Employment Law Exchange

Gavel

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Welcome

Well, it's all change this time and I have so many exciting things to tell you as well as providing a little information about those recent legal developments, which will keep us in touch with employment law until we meet on 18th March.2016.

First of all, thank you all so much for your support, interest and continuing involvement. It has been great (and not a little humbling!) to have you signed up and be able to plan what I hope will be a really valuable year ahead. Due to the changes and the need to set up a new organisation to support what was ELF, we were unable to hold our usual January meeting. As you will see from the list of dates below, we now have session in late April to make up for it. I hope this is OK?

In my email of a couple of weeks ago, I let you know that our first session is on 18th March 2016 and will be hosted by GoodmanDerrick, Solicitors, at their delightful premises overlooking Ludgate Circus at the bottom of St Bride's Street in the City of London. Jean Young, whom many of you know, was a long-standing PEEL member has arranged this for us. Harsa Beagly of ColArt and Val Stansfield from TSSA are also hosting events this year. All the venues are in central London and easily accessible by public transport. Thank you so much, Jean, Val and Harsa. So we really are becoming a collaborative and sharing organisation!

I am now working on a new and more interactive website that has the features that many of you have asked for over the years. As well as providing information, it will be our main communications tool and we intend that it will have a confidential, secure, area for conversations about work issues. I know we have had problems with the CAPITA site over the years and it is intended to provide something much improved. A financial support structure is now also in place and we aim to simplify the payments system.

At our meeting on 18th March 2016 can I ask as many as possible of you to both come to the event and stay for a buffet lunch (Lunch is now back on the agenda for all sessions!). It would be really useful to clarify precisely what you all want to get out of the new organisation, what changes and suggestions you have and to generally make things more of a club. This is why we suggest the name be changed from the slightly formal/old fashioned Employment Law Forum to the Employment Law Exchange, which, I think indicates a more active discussion and exploration of both the law and, most critically, how best to respond to it in practical ways. Please get back to me with thoughts.

The Programme 2016

(In formation about the first event will be sent out by email two weeks before and a

March 18th	'Working time'
April 29th	'Recruitment and career development'
June 3rd	'Pay'
July 15th	'Sensitive issues at work'
Sept 9th	'Conduct and performance management'
Nov 4th	'Equality, dignity and whistleblowing'
Dec 9th	'Wellbeing and health at work'

reminder a few days before, plus providing directions and any other useful information).I have also 'pencilled in' suggested special topics for the sessions, but as per usual, these are not 'set in stone'.

And now for some employment law

I have picked out a few topics which I hope you find of interest and you will know of other topics that have been covered by the general media as well as the professional press, the former coverage having to be treated with great care. Let's start with the case about alleged snooping by employers into private conversations, emails etc. of staff. The media screamed out stories about 'employers' right to snoop' but is the law really that simple?

Barbulescu v. Romania Appeal 61496/08

This is a case from the European Court of Human Rights and I guess, because so many politicians, journalists etc. get it wrong, remember has got nothing to do with The EU.

The ECHR is part of the Council of Europe, a much wider grouping of countries and its cases are important for us because the Human Rights Act incorporated the European Convention on Human Rights into our law. (You will note how long the case took to get to court). The case was brought against the government, not the individual employer because the Romanian Constitution provides a 'right to correspondence' and it Criminal Code imposes penalties of 6 months to 3 years for 'unlawfully opening correspondence'. B also claimed using the Council of Europe's Convention on Data Protection.(Romania was not in the EU when the incidents occurred).

B was an engineer in charge of sales. At the request of his employer, he created a Yahoo Messenger account in order to respond to customer queries. The employer monitored his account for 8 days in July 2007. This showed he had used the account

for personal purposes. The employer had a 45-page transcript, which revealed messages to his brother and fiancée, though none was of an intimate nature. His claim was refused for a number of reasons, all worth noting.

- ❖ It was said that using employer's equipment etc. for personal reasons was 'contrary to internal regulations'.
- ❖ A colleague had been recently dismissed for using the Internet for personal reasons.
- ❖ On the 3rd July 2007 the employer had issued a Notice reminding staff that they could be under surveillance. B had signed it.
- ❖ And the employer was only able to 'check the ways in which professional tasks were performed' during working hours. As his job was to use the Internet, to see if he was treating customer properly, they had to go through all the messages but only for the Yahoo Account. The court felt the employer acted fairly in this regard…

What are the implications for us? Clearly, this is not a 'snoopers charter' and is very much dependent on its facts. The 'voting' by the judges was 6:1 so it was no marginal decision. Two things seem clear. First, he knew it was forbidden and second the power to intervene by the employer is closely linked to the issue of performance management, in other words they had a reason to intercept/read his messages. He was also aware that surveillance could occur. Interestingly, the claimant did not really complain about the monitoring, it was the transcript, which was made widely available within the organisation that made him go to law. It was that that also caused the judges to debate long and hard.

