Employment Law Exchange

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Date: May 15th and May 22nd 2020

Venue: Online Zoom Meeting

Special Topic:'COVID-19 issues affecting employment and working contracts of employment'.

Introduction

This is the first of our May sessions. The topics to be covered, in addition to consideration of the COVID-19 issues affecting employment, are mainly connected to the workings of the contract of employment. We have therefore to look at the impact of the crisis on contracts and also its relevance for contract creation and termination.

We have today a combination of a quiz, hypothetical case studies, along with actual cases where I want you to consider what the decision was, (So the case has no name) and some basic questions. Please have a go at these before we Zoom, but also think of other questions you have of relevance to the topic. Please also check the Notes I have sent previously in connection with changes due to the virus. If you want new copies, please let me know.

Where are we on the COVID-19 emergency?

As you will no doubt have been reading, we are now entering a transitional phase, whereby it is hoped that the major impact of the virus has peaked or been contained and employers and employment can move towards normality.

It is sobering to think that around 25% of all UK employee jobs have been furloughed, i.e. placed on leave of absence whereby the government has paid 80% of wage costs, but the scheme is set into a very complex and frequently changing framework. An estimated 6.3 million employees have been covered. The legal mechanism involved has been the provision of guidance and 'rules' but little legislation or change to employment law itself, leaving many lawyers concerned about the status of the 'rules/guidance' .It appears that the scheme, though subject to modification will continue through to end of October 2020.

In addition, as discussed last time, millions of other employees have been working at home. It appears that this is creating new legal issues. The Mental Health Foundation estimates that the change has led to 28 hours per month 'extra' being worked. The Institute of Employment Studies has last week produced a research report (Working at Home Wellbeing Survey- (https://www.employment-studies.co.uk/resources/ies-working-home-wellbeing-survey) This confirmed the

tendency to work longer hours, but also muscular-skeletal problems, sleep difficulties, anxiety and stress.

This reminds us that the laws relating to health and safety at work remain extremely relevant and demanding, along with the common law of negligence and the implied as well as express terms of contracts. We know that PPE (Or lack of) has been a key area of concern. We are already seeing H&S claims in common law states such as the USA and, civil law states, such as France. We must remember that from a EU perspective, it is the most developed area of employment law and remains binding on the UK.

Recent Developments

From last weekend, announcements have been coming thick and fast, though proving controversial, not least for their lack of clarity, many argue. Particular concerns have focused on what we would call health and safety issues and how staff can be kept safe in specific types of workplaces. There is also considerable concern about travel to work, especially where walking or cycling are not viable options.

Key developments are:

- Extension of the furlough scheme.

The scheme is hugely costly, but can be extended by employers to the end of October 2020. It is a scheme, which is characterised by inflexibility-although some of the rules have been modified, but the intention now is to phase returns to work where possible. Hence, it will be possible to furlough employees on a part-time basis, though it is likely that the employer % subsidy will be reduced.

- An encouragement of returns to work where possible and where working from home is not viable.
- Encouragement of ways to get to work other than by public transport
- The continuation of distancing but little express requirements to, say, wear protective equipment, though much guidance and encouragement.

• (An interesting development has been the decision in the Debenhams Administration case. Staff had been furloughed as the company is still trading. The administrators claimed the furlough costs as 'expenses of administration. But were

They paying them? Yes-they had 'adopted' the employee contracts, i.e. treated as the employer.)

What are some of the practical and legal issues of the above change?

Now to a **QUIZ**. Remember the rules-statements which require you to decide whether they are True/accurate (T); False (F) or 'It all depends' (I) where you need to consider what it might depend on.

Please answer this before we Zoom

	T	F	I
If a current employee requests a 'new' Section 1 Statement you must provide one within 2 months			
If a self-employed worker has asked for a Statement you can ignore the request			
Under the new immigration rules from January 2021, - the points-based system, an applicant gets 10 points for English language skills and 10 for a PhD			
From 2021 a new Graduate Immigration Route will enable job applicants who have graduated from a UK university to stay for 5 years.			

