Employment Law Exchange

Gavel

Volume 16 (2) August 2016

Welcome

I hope you have all had a good summer-well the sun is shining today and it is very hot. I am recovering from the Olympics. Not that I was there but I have just returned from a week in darkest Normandie. I was promised TV for the Games, but although the countryside is rich in cows, forests, cider, cream, chateaux and abbeys, there was a total lack of Wi-Fi /satellite service. Just imagine the agony! My news was texted, plus gained from the very limited regional French press.

This was all very sad and frustrating, as one piece of news is that ELE is now sponsoring a young heptathlete. She is 17, has a better PB at her age than Jess Ennis had, has just won Bronze at the European Junior Championships, Bronze at the UK championships for High Jump. Her name is Niamh Emerson, if you would like to, check her out. The sponsorship (She has Nike for her main needs) is to help her family travel to support her. I do hope you agree this is a good cause.

Anyway, as our first meeting of the Autumn is not far away it is time to get down to business.

1. Confirmation of meetings etc.

Our first meeting is on the **9th September 2016**. The Special Topic is 'Performance Management'. We shall use both existing case-law for guidance and some case studies. I intend to cover Probationary Periods, work with a strong training element, support for qualifications, e.g. study leave, fees funding, assessing performance, performance pay, underperformance and responses, the impact of illness and disability, application of

disciplinary rules and actions. If there is an aspect not mentioned that you would like covered please let me know in the next week or so.

Colart is hosting the event. When the meeting information is sent out we will re-inforce/clarify directions for finding Colart's premises. Thank you again to them for hosting.

Our next meeting is on **14th October 2016** at **GoodmanDerrick's** premises. This, if you recall, is a special meeting for us to get together and learn more about each other's workplace and practices. I will be sending out a short template for basic information to be completed and available in the members' zone on the website. This will include such matters as nature of business, number of staff (Of all sorts) HR structures/arrangements, corporate structure (If relevant) and arrangements for HR/legal policy development. We will then look at some topics in detail preparing us to be in a position to compare approaches. We can clarify this aspect of the meeting on September 9th. Thanks again for the hosting.

I am going to suggest that this date is a **'must'** for our members, as I intend we have our first lunchtime speaker. The intention we have 'names' to join us and share thoughts on current or perhaps future employment relations and law. It is also an opportunity to bring colleagues and others, so we have a good-sized audience. I am approaching 'likely suspects' and will keep you posted. If you have ideas for good speakers, please let me know.

Then, on **4th November 2016** , we have a change to our schedule of special topics. If you recall, there has been a lot happening in the law relating to the internal settlement of disputes and problems. We felt we needed to get on top of this-including some of the tax changes as well as the implications for constructive dismissal, breach of contract etc etc. The question of 'without prejudice' has also loomed large. So if it's OK with you all, the proposal is that we explore this at this meeting. Summed up it is, 'When does a 'settlement' turn into a ' dispute'(And vice-versa !Our last meeting for 2016 is on 98th December, when our Special Topic is 'Health, Safety and Wellbeing'.

And now for a few snippets of law and related matters……

1. Research on temporary work from the European Commission

There has always been a debate as to whether, for an individual, is it worth taking a temporary contract as a stepping stone to a permanent job? Or is it that or

unemployment? Interestingly, although the research shows a limited and declining incidence of transition to permanent work across the EU (With very low rates in Spain, Portugal, Denmark and Bulgaria) the UK emerges well. We not only have one of the lowest rates of temporary work (Did they count zero-hours?) but one of the highest transition rates. Does this mean that many UK recruiters are recruiting on the basis of an individual becoming a permanent staff member and, in effect, using the temp contract as a probationary period?

2. Battles over new employment laws

It is interesting, even in this post Referendum era, to observe the policy debates in the EU. The Commission has proposed wider protection for 'posted' workers, including those posted cross- border via agencies. In effect, they have proposed a strengthening of the protections for the workers, in terms of greater rights re. pay, alignment with the protections from the TAW Directive and coverage by 'host' labour laws if the posting is 24 months +. A number of states considered this too much interference and contrary to the subsidiarity rules. The Commission rejected their complaints, but this may be a significant development in loosening the EU's regulatory powers and increased powers for state governments. In fact, such rules are important for sustaining the Single Market and ensuring fair competition-but battle has been joined.

3. Dress codes and Muslim women

This seems to be becoming a really hot topic and one that we have dealt with here in a number of cases, usually lost by claimants. The ECJ in Betriebsrat C- 216/15 is considering AG's Opinion, as they are for other similar cases we considered last time at ELE. B wore the hijab to her work, which involved her meeting clients. One complained about it and she was asked to remove he headwear. She refused and was dismissed.

