Employment Law Exchange

Gavel

January 2021

Introduction

I guess this is rather strange having a Gavel at this time of the year, but so much has happened that I thought, as there is no chance of going to the theatre, or any other cultural event what could be better than a read of the Gavel? Aside from further COVID-19 information we have the provision of the trade deal with the UK, though in reality, it covers lots more, some of relevance to HRM, for example recognition of certain professional qualifications.

But first, let's look at some other developments: Some of these are of considerable importance or mark a change in direction for employment law. There is of course BREXIT, but we have already considered much of this. It is the 'rise' of technology in HRM, especially AI, which is likely to be high profile in 2021. It raises some key legal questions.

Please also keep in mind that the new immigration legislation comes into force on 1st January. You have received the key information about this already. Clearly, its main relevance is for recruitment, though I think some details are yet to be finalised. On an unrelated topic-we are still awaiting the Supreme Court decision in the latest Uber case on worker status.

Whatever details are yet to emerge on BREXIT, in particular, it is inevitable that 2021 will be not only busy in terms of employment law but possibly game changing. Before providing a prelude to some of these changes, we have a few routine matters to note.

- The new rates for the NMW were recently published. They come into effect in April. Although there are increases in the various rates, they are very small. The basic rate in now £8.91.
- Similarly, there are slight increases for statutory payments from April 2021, including for SSP, up from £95.85 to £96.35; Paternity Pay, £151.20 to £151.97 and Shared Parental Pay sees the same increase.
- Of greater significance are changes to the Rehabilitation of Offenders legislation. These changes, announced on the 7th December 2020, have come about because the current rules were seen as contrary to the European Convention on Human Rights. (We remain members of this Convention, as it has nothing to do with the EU). The European Court of Human Rights enforces the Convention and litigants from signatory states can access the Court directly and, usually, bring cases against their own government. The 'right to privacy', family life, 'freedom of expression' a right to a fair trial and fair (Non - degrading) treatment are the widely used 'rights'. Many important rights, e.g. affecting trade unions, gay people, migrants, writers and journalists have come from ECHR decisions and they remain binding. Indeed, some are forecasting that after BREXIT, the court will be accessed even more. The government has recently announced a Review of the Human Rights Act, using a panel of experts. They will primarily look at the relationship between the ECHR and UK courts. Specifically, this will explore precisely how ECHR decisions are 'taken into account'. Are they 'binding'? In addition the Review will explore the relationship between the Convention and the UK Parliament, Executive and Judiciary.
- Changes to the Re-habilitation of Offenders legislation.
  The proposals are quite radical. First, potential employers and others will not be able to 'benefit' from automatic disclosure of youth cautions, reprimands

and warnings; and, second, a new law will ban the multiple convictions rule. Neither can be required unless the work is covered by exemptions.

- Rather quietly, a very important possible future change has come from possible legislation on Restraint of Trade and Exclusivity Clauses. We know that such clauses are widely used and affect both on- going work relationships and situations after a contract has ended. The role of law to date has been to assess whether the clauses, especially restraint on work after an employment contract is ended, could be justified on grounds of reasonableness. This has usually meant in terms of the period of restraint and the geographical scope of the clause. It is often hard to predict the outcome. Where the clause was a ban on working for another employer (Exclusivity clause) while the employment contract continued we have less case-law, but growing concerns regarding the low paid, part-timers etc. who we banned from 'moonlighting'.

  A Consultation, which closes on The 26th February 2021, seeks views on banning exclusivity clauses where individuals are earning less than £120 a week. The explicit policy of changing the rules on restraint of trade after termination is to encourage innovation and new businesses. It asks whether there should be a limit on the length of the 'restraint', whether clauses should only be effective if the 'old' employer provides money during the restraint period; or whether all clauses should be unenforceable.

  Maybe we can reflect on the experience of the furlough scheme, which purported to ban working during the application of the scheme? And, if you use these clauses and you consider them important, why don't you reply to the Consultation?
- ACAS Early Conciliation will last for a standard 6-week period, with a possible 2-week extension. This is to also allow for correction of any errors on the forms themselves.

