



Employment Law
Exchange

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Date: March 8th 2019

Venue: TSSA, Devonshire Buildings,
16-17, Devonshire Square, EC2M 4SQ.

(With thanks to Val)

Special Topic: 'Pay and related topics'.

Introduction

Is everyone OK with the dates for the rest of the year? And with the Topics?

I have received some very helpful suggestions, which I will aim to include in sessions. It is not too late to make suggestions/ requests.

Our next meeting is on May 17th. Is there anyone able to host it?

And just as a taster- to remind us of some general themes currently emerging in employment law

- **First**, we are seeing quite a lot of policy development, especially following Taylor, some of which is quite radical (For example, a move to Day 1 rights; changes in the burden of proof, more 'joined up thinking, especially on enforcement of law). Much of the effort is geared to so-called 'vulnerable workers' but the consequences may well go much wider. Quite a lot of the changes, for example, reporting on the 'executive pay gap' will require more bureaucracy for employers.
- **Second**, quietly, there are changes in the administration of justice, with declining 'silos' and more interchangeability of judges and others. There must be questions as to whether the essential features of employment law might be watered down
- **Third**, we are seeing more cases going to the CA, and significant numbers in the Supreme Court. Basic principles of law are being confirmed and there is no decline in applying EU law cases
- **Fourth**, we are still seeing the effects of the 'fee regime' with few cases in the EAT, though ET numbers are rising.

1. News about and from Europe

The overall position with BREXIT is still unclear, though possibly the risk of 'no deal' exit has reduced a bit. Whatever, it seems we are still in for a long period of uncertainty, though much less so if we 'remained'.

- European election are due in May and there is a possibility of an increase in populist representation, though most electoral systems make it hard for extreme left or right parties to dominate.
- An issue around data, this time it's copyrighted material is the topic of a draft Directive that has proved very controversial. The aim is to make on-line communities responsible for materials that users might upload and there is greater control over copyrighted material. However, the filters used are so expensive, small operators in the creative industries can't afford them.
- There is increased evidence of hostility to some MNE's especially Google and Uber and efforts to find improved and enforceable regulation is top of agenda.
- Matters are focused on moves towards driverless transport. The USA is focusing on regulation of privately owned autonomous vehicles-hence Lyft and Qualcomm are well advanced. By contrast, in the EU, the priority is helping mobility and looking at public transport in the context of notions 'public space' but also encouraging other forms of mobility like walking!
- Particular EU hostility is reserved for the GAFSA companies like: (Google, Apple, Facebook and Amazon). Battle lines are being drawn but it is important to bear in mind that outside individual countries only the EU has a workable international legal system.

Case law on employment matters has all but dried up-it is hard to think why. Also, more and more cases are being heard and decided on in French.

2. UK Government Policy And Law

At our last meeting we spent a lot of time on the Governments response to the Taylor Review (pp 4-7). There seems to have been some further movement, though many experts seem underwhelmed by many of the proposals. As I said, we have especially noted some of the procedural proposals and enforcement changes-it is not always providing individual rights that brings about the greatest change, for example, the proposal that 'continuity of employment' only be broken by a month without working, not a week. This is a major and probably controversial proposal, as it would considerably widen access to unfair dismissal and redundancy. In the meantime research and other materials continue highlight some of very difficult working conditions of those in 'precarious work'.

- **Naming Scheme for unpaid ET awards.** We now know that awards can be registered and if unpaid after 42 days and if for over £200, the 'naming scheme' kicks in. The 'naming', as with the NMW takes the form of a quarterly press release on the GOV UK website. Employers are to be given 14 days to explain any exceptional circumstances for the non- payment (I was checking GIOV UK for NMW 'naming and shaming' and found it very hard to get any information. The system is certainly much lower profile than the 'equal pay gap' processes. In any event, the GOV website is not very user friendly, so one wonders if the culprits will be found out?)

- **Recruitment guidance has come from the Home Office regarding BREXIT**
It looks like this;
 - If there is a **Withdrawal Agreement** in place (To 2020 or 2022), we will have an Implementation Period, **(IP)**
 - All people living here before the end of the period have settled status, providing they have lived here for 5 years continuously,
 - If they were here before the end of the IP but do not have the 5 year residency, they have pre-settled status and after 5 years they can apply

- Close family members can join them providing the relationships were existing before the end of the IP
- They can access work, health care, social protections etc.
- Those who have permanent residency are encouraged to apply

- In the event of there being **'No deal'** there is no IP
- The Settlement Scheme will apply if here on 29/3/19
- They can apply up to 31/12/2020 relying on their EU passports; they can also apply for Settled status and have close family rights until 29/3/2022
- There is then an end to free movement, beyond a 3-month stay, though people can apply for European Temporary leave to Remain and decisions will be based on skills needs.