You can only make redundant a furloughed employee at the end of the three-week periods used for calculations.			
If in your employment contracts you have prescribed periods when holidays have to be taken, furloughed employees can be required to take them then			
It will be lawful to call back into employment full-timers first.			
Consultation over redundancy can begin during the furlough period.			
Soon 'gig/zero-hours' workers who have worked for you for 26 weeks will be able to request a 'stable' contract.			
If employers do not enforce the 2-meter's social distancing rules and an employee 'catches' COVID-19, they will be liable in negligence.			
Peter wanted to use the employers Grievance Procedure while furloughed. He was told to wait for 'normality'.			

There are many other questions-please add your own. One might be whether an employer has the right to demand a job applicant has used the COVID-19 testing phone app? If a business goes into administration but had furloughed staff prior to this, is the administrator liable for the furlough scheme by 'adopting' the staff? If the Government changes the rules of a scheme and does it by Tweeting, is there anything an employer (Or employee) can do, especially if they had relied on earlier advice/guidance?

Some case studies for discussion

1. Mary has been a client relation's manager for your organisation for six years. You are a recruitment business. She has a 2-year-old son and has been working at home. Her partner, Tim, is disabled. You decide that you would like her to return to your headquarters. She has refused to come. She says that having her work at home was a variation of her contract as regards her workplace, that both of you had agreed to. To change her workplace back would be difficult for her and

anyway, you have expressed the view that homeworking was 'very effective'. She had therefore relied on the changes being permanent. What is your response?

2. Yusuf is aged 59 and is of Pakistani origin. He works as a chef in your hospitality suite. This is used mainly for clients and events. He has been furloughed but now notified that the work premises will re-open on 25th May 2020. He asks what are the safety arrangements for him, being in one of the 'at risk group', i.e. from the BAME community. You tell him that 'We will aim to comply with Government Guidance'. He responds by saying he can't return unless he has clear evidence that he will be safe. What are your options?

3. Your business (The Ethical Finance Co) wants to get back to normal a.s.a.p. You employ 'consultants' who work on projects for clients, usually on their premises. John has been directed back to his mobile role after being furloughed. He refuses, as he wants to stay at home as he does not want his children to return to school due to virus risks. His wife works part-time. He says he is faced with a domestic emergency, which is protected by law. What will you do?

The EMPLOYMENT LAW EXCHANGE: ZOOM SESSION 22nd May 2020.

This time we are scheduled to explore legal developments in equality laws, H&S/negligence/vicarious liability and whistleblowing, data protection and related topics, but we needed to catch up on matters that we did not have time to cover last time (pp. 5-7), especially issues around contracts, and job termination

Some other legal developments

We actually have some very interesting equality cases, including one from the ECJ that is, potentially, of huge importance. But that is for our Zoom on 22nd May!

Unsurprisingly, there has been little new **legislation** other than that responding to COVID-19. However, we do have recent legislation that has to be implemented, though, to date little detail.

This includes:

- Protections concerned with neo-natal deaths
- The requirement of employers to pass on customer/client tips and service charges
- Those on gig contracts able to request a stable relationship after 26 weeks
- Redundancy protections for pregnant women or those who have recently given birth.
- We have a Consultation on a matter closely linked to other policy developments, i.e. provision of unpaid leave for one week a year to deal with caring responsibilities. It is a rather strange idea, in that the 'carer' can be not just a relative, close friend etc. but also a neighbour. It is unclear who qualifies, beyond being employees, and the leave has to be taken during one calendar week. I am not sure how attractive this will be?

Despite the COVID-19 emergency we have seen quite a lot of **case law** since we last 'met'. A pattern seems to be emerging whereby the CA is dealing with more employment cases, but relatively few being heard by the EAT. It is also important to note that due to changes in the administration of justice that there are a wider range of judges in the EAT that are drawn from the High Court bench more generally. This means that the 'employment specialists' that we have been used to in the EAT, sometimes with lay members experienced in employment relations, are less in evidence. Employment appeals are therefore more likely to be heard by judges experienced in commercial/business/property law. My feeling is that the particular features of employment law and employment more generally may be losing out. This coupled with both the decline in the role of lay members and a growing number of cases being heard by the CA are having an impact. This is not to say the judgments are bad or unfair-simply that there is a slight cultural change.

