Employment Law Exchange

Gavel

Winter 2020

Introduction

Welcome! I thought with these long winter nights you would enjoy a 'catch-up' of employment law developments by snuggling up with Gavel. Our next meeting is on 20th March-venue to be confirmed, with our special topic being developments in flexible working, but also further preparation for the important 6th April changes.

As we know, we are facing a lot of legislative, along with several important BREXIT-related developments. This is especially in terms of skills shortages, recruitment from overseas and debates over the rules to be applied and, say, whether the pay levels should be UK wide or sectoral or regional.

However, before we look at the changes and developments since our last meeting in early December 2019, I thought might be helpful to reflect on the last year more generally. But also to remind ourselves of what areas of law have remained relatively static. Let's take that first.

The law relating to job termination, whether caused by redundancy, business changes or dismissal for capability/ misconduct saw few changes, but a continuing emphasis on procedural correctness. The one major development here was the case of Djuti v Royal Mail, followed by Cadent Gas v. Singh (In previous Notes) where the courts have accepted arguments that the stated reason for termination must be the genuine

reason, even where the stated reason is plausible. There may be clues to the opposite, if procedures and the personnel involved are examined closely. Who produced the evidence? Had there been personality clashes? Who chaired the disciplinary? Had evidence from the worker gone missing? Who stood to gain from the dismissal of the particular worker? The tribunals are willing to consider evidence for a disguised reason as well as the arguably genuine reason if the disguised reason was part of the employer's decision-making.

Equality law has similarly been fairly stable, though issues around equal pay and it's reporting are bubbling up. This is not least because the pay gap between men and women remains stubbornly the same or similar to even 1970! Successful claims in race and sex discrimination remain fairly rare, though disability case law continues to show care must be taken to make 'adjustments' and to avoid actions and attitudes indicating 'detriment'. It still seems difficult for claimants alleging dismissal for 'whistleblowing' to make successful claims (Tribunals want clear evidence of all the elements of the definition of whistleblowing to be met). Though again usually an uphill struggle for claimants for age discrimination, though we do have one recent successful claim for age (See later).

Clearly, a topic that 2019 saw centre- stage was that of employment status. The saga of Aslam v. Uber continued with Uber continuing to assert that they are just a platform not an employer/the drivers are in business and cannot be 'workers' and many other arguments, most of which were lost in the CA. The Supreme Court will shortly hear the case. In dealing with a range of occupations last year there seems to be a growing acceptance of the SC decision in Autoclenz v. Belcher that documentation, for example, describing people as self-employed, purporting to deny 'mutuality of obligation' etc. etc. can be overridden by examining the practical 'realities' of the relationship. It is clearly intended that 'sham' relationships can be challenged.

Another area that continued in 2019 to be confusing is holiday pay and how it is calculated. Research suggests that most employers are still only paying basic pay for holidays. We know that paid mandatory or voluntary overtime, commission/bonuses, expenses etc. do count, so not looking at the totality of pay is inadequate. Case law from the ECJ and UK courts confirms that the aim of the law is to provide accurate replacement income so as to ensure an annual break is possible.

Some say there are problems with payroll software and the regulations themselves are not helpful. However, on 6th April 2020 the reference period will be 52 weeks, which should simplify matters and affect the way payment is made. The Harper decision is on appeal (Part-year workers-here a music teacher in a school benefitted more from the holiday pay rules compared with 'whole year' staff). Otherwise the law is settled.

Just a couple more developments over the year. Vicarious liability of employers when a third party is involved has continued to evolve and the legal test appears to be changing from whether the traditional approach which has been to ask whether an employee's conduct was 'in the course of their employment' so as to trigger employer liability is widening out or being added to a notion of accountability where inadequate care or management etc. leads to harm. We have seen liability for non-employees, for 'workers' and office holders who inflict harm. Now, for example, we may be asking, can an employer be liable for an error made by an independent occupational health provider? Or incompetence by a 'head hunter'? Or? Is a wider doctrine emerging whereby if someone is performing work for an organisation from which the organisation benefits- the employer/client can the client etc. be liable for their errors? The SC is currently determining one such case-so let's keep a beady eye on it. The implications are major if the SC decides there can be liability.

Any interesting new cases?

Well…. Yes. Especially relevant and topical is the case of Metro line Travel Ltd v. D'Auvergne and Others. (2020) UJKEAT 0214/19.

The claimants ware bus drivers. Arriva had employed them but then TUPE'd to Metro line. In the contract documentation they had references to 'meal relief payments' when there were no facilities for meals where their buses stopped at break times. The documentation involved was entitled 'A 'Summary of Prevailing (Collective) Agreements' which the employer argued when they stopped payments, was not contractually binding. They further argued that the term relating to payments was either not contractual, or had not been ineffectively TUPE'd or had been varied by the new employer.

