then there has been the ability for the employer to say, OK, you don't accept the change. We've explained the reasons why we want to do it in that. But essentially, what we're going to do then is technically dismiss you with notice on your current contract, but immediately offer you a new contract with the change terms. And the reason that would work is because firstly, if they'd gone through a proper process, then they could argue it was a fair dismissal.

But also they were offering another job straight away. the point I made earlier about mitigating loss, i.e. the individual has to be looking to show that they're trying to find another job, the employee can tell them and say, they've offered another job straight away. So, and by not accepting it if they don't, they're not mitigating the loss.

So it's been, I would argue, if it's done properly, a fair process that's been in place for long time. But unfortunately, unscrupulous employers, people not doing the right thing, there's been cases, and the P &O one was a big one. So the new government said right from the start, but before they even came into power, we're going to change this. And everyone's saying it's a ban and fire and rehire, not technically an absolute ban. There will be what are called a business survival exception, but it will be a higher threshold.

So if a business can show that they literally will go under if they don't make these changes, becoming solvent, for example, then you will be able to do it as long as you've gone through a fair process that I've kind of mentioned already. So no consult with the staff.

Stuart (17:19)
Right.

Paul Burton (17:40)
Tell them why you need to make the changes, et cetera. But there is going to be, it is going to, we don't know all the exact detail yet because this is why it's been pushed back from October to either early next year or even later because there has been a lot of consultation around this. know, obviously lots of employers are unhappy about it and the detail about exactly what areas of contracts are going to be under this is still yet to be decided.

Stuart (18:10)
Yeah.

Paul Burton (18:10)
We know about some, so pay reductions, changing hours and shift patterns, removal of benefits, place of work change. Those sort of changes will definitely come under it, but there may be some more as well. And we're waiting for that. But the practical thing is all about drafting contracts with flexibility.

Stuart (18:33)
Yeah. Yeah. I is it is it's always a bad thing for the employee? Because I I'm guessing that some companies might just turn around and go, Whereas I might have rehired you in a different capacity, I'm just not going to bother. So you therefore just lose your job. Is that is it potentially a bad thing?

Paul Burton (18:48)
Yeah, they could make redundant. Potentially, yeah. So some employers rather than saying, and this is where the whole duty. So under employment law redundancy side of things, there's a duty to try and avoid redundancies. So if I employed you and some other staff and I thought, rather than making a couple of you redundant, I'm going to see if you'll all accept, you know, go down to four days a week or something, or, you know, just take a lower salary or not get your bonus this year.

Stuart (19:04)
Yeah.

Paul Burton (19:17)
And you might all think, actually, that's better than losing our job. Well, if it's now going to be really difficult for me to do that without jumping through a of hoops or opening up a risk, I might just think, well, I'm just going to have to make a couple of them redundant. That is a potential consequence of the change. As I say, we don't know the detail yet, but yeah, that could be the case.

Stuart (19:20)
Sounds good, yeah. And it's and I'm assuming again, I do want to move this on, but I I'm assuming as well there needs to be a time period before rehire for this like so if you let's say you do pretend you want to hire someone at back at some point, I'm guessing there might need to be what, six months between doing it or something. Right. Right.

Paul Burton (19:57)
It would depend on the notice period. So, and I say again, technically, if it falls in one of the terms that I've mentioned, like pay reduction, et cetera, you're going to have to show that your survival of the business is substantially at risk to even be able to do this. But if you are going to do it, then if you're going to dismiss and then rehire and minimise the risk, then you're going to have to give at least their notice period. And so obviously it could be anything from weeks to up to six months.

Stuart (20:31)
Wow, okay. Wow. All right. No, I wanna move us on because there's another question that you referenced earlier on that I want to get back to in terms of the one small one word that that makes a very big change. And it was I suppose it was the phrase reasonable steps to all reasonable steps to prevent sexual harassment. Do you want to just explain how significant that one word actually is?

Paul Burton (20:38)
Yes, it's potentially quite a big one. Now, unfortunately, the change is coming in, supposedly in October. The government has said they're going to produce guidance, almost a list of what the all reasonable steps can be, but they're not going to do that to sometime next year. So there's going to be a gap in when the law comes in and what that is. But it is a big change. It happened in Australia a few years ago.