At a European level, we have little of relevance from the ECHR (Unrelated to the EU or BREXIT) though we do have an interesting case from the ECJ on **employment status.**

B v. Yodel Delivery Network (2020) C-692/19

This is quite a difficult case. It was referred to the ECJ from Watford ET. A working time claim was made. Unlike in the UK where we have a definition of a self-employed person who can also be a 'worker', the EU does not have a definition of a worker. The approach of the ECJ was therefore different from what we would do. They looked at it much as whether B was an employee-in which case he could claim, or self-employed, in which case he could not. (It is interesting that many in the EU are asking for a 'worker' status to be defined).

He was a delivery driver who had considerable flexibility through deciding how much work he wanted, he could sub-contract work (Though Yodel could veto his choice), he was liable for the conduct of the person to whom he subcontracted and he was free to work for others, including competitors. (In reality he did not subcontract work). He claimed he was an employee or a 'worker' in UK law.

The ECJ took a different approach than a court in the UK might. To be an employee he needed to be in a hierarchical relationship', i.e. 'under the direction of an employer. (We look for 'personal execution of work' not within a B2B relationship for 'worker status') The ECJ, so long as the flexibility etc. was not 'fictitious' he was self-employed only and unable to claim. They summed it up as because he;

- Could subcontract
- Decide how much work to do
- Work for others
- Fix his own hours of work

Is this helpful or does it confuse matters even more? What do you think would be the answer under current UK law? How does it fit with the Uber cases/? Deliveroo /etc.?

Last week we had the football referees case on their status **(HMRC v.Professional Game Match Officials Ltd (2020) UKUT 147).**

The referees were contracted by an 'overarching contract' and contracts for specific matches. HMRC considered them employees. In a lengthy judgment, the Upper Tribunal concluded they were not employees, citing an old employment status case of Ready Mixed Concrete. The relationship did not have'/mutuality of obligation', there was insufficient control over their work and there were a number of factors inconsistent with it being an employee contract. My reading is that the lack of control was critical-after all they have a role where independence is crucial!

I guess the good news is that again HMRC have lost and for those hostile to IR 35 changes, this must discredit the CEST test, and their adjudications. It means that if you want to contest that someone is an employee, this may well have strengthened the position.

For the purposes of NMW/NLW unless the law expressly allows for it, providing some of the pay in vouchers or payment in kind is unlawful (Commissioners for **Revenue and Customs v. Middleborough Football Club (UKEAT,2020 0234/19)**

Stewards and similar who worked for the club were paid in cash but some of their pay was made up with season tickets. This was confirmed as unlawful-though clearly had some value.

Now we have cases on **terminating jobs.** This first case **is one for you to have a go at deciding who won and why.**

X v. Y

X was an administrator who had worked for Y since 2005.Relations with the business owner were not good. In November 2016 matters came to a head with her being shouted at by the business owner, called a liar and she walked out then stayed at home. She was contacted by the business owner's wife to see if she was OK. She said 'No' and said she was very upset and would bring back company property. X contacted a CAB that advised her to submit a Grievance but she got no reply. The business owner then wrote to her saying that he 'accepted her resignation', but also stated that she would have been disciplined for having left the workplace without consent'. It was also alleged at the ET that X had shouted as she left; 'Tell him he can stuff the job up his arse'.

She claimed for unfair dismissal and constructive dismissal. The employer said she had resigned.

Who won and for what ? How might the matter have been handled differently?

We discussed last time how, generally, constructive dismissal is not easy to win as a claimant, but employers still need to be careful, as the next case illustrates.

Finally, we have a follow up to the Djuti case, where a claimant was successful is establishing that the 'genuine reason' for her dismissal was whistleblowing and not incompetence. The next case shows that this, too, is hard to establish.

Argawal v. Cardiff University (2020) UKEAT 0115

This is an important case and follows up many cases we have recently considered.