It has to be borne in mind that the notion of 'private life' has a wide interpretation in law and if communications are to be intercepted the employer needs to have warned staff as this affects whether there is a reasonable expectation of privacy.

SO;

- *Would the case be decided the same way in the UK?*
- *Are there any lessons for us?*
- *And do you think other legal claims might be possible in the UK? In what circumstances?*

- *What do employers need to be especially careful with?*
- *What if the employer had been told by security staff that there was a thief in the building and they searched, bags, clothing etc. of staff, finding copies of emails that had been sent about private matters and were sent in work time?*
- *Aside from questions of employee awareness of rules and, say, the fact that some things are clearly forbidden by disciplinary rules, what other 'defences' are there?*

On this general subject you may like to have a look at the European Union Data Supervisor Guidelines about personal data. It is written for the EU institutions but is available and quite useful. It is entitled Leading by Example: The EDPS Strategy 2015-19. (www.EDPS.europa.eu)

New legislation

One of things that intrigues me about some of the new legislation we have considered and will need to consider is the way in which enforcement is being tightened up, not so much with bigger penalties but by sort-of making an employer 'vicariously liable' for breaches of law by other, independent people or bodies. We have seen this with the use of agencies (Using off shore havens) and we will see this notion extended b other tax measures. It means, of course, that contracting with organisations needs to be very carefully undertaken, not just in terms of insurance and indemnities but through' due diligence' checks. And remember criminal liability cannot be offloaded. So-be very careful and ensure those buying in services etc. are aware of this trend and that you have guidelines within the organisation. We can chat further about this.

A recent example is not likely to affect you but is a symptom of this trend. Currently, the Government is Consulting on the **Posted Workers Enforcement Directive** from the EU. The Consultation took place last year (There were 9 responses!) and the Government reported on this on the 29th January 2016. You will recall it deals with cross border skills supply. If this is in the construction industry, a head contractor is

('vicariously') liable if a subcontractor does not pay the posted workers. There is a 'due diligence' defence but we are as yet unsure how demanding that standard will be. The Government has promised a 'light touch' in any new Regulations. Might this idea spread?

You will, no doubt, have heard about some of the controversies surrounding the **Trade Union Bill**, especially over strike ballots and picketing. However, the most relevant aspect for HR is the proposal that the 'check-off' system in the public sector be abolished (saving, it is said, £31 million) and monitoring of time for trade union activities. The Impact Assessment says that 21k bodies will be affected by both measures but employers will have to report time spent on TU activities.

The **Small Business, Enterprise and Employment Act Regulation, 2015** are now in force. The relevant provisions are that employers are now required to report(To relevant bodies) whistleblowing disclosures. The Regulations also cover public sector 'exit payments'(Note also the wider tax proposals on exit payments generally) capped at £95k. There is also a Consultation on Repayment of Payments where an individual is re-employed in *any* part of the public sector not just the area they left. Potentially, this is a major change and it is intended to cover anyone earning £80k a year or more.

And finally for now, we need a quick glance at some very important **tax changes** happening on 6th April concerning 'intermediaries'. The particular target is 'umbrella' companies where the staff supplied to clients by them have been able to benefit from 'derogations' to taxation of travel, subsistence and accommodation costs. The derogations are abolished and new 'anti-avoidance' provisions are in place.

It is important to note that people supplied through PSCs and SDCs and if not caught by IR 35, people are outside the Regulations. It seems unlikely that IR 35 will be changed in the short term but enforcement might change. If the Regulations do apply they also do to salary sacrifice schemes linked to expenses.

Tax avoidance is being treated more and more seriously, and some suspect that hirers/clients may be required to collect the relevant tax.

Clearly, our old friend-employment status remains hugely important and may well get

more important.

Implications?

- Will PSC's get even more popular?
- But are sole traders even more attractive?
- Should you give priority when hiring skilled third parties to those with companies? Or to sole traders?
- Are there implications for AWR, for example, because when the tax changes 'bite' the temps will have less cash and possibly claim against the client for the shortfall?
- How will umbrellas react?
- What about those Internet platforms that 'create' services-will they be covered?
- Will there be a move to project work and payments, rather than daily or weekly rates?