We're kind of copying their law change and employers have found it over there in the cases we've seen so far, quite difficult hurdle to get over because it's going from, have we taken some reasonable measures to have we taken every single measure that was reasonably available to us? And we said, what does that mean? Well, that could be quite a huge thing. In the past, it could just be a policy.

Stuart (21:27)
Right.

Paul Burton (21:52)
bit of training to your managers, et cetera, telling staff, they mustn't harass people obviously. All reasonable steps is much more than that, we would argue. You're going to have to do risk assessments to show. So for example, if you've got loan workers or you've got particular sectors, it might be a bigger danger. So the risk in the hospitality sector is going to be completely different to the risks if you’re in an office environment.

So you're going to have to do risk assessments. You're going to have to be much more on top of your training. And going back to the point I think you raised in part one about regular training, you're going to have to show that. You're going to have to come up with prevention strategies. Look at, know, if you have had any issues of harassment, have you dealt with it properly? Are you giving everyone, you know, multiple routes of raising concerns and issues. So as I say the government have said they're going to provide some detail on what they expect but that's to be decided and so we telling clients that you they've got to get on top of this straight away really.

Stuart (23:00)
Yeah, no, that's fair. And look, I there's two other final questions that I just wanna touch on. Zero and low guaranteed hours. Talk us through like I feel like this is an area that's been like under the spotlight for a long time, ever since sort of Deliveroo and Uber came in. what it what do you think is gonna change material materialistically here?

Paul Burton (23:23)
Yeah. Right, but the first thing to say is the wording in the Act, the Employment Rights Act that came in on this area last year, is a complete mess. I belong to the Employment Lawyers Association and we go, know, annually we have a training day where eminent barristers come along and talk to us about things. And two Kings Councils, that's the top of the tree as far as barristers are concerned, admitted that they couldn't make sense of the wording when I went back in a couple of months ago. this is, and again, this is what I'm saying, this is still quite a vague area. But what I can say is, at the moment, the way it's drafted, looks like, if you've got a low or zero hours worker working for you, they will have the right, we think maybe after 12 weeks, that's what's suggested. So very similar to agency workers get rights after 12 weeks.

After 12 weeks, the average of what they've worked, the employer will have to offer them a contract of that average hour. So if I work for you as a zero hours worker and in the first 12 weeks I averaged 10 hours a week, then you're going to have to offer me a minimum of a 10 hour contract going forward. And the wage draft at the moment, you're going to have to do that every 12 weeks. Now, of course, might, yeah, yeah, yeah.

Stuart (24:54)
wow.

Paul Burton (24:57)
That may change, but that's how it's looking. That's how it's at the moment. And obviously, certain sectors are going to be really affected, know, retail, care sector, hospitality, I've already mentioned when we were talking about things just now. those areas that traditionally rely on zero hours worker, this is going to be a huge change. And so I'd advise clients in those sectors particularly, they should be looking at, you know, that the zero hour workers and low workers, hours work of staff they've got at the moment, analyse what ones they need, how they're working, because along with the shift pattern changes that are due to come in, there could be big risks and costs down the line.

Stuart (25:44)
Yeah, I get again it seems some respects prohibitive a little bit to employees in some respects because I suppose Yeah, some employees won't make the hire. They because they're like it's too much like hard work. I don't I don't want to get drawn into this, so actually let's not bother.

Paul Burton (25:47)
Or they would give very short fixed term contracts of only a month or two. To avoid that, if it is 12 weeks for example, that offer of guaranteed hours Or along with the six months qualifying period, just saying, well, if we do have to give guaranteed hours after 12 weeks, we're going to then just bring the contract to an end before the six months.

Stuart (26:08)
Yeah.

Paul Burton (26:27)
So yeah, could again, it could be unintended consequences that could go against the employee.

Stuart (26:34)
Yeah, no, no, fair enough. And then we're also expecting, I suppose, stronger protections around pregnancy, family leave, equality action plans around gender pay. I think you mentioned that earlier on and the menopause as well. Are these are we are we moving from potentially being more HR and well-being conversations to much bigger, I suppose, employment risk issues?