- **Government White Paper December 18th 2018**
 - The key proposals here are;
 - There should be a single *uncapped* route for skilled and highly skilled workers
 - Employers will still need to be sponsors but there will be no need for a resident labour market test
 - Aim is to have visa's sorted within 2-3 weeks
 - The £30k salary bar will be retained
 - There will be a separate scheme for unskilled labour allowing access for up to 12 months and for specific countries. These workers will have no rights to bring in close family members or access to our public services
 - There will be an 'on line' right to work check available to employers so they will not have to rely on paper documents. This seems only to be available for non-EEA people who have biometric permits.

Questions/comments?

- **ICO publishes Guide to Data protection**

There are 5 Sections;

- Introduction
- GDPR
- Enforcement-
- Intelligence Services processing
- Key themes.

This is a hugely detailed document. It also emphasises that the ICO recognises the need for more guidance.

The key themes include;

- Special protection for children and their data-children may not appreciate risks
- Vital to act fairly
- Vital to have lawful basis for keeping/using data, eg consent. Only children older than 13 can provide consent
- Otherwise need appropriate adult consent
- Communications need to be understandable by children
- There is a very important section on sorting the contracts between data controllers and processors. The Guidance here looks good

The ICO emphasises that it is developing other special areas for guidance, e.g. political campaigning, data sharing, journalism and security

- **Government response to the Annual Report of the Director of Labour Market Enforcement**

- The report has to contain information on the 'scale and nature of non-compliance' and likely future patterns
- It urges the three enforcement bodies (HMRC, Agencies and Gang masters bodies) to learn from each other
- BEIS and EAS should consider whether the enforcement bodies be able to impose civil penalties

- HMRC should take over enforcement of 'holiday pay' for vulnerable workers(So no individual claims?)
- All should review the Guidance on the NMW
- **BEIS response to Consultation on salaried workers and salary sacrifice.**
 - This calls for a new Consultation on a definition of 'salaried hours of work'. Currently hours are averaged over a year but pay is regular but the rules only apply if pay is made weekly or monthly. Is more flexibility required?
- **Government Response to the Women and Equalities Select Committee Report on Sexual Harassment**
 - This accepts the need for a stronger evidence base.
 - It also accepts that the matter should be taken more seriously, with a Statutory Code of Practice(Implications?)
 - Should widen the scope of protection to 'workers' and law should apply regardless of who the harasser is-though the government response I did not find very clear
 - What of interns and volunteers? No 'they can claim under the Protection from Harassment Act and the HASWA!!
 - Interesting responses about the role of HSE-should link harassment with their role and also see links with Public Sector Equality Duty
 - The government rejected ideas for extending greater protections to vulnerable workers, along with lengthening the period within which to bring a claim. Generally, it was very cautious on extending rights, though the reasons were not that clear and the alternative rights they said people have are not easy to enforce or have other limitations.(How many claims have there been under the Protection from Harassment legislation?)
 - Though it did see a need to reflect on NDAs
 - And saw that professional associations could have a key role.
- **And finally! What about flexible working? What do we know?**

Working Families has just published its **Modern Families Index for 2019**.

The findings make interesting reading, for example;

- Although 86% of parents want to work flexibly only 49% can: 10% reported that they couldn't because their manager didn't like it
- More men than women, senior rather than junior staff reported they gained control through working flexibly. Those who didn't said the demands of the work, especially hours, were to blame.
- 44% of parents take work home-32% of them to keep their manager happy
- There were differing view on the extent to which technology had helped
- Working flexibly does not necessarily lead to improved well- being. Poor well being was reported by Millennials, in particular

3. Case Law From The UK

3.1 Contracts and related issues.

The legal world has been abuzz regarding employment status Last time we looked at the decision in **Uber v. Aslam and Others** where the CA held that the drivers were, indeed, workers. The court was very critical of Uber's obfuscation and time wasting they have appealed to the SC, that has agreed to hear the case. This will likely coincide with the Taylor proposals being debated. (It calls for a statutory test etc.) .

The way the wind is blowing seems to be that 'mutuality of obligation' is being downplayed, or at least having main relevance for continuity of employment. Some think the 'agency arguments' might still have life and there is debate as to whether we should decide according to legal 'tests' or 'approaches'.

We then had an interesting claim by Jess Varnish, the Olympic cyclist who alleged that British Cycling had unfairly dismissed her when it dropped her from the British team for the Rio Olympics. She said it was because she had complained of sex

discrimination etc. against some coaches. She was not held to be an employee, despite being subject to incredibly high levels of control. This case shows how wide the 'employment status' debate has gone and therefore the extent to which organisations should take responsibility for their actions against individuals.

At the same time, unions representing self-employed workers are seeking recognition of the union by applying to the CAC!

3(b) Equality case-law

At a time when many 'bog standard' areas of law are producing very little case-law-sometimes because so many cases are now being withdrawn, this area of law has produced some important decisions recently.

The cases continue to show that winning a discrimination case remains very difficult.

Here the issue was one of parity of treatment,

Olalekan v. Serco (2019) UKEAT 0187.

O was a black prison Custody Officer. He was dismissed following an assault on a prisoner (He hit him on the ground three times when allegedly he was restrained).O he argued white officers who did the same thing had not been dismissed whereas three black officers had been dismissed..