I suppose no Notes or Gavel would be complete today without a COVID -19 update? On 20th December 2020, the Government updated its Guidance. Interestingly, the Guidance refers to the role of HSE-to provide advice but also enforcement which include requiring work to stop, improvement notices and prosecutions. There is updated Guidance on Shielding and protecting Extremely Vulnerable People, and on Working Safely (Updated 14th December 2020). This deals with Self-isolation but also sets down new priorities for employers to consider mental health and well-being.

Other COVID Issues.

One of the quiet revolutions that COVID has inspired is an apparent escalation of the use of technology for work and for managing work. With so many working at or from home, the imperative was there. The TUC has recently published a research report, which is well worth a read. Entitled Technology Managing People (2020). It presents survey results drawn from a range of employees and has a particular focus on the use of AI, for example, to monitor employees, set targets and to determine who should be selected for redundancy. The report is about, essentially, the role of technology in HRM and it recognises that it is already used extensively in absence management, work allocation, rating, assessment of training needs etc.

There is then consideration of the possible implications of its use for:

- Employment rights
- Equality and diversity
- Privacy
- Mental wellbeing

(I might add matters such as 'trust and confidence' in the contract of employment, contract variation rules, the need for consultation etc.).

The survey findings do make an interesting reading. Included here are findings that;

- 89% thought being surveyed was possible but did not know if they were
- 28% said they were 'comfortable' with AI
- COVID has led to 60% of employers using new technologies

- There was little evidence of employers seeking the views or consent from employees of the changes (Is that back to the ECHR? And other established UK rules?)

If you are interested in this aspect of HRM you may find the following useful:

ACAS My Boss the Algorithm March 2020. Written by Patrick Brione

Allen, R (2020) 'Artificial Intelligence, Machine Learning, Algorithms and Discrimination Law 'TUC Paper January 2020.

I guess these topics may well be ripe for management and wider training, as well as possible litigation. On the latter point at ELE in 2021 we shall need to consider not only the fall-out from COVID but also the 'rise' of possible litigation on the role and use of technology. This is interesting, not least because much of the recent growth areas of employment law have been in the 'softer' areas such as equality law, privacy, respect for family life and the role also of disability discrimination law as covering mental health problems.

There is a very real sense that 2021 will be 'exciting' but also may well see major changes.

And now for a brief return to COVID. Here is some of the most recent data, mainly about the people affected.

7.5% of those tested were positive (10.8% for London; 3.1% for the South West; 4.1% for Wales)

The highest rates were for fewer than 35s in patient-facing roles; those otherwise most likely to test positive are aged 18-26.

Case-law

There is really only one case of importance and it concerns agency working. We have considered some aspects of this case before but this is an EAT decision that brings together a wide range of issues.

Angard Staffing Solutions v Royal Mail group (2020) UKEAT 0105 19

Angard supplied many staff to Royal Mail. Temps using the Agency Work Regualtions, 2010, brought claims. (Claims under the AWT are very rare). The temps were supplied by the agency on a 40 hours a week contract. Royal Mail (RM) staff worked a 39 hour week, but the temps were paid for the 'extra' hour. The AWR uses language not that dissimilar to discrimination legislation, and one of the claims was that temps should be considered for vacancies at RM. This was rejected-the law simply requires that they be 'notified' of vacancies, not considered for them.

There was also a question as to whether in the interests of non-discrimination; they should work the same hours and not the requirement basically about pay.

Permanent staff at RM undertook training while the temps continued working-was this discrimination. No, as the Regulations do not deal with the content of working time.

Similarly, it was not a breach when RM staff was given the first option for overtime-the Regulations are primarily about pay.

Similarly, RM staff had more detailed information on their pay slips-again the regulations only cover the amount of pay not related matters.

Similarly, it was not a breach when RM staff were given longer periods of notification of breaks than temps. It was held that timing related to breaks was not covered by the Regulations.

The only claim that was successful was for delay for the temps in providing 'back pay' following a pay rise of 5%. As this was directly related to pay, it was allowed

The decision is clear and does not provide temps using the Regulations with many protections. The Regulations are basically about equal treatment in terms of pay but it must be borne in mind that the employment relationship is with the agency, against whom the claimants first claimed. Hence the claim by the agency against RM. The case all goes to show how complicated employment relationship can be hard to regulate and hard to use by claimants. From a client perspective, there seems to be little to worry about, in terms of using temps beyond that of ensuring parity of pay.