Interestingly, all arguments failed. The right to payments had been incorporated into their contract (Which can anyway be made up of oral and written terms). The court has offered some thoughts on the basis on custom and practice. (Remember ETs can

'construct' a contract where written evidence is not there or matters can be implied). They won their case for an unlawful deduction. Interestingly also the case was presented by one of the drivers!

So, a reminder that there is sometimes a difference between what written information is provided by the employer and the 'contract of employment'. -The situation can be simpler if the employer and employee/worker both sign and, possibly add that it is a 'whole terms' contract. Alternatively, a document might well comply with statutory requirements as to the provision of a statement and yet still not be seen as decisive as the terms of the contract!

This is because the issue has been a running sore of employment law ever since 1963. An employer can be in compliance with legislation yet still the documentation may not be seen as the contract or the complete contract. The legal difference between a S1 statement and a fully binding contract remains, in theory at least valid, as does the ability to incorporate extra terms or interpret terms differently from expected.

Another contract case, which perhaps the employer was fortunate to win, is:

Robinson v. Sheikh Khalid bin Sagr al Qasimi (2020) UKEAT 0106 /19

R was employed as housekeeper/manager from 2007-2017. She was dismissed in 2017 for making allegations against her employer. It appeared that from 2007-2014 she had not paid any income tax. This ensured she had been working under an illegal contract and could not make claims. Her response then was to allege her employer did not operate a PAYE system, was 'manipulating information' and asserting she was self-employed. However, her contract stated she was responsible for paying her tax. She countered that by claiming that the £34k she received was 'net of tax' as the employer had already deducted it. They did not believe her and she lost her unfair dismissal case. A strange case…

Another interesting contract case, this time about the role of implied terms and how important they remain, though unwritten.

Q v. Ministry of Justice (2020) UKEAT 0120/19

The claimant worked in the Probation Service. Local Social Services staff considered she was a risk to her daughter. Q failed to report their concerns. She should have done. She was dismissed. She argued that her rights to privacy under the ECHR had been infringed and that it was purely an issue between her and Social Services. Information should not have passed to her employer.

The arguments failed. There is always an employed term in a contract of rather quaintly described as 'faithful and honest service' which has been interpreted to cover revealing matters affecting employment and /or damage the employer's reputation. Anyway the ECHR had no relevance, as she should have reported the matter to her employer according to her contract. The 'right decision'?

Ewart v. Oxford University (2020) UKEAT 332491

Age discrimination, i.e. typically enforced retirement or refusal to employ has traditionally been hard to make a successful claim for. The reasons put forward in our early case law-providing on-going opportunities for advancement, creating opportunities for younger staff etc. etc. have generally held sway. However, in this successful claim the employer argued that a professor, who following retirement, should not have a two-year fixed term contract renewed, was lost by the employer. It had argued that the rule was vital to ensure younger academics could have a role, but the evidence suggested no increase at all in younger staff and also a continuing need for more experienced staff. So-the theory is attractive but it has be backed up now with hard evidence. Many commentators expect now a rise in claims.

What of further legislative developments?

The battles continue over skills shortages and migration rules post formal BREXIT. However, there are still complaints about the extension of IR 35 to the Private on Third sectors, the workings of the CEST on-line status test and the whole area remains subject to dispute and controversy.

At this time it is difficult to see any significant changes-so we have to be prepared for IR 35.

There has been more action on recruitment after BREXIT. Maybe, as a prelude to the new rules we need to note a couple of things. First, maybe as result of increased graduate numbers, there has been a decline in graduate recruitment, and, second, an increase in unpaid internships. Meanwhile, although the political debate has focused on high skills jobs, employers are reporting growing problems in recruiting to medium to low skill jobs. We maybe also need to report on continuing debates around apprenticeships and the lack of support for institutions providing vocational training as opposed to university study. (The Augar Report, 2019). This seems to be an issue that will not go away without serious educational investment-and that takes time….

So, at the moment we have a £30k threshold for overseas recruitment to skilled work. The MAC has suggested this is far too high-and thinks £24k would be right, and Chambers of Commerce have suggested £20k-not least because of regional variations.

On high skill, only 500 people came to the UK in 2019 as Tier 1 job applicants. Tier 1 is to be replaced by a new label- a Global Talent Visa, designed very much for science, engineering and medical staff. This will happen from the 20th Feb. 2020. This is designed to target potential high flyers and have weighting for shortage skills. They do not have a specific job offer. Most commentators considers this will be good for non-EU applicants but bad news for EU applicants. The rate of £25k but lower for public sector shortage areas. T2 will have no numerical caps but still have the £25k salary level.

We will be keeping a beady eye on developments in the area. They seem to be coming thick and fast.

But for now, can we focus on preparing for our next ELE meeting and on contract documentation. Any queries please do get back to me. Please do let me know if there are issues/topics that you would like discussed and please now bring to our next meeting any contracts, new drafts, queries/uncertainties. Please also bring this Gavel in case there are questions/practical points emerging from it.

Cheers,

Patrica Leighton