He lost at the ET, the ET accepting the circumstances of the assaults were different. He appealed on the basis that the ET should have considered an hypothetical comparator, the investigation into the incident was too limited, and there was no reasonable appeal. Sadly for him, the case was poorly argued and anyway the EAT said the comparator arguments should have been raised during the internal

procedures. Although the EAT recognized that insufficient attention was paid to O's good record, the fact that the employer said they would have dismissed a white officer on the same facts was very telling and won the case.

Another race case is that of;

Royal Mail Group v. Efobi (2019) EWCA Civ 18

Efobi was born in Nigeria but held an Irish passport. He was a very well qualified Information Systems expert. He worked as a postman for Royal Mail but applied for 22 jobs in the Information Systems area, He lost his claim in the ET, though the tribunal was very critical of the behavior of some managers.

On the company's application form there was no need if you were already an employee to put down your place of birth, however Efobi did fill it in. The recruitment process was quite complex, with lots of tests. There were also, allegedly, many changes-interviews changed from face to face to telephone, jobs being 'pulled'. He alleged that there was 'systemic, subtle discriminatory bias embedded in the process'.

He wanted to shift the burden of proof, for which had, following Igen v. Wong etc. to raise an inference that the treatment of him was because he was black. He lost in the ET but won in EAT where the court accepted there was enough data from which to infer possible discrimination. For example, no other Nigerian had been successful. And the fact that the recruiters had known of his background.....

The CA allowed the employer's appeal. To raise an inference there needed to be more data on the successful candidates. Even if they were non-black that would not be adequate. They found no evidence of systemic racism and suspected that even if he had got through Stage I he would have lost when the employer had the opportunity to rebut it.

The next case is on religious discrimination. Although very different from the so-called 'gay cake' case involving alleged sexual orientation discrimination but with a

religious backdrop to it, many had worried that then the NI decision would restrict claims. Maybe they were right.

Gan Menachem Hendon v. de Groen (2019) UKEAT 0059

G was employed at an orthodox Jewish nursery. She had been employed for four years. At a BBQ organized by the nursery, which she attended along with her boyfriend, he was overheard saying that he lived with her in Pimlico. The nursery considered this disclosure would cause serious harm to its reputation parents would withdraw children etc. She did not consider that her understanding of Judaism had been infringed, whereas the nursery did. She was told she could stay if she lied about the cohabitation. She wanted an apology. (She had been told that an investigation had taken place by a 'panel', but in fact it was very brief and by one external HR consultant)

She won at an ET but lost at the EAT. She had to show she had suffered a particular disadvantage because of her religion. But here they shared one religion-it was just the interpretation that was different. You can't bring a case about religion, they said, if it is about the tenets, i.e. views on co-habitation alone.

Hmmmm. What are your thoughts? What would have been the position if she had claimed just for unfair dismissal? Could the employer still have defended it?

We now have an equal pay case-much in the news.

Brierly v. ASDA Stores (2019) EWCA Civ 44

The case involved 30k claimants. They were mainly women working in stores and claimed equal pay with mostly men working in distribution centres'. Asda argued that they could not compare themselves as the stores and centres' had very different roles-one was a cost centre, the other income -generating; retail was not covered by collective bargaining whereas the distribution centres were.

The CA rejected these arguments and asked whether there was a 'single source' for terms of work and whether the terms were 'broadly similar'? Applying long

established case-law such as Lawrence v. Regent Offices and Leverton v Clwyd, they won. It probably helped their claim that ASDA/Walmart is a notoriously 'top down' company.

And now for a '**whistleblower case**'

Chumbar v Hestia Health (2019) UKEAT 0229

The case combines claims for disability discrimination, wrongful dismissal and whistleblowing.

C was disabled with severe arthritis. Despite this causing him severe mobility problems he was told not to use a lift and had to climb up two flights of stairs. The employer was well aware of his problems. He was a carer in a care home. One of the residents was distressed as he had soiled himself. C dealt with him and reported that other staff members had failed to react and had failed to treat the resident with dignity. He contacted the CQC, who passed it on to a local safeguarding team. There was then an argument in the home with very strong language used. He was dismissed. He part won at ET but won at EAT. There were no reasonable adjustments for his disability and the EAT accepted that he had been dismissed for the whistleblowing which the employers were trying to cover up.

3.3 Termination etc.

We have a rather simple, though interesting TUPE case, which concerns the attempts of employers to use TUPE to 'disguise' what was really going on/

Hare Wines v. Kaur (2019) EWCA Civ 2016

K allegedly had a poor working relationship with a colleague. There was a TUPE transfer to another business, but K told by letter on the day of the transfer that she was redundant. She had in no way objected to being transferred. It was held that her dismissal was automatically unfair and she was awarded £16k. It was clear from the facts that the transferee, to which the colleague had transferred did not want her. *'the transfer was no more than an occasion for dismissal'*

Further Actions