The advice is that the employer must show a genuine occupational requirement- a matter that has been the subject of other A-G Opinions. Let's wait for the decisions of the Court. Whatever the shape and timing of post EU UK, these cases will be, if not technically binding on us, but will be very influential.

4. UK Government policy changes etc.

Fairly quiet over the summer: but a few things to Note.

- No news yet in the legality or otherwise of ET fees

- The General Data Protection Regulations-considered in June ELE, may or may not be implemented in the UK following the Referendum. However, they are an integral part of the Single Market, so if we want to keep access we may well need to apply them.
- The House of Commons has issued documents relevant to the legal position of the UK following the Referendum. A Briefing Paper-What happens Next? (Paper 7551) specifically deals with the thorny question of how ART 50 and with-drawl from the EU works. This document was published on 30th June, 2016.
- Wales has indicated it is not prepared to implement aspects of the Trades Unions Act 2016-more' disunited kingdom?'
- DWP has issued fresh Guidance on Employing Disabled People.
- There were only 8 cases determined by the EAT in July, but some of interest.

Phoenix Ho Ltd v. Stockman UKEAT(2016) 0264/15

This confirms that for SOSR dismissals the Acas Code does not apply.

The question of the definition of a 'worker' continues to be a 'hot' one.

McTigne v. University Hospital Bristol (2016) IKEAT 0354/15

M was supplied to hospital by an agency. The arrangement was that she had to report to an NHS Supervisor regarding matters such as sickness, holidays, was covered by NHS D&G policies. She had an 'Honorary Contract' with the hospital as a forensic nurse examiner. To do this she attended meetings at the hospital. She was a whistle-blower and wanted to claim against the hospital. Could she? The ET said 'No'-her contract was with the agency. It is interesting that although under ordinary worker definitions she would not be able to claim, as she has no contract with the hospital and her employment relationship is with the agency, she may still be able to claim. Under the revised whistleblowing rules, S 43H of ERA allows people to be covered if they are supplied by an agency/intermediary and have their terms of work substantially determined by the client.

She won her appeal and the case goes back to an ET to see if this is the situation. The whistleblowing right is therefore wider than the ordinary worker definition and the fact

that she could no claim to be an ordinary 'worker' was irrelevant. This is the first case we have had that has confirmed the position and employers need to be aware of this wider protection.

Dronsfield v. Reading University (2016) UKEAT 0200/15

This case concerns disciplinary investigations and procedures. D was suspected of a sexual relationship with a student. Such relationships should have been revealed to the management, as he was her supervisor. As a tenured staff member he was covered by rules, which allowed for dismissal only for 'immoral, scandalous or disgraceful conduct'. Following an investigation, he was dismissed. It was found to be unfair. First, reports favourable to him had not been considered following the investigation. Second, the disciplinary panel had not considered whether he had broken the specific rules that applied to him. Substituting 'gross misconduct' is not adequate.

So-be careful to follow, precisely, your own rules.

Haward v. Zurich Insurance (2016) UK Supreme Court 48

H exaggerated the impact of an occupational accident-as revealed by undercover surveillance. His compensation was reduced by 90% on the basis of the tort of deceit. If the employee's conduct persuades someone to act-here to set a high award, then the tort has been committed and money has to be repaid. This is a rare legal action but the willingness of the SC to apply it shows that untruthful, misleading conduct can be penalised using 'old' common law rules. When else might they have relevance?

And finally, an hors d'oevres, for our next meeting-

Fennell v. Foot Anstey LLP (2016) UKEAT 0290/15

F joined a firm of solicitors as an equity partner when aged 49.Initially, he performed well and then seemed to have 'gone off a cliff'. The firm voiced concerns and thought this would lead to him leaving the firm. He did not. He was set performance targets (He said were too high), and then his partnership was not renewed when he was 52. He alleged age discrimination and also argued that there was a prima facie case of D, such that the burden of proof had shifted to the firm. No; said both the ET and EAT and it was not age D either. His performance was simply not good enough and the firm had lost confidence in him.

This is a really good case to read (In those spare moments you have!)

AND FOR FUTURE DISCUSSIONS:

Have you been reading about that Equal Pay Gap, especially its impact on working mothers-and part-timers. There has been some surprise at the size of the 'gap', so the new Regulations on Pay Reporting will need careful consideration. So; despite;

BREXIT

SO FEW CASES GOING TO ETs AND THE EAT

There will be lots to work on this Autumn.

THAT'S ALL FOR NOW. PLEASE RAISE ANY QUESTION ABOUT ANTHING IN GAVEL WHEN WE MEET ON 9th September.

Professor Patricia Leighton,
Employment Law Exchange Leader