Paul Burton (26:45)
Yeah, it's all cultural issues, I would say. yeah, all these changes over the last few years with flexible working and family-friendly rights and now these changes. Yeah, I think there is a greater focus now on that, as you say, the risk management. You've got to try and make your culture within your business as good as it can be.

At the same time, making sure you've got all your documentation, your training in place. HR professionals are going to have to take a lot more sort of a holistic approach. Gone are the days where it's just like informing people, this legislation's changed, this policy's changed. You've got to look at a lot wider picture, becoming more of a governance sort of issue, really.

Stuart (27:59)
Yeah. Yeah,

it's tough. Again, it's tough because you're again you're covering so there's so many like the bit that stands out for me and it's possible a nice way of sort of wrapping things up and tying it together, bit that stands out for me from the two conversations that we've had is how much information there is here. And if I'm a manager, it sort of blows my mind all the detail that I need to know.

Paul Burton (28:05)
Yes, yeah. And the short answer is I wouldn't expect managers to know all the detail. That's why it's really important you work, whether it's an internal HR team or external support. All managers, matter how good they are, would argue, are going to have to be supported as these changes come in into force.

Stuart (28:52)
Yeah. And so look l last words of advice for our for our audience, the people in HR right now. What would you give them all about these current changes? 'Cause that as I said, there's a there's a lot here. So what would you advise them to be thinking about or doing right now?

Paul Burton (28:59)
Being proactive so and you know we've talked about things like being proactive during the probationary period Being proactive when it comes to training people and that You know invest in that side of things now invest in your management training now Focus on Consistency, know results and everything, you know, it's not all about getting it right every time You know, even in unfair dismissal law, you know, there's a band of reasonable responses, you know, you're not just because someone else might come to a different decision, that isn't the main thing. It's about how you come to that decision. Are you consistent in your approach? And of course, yeah, back it up with your improved documentation, et cetera, for your staff and managers, yeah.

So, it sounds like it's gonna be a big couple of years for people in HR. Like it sounds like there's a lot. And do you think I'm adding another question on here, so apologies. But do you do you think there's precedent that's gonna happen over the next two years? Do you think that some companies are almost going to be guinea pigs within these changes that will then highlight what these changes genuinely mean?

Paul Burton (30:03)
Yeah, always when you have these changes, you get these sort of show cases, know, these big ones that you see in the news. It tends to be the big employers. But, you know, so your public sector employers or, you know, your really massive retail employers, for example. Yeah, yeah, exactly. and that's and cases as always in employment law.

Stuart (30:25)
Well we've used P N O, haven't we already? We'd like P and O have been an example of what we used already. Yeah.

Paul Burton (30:49)
You get the legislation upfront, there's lots of uncertainty. What are the exact boundaries? And in cases and judges will decide how that is formed. And yeah, that will happen in the next couple of years or even longer because there's so many changes.

Stuart (31:04)
Yeah, that's big. But look, Paul, it's been a real pleasure to talk to you over the last hour or so. Like the one thing I would say, d do you wanna do you wanna just give your contact details just in case there is anybody that wants to get in touch with you? What's it what's your email address?

Paul Burton (31:19)
Yeah, of course. Thanks, Stuart. Yeah, it's great. to chat. It's a so Paul Burton. So my email address, if you want to get hold of me, is paul@vuehr.co.uk That's probably the best way of contacting me. And we've got a general one as well, Vue HR on our website. So if you want to look for more detail there. yeah, email is probably the best way to contact me.

Stuart (31:46)
Absolutely.

Paul Burton (31:45)
And yeah, I'll be more than happy to talk to people.

Stuart (31:48)
Yeah, and look, if anybody wants to be put in touch with Paul and come by myself, my email is se@elliottscotthr.com.

So look feel free to drop me a note and I'll put you directly in touch with Paul himself. But look, it's a real pleasure to talk to you and I'm so internally celebrating because as I said at the very beginning of this this show, we've tried for a couple of couple of couple of days now to get this booked in. So we've finally done it.

Paul Burton (32:11)
I know, sorry for the technical.

It's been difficult. Thank you for the opportunity for the chat. it's been great to do it. And I hope that everyone found it useful.

Stuart (32:26)
Thanks so much, Paul. Have a good day. Cheers. Bye bye.

Paul Burton (32:28)
Cheers, Stuart. Take care. Bye