A was a senior lecturer in urology but also a practitioner at a local hospital. From 2011 she had raised a number of Grievances. In 2014 the university proposed to make 69 staff redundant , and in 2015 A was warned that her job was at risk. She was made redundant in 2016.The Head of Department who had constructed the 'pool' for selection had left the university soon after. She alleged she had been racially discriminated against, especially through the devising of the 'pool'. She felt the selection process generally had been 'staged'. Her complaints were very much as to how the case for redundancy had been handled both by the university and the ET. For example, she asked the ET to call the former Head to find out how the decision to select her had been staged. They refused. The ET also rejected the evidence of an expert in Equality Impact Assessments, saying she was not an 'expert' and argued that 'racism was rampant'.

Her argument was based on the Djuti, from the SC, which had accepted arguments that the reason put forward for a decision by an employer was not the 'genuine one'. She lost-the EAT found no evidence of a 'gigantic conspiracy'. The selection was therefore valid.

Now to a **QUIZ**: Remember the rules-statements which require you to decide whether they are True/accurate (T); False (F) or 'It all depends' (I) where you need to consider what it might depend on.

	T	F	I
Geoff has been furloughed He was asked by his employer to 'help out' at his employer's brother's business. This is fraud.			
Plasma Ltd wants to call back to work premises homeworking staff. They have specified that facemasks must be work at work. Jenny suffers from asthma and says she cannot return to work if she has to wear a mask. She can be lawfully dismissed.			
3 Wayne, aged 27, usually commutes to work by bus and is called back from being furloughed. The buses are very full, due to COVID restrictions and he is often late for work. He is dismissed lawfully.			
4 On the same basic facts as Q, Wayne's employers tell him to cycle or walk to work. He refuses and is lawfully dismissed.			
Philip has been working at home He has suffered from stress and anxiety. He is called back to work when his employment re-opens. He is a security guard and works alone. He says he can't cope and wants changes. 'Being alone at home for weeks was bad enough-I can't be alone here as well'. He is told that 'In the circumstances, it would be better if he found other work'. He can claim for unfair dismissal.			
Mary was cycling to work and was stopped by the police and fined for 'riding far too closely to another cyclist'. She must pay up			
Sharon has received a bonus , usually of £5k a year. Staff have been told that furloughed and staff working at home are excluded from this years' scheme as the former group 'have not done much work this year, and the latter that we have not been sure how hard you have been working'. It will be an unlawful deduction.			
Ratchet Ltd has announced redundancies. The company, in selecting people to be retained, will give priority to those who have continued working during the crisis. These are predominately senior managers			

and manual staff, both groups comprising mainly male workers. This will be lawful.			

Now for some more case law

We can now turn to our other topics of equality law, whistleblowing etc.

NH v. LGBTI (2020) Case 507/18

This is a case from the ECJ. It deals with a situation where the CEO of a German company in a media interview stated that he would never employ a gay person. There was no vacancy, no job applicant at the time, and the case was brought by an organisation committed to diversity. It was argued by the organisation that his conduct contravened the Equal treatment Directive of 2000. He argued that the Charter of Fundamental Rights entitled him to be protected for 'freedom of expression'. He lost. This clearly moves equality law onwards.

It is possible that the Covid-19 emergency will give rise to claims based on whistleblowing, so the next case id worth noting.

Riley v. Belmont Green Finance (2020) UKEAT 0133/19

R was on a temporary contract as an underwriter. He was not happy in his work and complained. At a meeting he stated that the company was lending to people with CCJ's, but he did not specify the precise legislation that had been allegedly breached. He was dismissed but as his allegation was somewhat vague and he did not provide any other details, he whistleblowing complaint was rejected. So, people do need to be precise and comply with all aspects of this law.

And finally, we need to note the dramatic decisions by the SC to reverse the vicariously liability cases involving Morrisons (Employee divulged personal data of customers to the press as he had a 'grievance' against his employer); and Barclays Bank (case where a large number of female job applicants were sexually abused

by a doctor contracted by the bank to undertake medical examinations over many years).

The first case was reversed because the employee in question was 'on a frolic of his own, i.e. a personal vendetta for which Morrisons should not be liable, and the doctor was not an employee and engaged on a fee basis for each examination he undertook.

These two decisions have returned the law to its nineteenth century basic rules.