The intermediation industry in the UK is large and growing fast. So this is one of topics that will run and run! It must also be borne in mind, that, in theory, tax rules have no link with employment law and its rules!

Just a few cases

The comparative dearth of cases continues, though a few have been of interest or significance.

Two are about that 'not easy' subject of constructive dismissal. Remember this is where the employer commits a serious breach of contract/repudiation that terminates the contract when the employees 'accepts' the breach by resigning.

Higgins v. BA (2016) UKEAT 0016/15

H was an engineer. He was dismissed for failing to follow procedures. On the day in question there were severe staff shortages, two contractors were brought in, one of whom damaged a wire that H tried to fix but did it wrongly. He appealed against the

dismissal, which was in part successful but was demoted three substantive grades. He appealed, lost and then resigned. He won at the ET, with a 50% contribution. The EAT upheld the ET's decision. He was entitled to resign and, as we know, it is quite hard, though not impossible, to justify a CD claim.

The decision was based on a long-standing decision in **Hogg v. Dover College** where an employee suffered major health problems. He was told the employer could not keep him on full time so he told to would work half time for half pay. He agreed initially but then resigned. His 'old' contract had been broken, despite the apparent agreement. Note also the important case of **Buckland v. Bournemouth University, 2013** that illustrates the breadth of employer conduct that can breach the contract(Here they undermined his position by refusing to accept the number of failures in exams.

Equality law and 'whistleblowing' cases do continue apace.

Noble v. Sidhill Ltd (2016) UKEAT 0375/14

In some ways this is a shocking case and one wonders what management was doing. N is white British, but brought complaints for race, religion, age and sexual orientation discrimination. He worked with a colleague who was his line manager who made constant comments, such as anti 'Paki' remarks, anti-semitic comments, mimicked the accent of a black Caribbean colleague, he referred to Nelson Mandela as 'evil', along with comments about the 'male menopause' and constantly referred to N's stepson' as his 'gay stepson'. N had none of the characteristics commonly used to support claims. Nonetheless he won, as the law is about relating to 'characteristics', not that the claimant has to have them.

An interesting, if cautionary tale, dealing with the withdrawal of job offers should be carefully noted.

Pnaiser v. NHS England (2016) 0317/15

This case is about the shifting of the burden of proof in equality cases. This occurs when a claimant raises a prima-facie case and the respondent has to refuse the allegation.

P was a manager who in the previous two years had suffered significant absences from work due to a disability. She was made redundant but she was offered a new role subject to satisfactory references. The manager making the appointment telephoned a referee of P. The referee knew the claimant was disabled and that the absences were likely disability related. The reference was not positive, especially regarding the absences, despite good appraisals and the interview panel had described her as 'excellent'. The manager did not ask why the referee had made the comments she had.

The NHS put forward no justification for their actions. The decision of the ET was reversed by the EAT(Unusual these days without a referral back).

Lessons from the case? Clearer advice to staff about the way they need to report on absences etc., especially where there is countervailing evidence of a good performance when working. Those raising references she also, perhaps, be a bit more proactive in probing why an 'excellent' candidate was receiving such a negative reference, especially when the referee is by telephone and questioning is possible.

An 'automatically unfair dismissal' this time for TU activities provides some clear guidance.(And maybe how managers ought not to behave!)

Corrigan v. University of Bolton (2016)UKEAT 0408/12

C was the UNISON representative and was a librarian. There were to be 7 posts deleted but two created and C was considered a strong candidate for one of them. During the consultation, C asked for and got a vote of no confidence in the V-C and Pro V-C. The V-C had complained about the costs of the consultation and to draw attention to it he turned over £10 notes every ten seconds. He then produced a cheque for £400K, said to be the overall cost of the consultation. The two new library posts were then deleted and a post C was unlikely to get, re-instated. She took out a

Grievance and she was then made redundant.

The question was about the motivation of management. Here the management had not established that they had dismissed her for a reason other than her trade union activities. The burden of proof is clearly on the employer.

Although this case is about trade union activities, it is relevant for a wide range of possible 'automatically unfair reasons.

So...

THAT'S ALL FOR NOW. PLEASE RAISE ANY QUESTION ABOUT ANTHING IN GAVEL WHEN WE MEET ON 18th March.