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# **Introduction**

This is an action-packed edition and I hope you will find it helpful. You will have read about the dramatic Supreme Court decision regarding ET fees, but the implications maybe need a careful look at. They are set down later in this Gavel.

Let’s look at some **basic things first:**

* Our **next meeting** is on 15th September 2017. Its **Special Topic** is scheduled to be Dealing with Allegations (Harassment/bullying etc.). You may have some more urgent concerns regarding a matter we could usefully discuss. If so, do let me know, as it is not difficult to make changes. At present we do not have a venue for this event. If any member is able to offer their premises, please do let me know.
* The **ELE Guides**. I want to confirm with you that we have Four Guides on the website on the basic legal principles applying to core HR issues. (One is only as yet in ppt form). The three are;
* A Guide to eLegal Sources for Employment Law
* A Guide to Recruitment
* A Guide to Contract Law
* A Guide to the Legal Issues Relating to Performance Management

The Guides can be downloaded from the Member Zone on the website (Password: **equalpay**) and if you wish, customised for your organisation.

Website: www.employmentllaw exchange.co.uk, just in case you had forgot. It has been updated very recently).

I had thought that the Guides would be useful for trainees or new staff, as they are written in what I hope is an accessible style. The references to cases are taken from your Notes, so if you want to follow up a reference (Using the Legal Sources Guide!!) you can check your Notes over the last year. The Notes are anyway on the website.

I would really welcome feedback on these Guides and suggestions for how they might be improved and for topics that could be added.

* A Special meeting for **13th October 2017**. This is a unique event and planned as part of the European Freelancers Week activities. It will take the form of Round Table between HR professionals (You!) and freelancers/contractors/IPros. The idea is to explore mutual expectations where people are recruited and employed on a non-employee basis. My own research tells me that there is much room often for uncertainty, confusions and even conflict. It is intended that as an outcome of the event (To be held in Docklands) we will, produce a **Guide to Best Practice** in the area. The event is at the planning stage, but I am inviting some interesting people, policy-makers and others and am keen to have a good ELE presence. If there are people in your organisation who might also be interested please let me know.

**Now for some other News**

1. **The Pay Gap**

We are now seeing the publication from some employers regarding the Pay Gap between men and women. Perhaps unsurprisingly, the public sector gap is revealed as less great than the private sector. For example, the Department of Education median pay gap is 5.95, with more women than men in both the highest pay quartile and the lowest. By contrast, at Virgin Money the gap is 32.5% and at PWC 33%. These reports are well worth looking at for how data is presented and the Commentaries. We are expecting a similar report from the BBC!!!

1. **The ET Fees decision from the Supreme Court**

Many have been surprised at the outcome of the appeal by Unison that the imposition of fees for ET was unlawful. It will be recalled that the CA had stated that they were only so if the outcome of the change was to make access to Et’s ‘impossible in practice’ (As opposed to more difficult.).

The Supreme Court, where some powerful barristers represented the Union, dealt with two substantive questions (Others were withdrawn during the hearing). First, was the change itself lawful, i.e. was it properly authorised by S 42 of the Tribunals, Courts and Enforcement Act 2007, and second, whether the change impeded access to justice. There were other particular questions, dealt with Lady Hale, on the assertion that the changes operated in a discriminatory way against women.

The decision itself, which was unanimous by seven judges, is feisty, to say the least. The first part (It is 40 pages long-to read it in full, access the Supreme Court and check out ‘decided cases’) deals in great detail with the change in June 2013, the A and B categories and the direct effect on claims. The statistics-as we have discussed at ELE, make stark reading in terms of the decline, especially in category A claims.

At the heart of the decision, the Court sets out its reasons for deciding that the change was unlawful. The Court relies on Magna Carta, Donaghue v Stevens and so much more ‘classic’ legal authority. The really important statements are as follows:

* The administration of justice is not merely a public service like any other.
* The courts are not just providers of services to users.
* That the services of courts are not just of value to the users.

They went on to state that people should have ‘unimpeded access’ to Justice. ‘Without access, laws are likely to become a dead letter’. The Court also thought the decision by the government in 2013 contravened EU law, though the point was not discussed at length. Overall the Court was scathing about the impact of fees, especially on poorer claimants, coupled with a poor government performance on enforcement of judgments (Only 53% getting the compensation in full and recent changes had made little difference).

**What are the implications?**

Clearly, the abolition now of fees will make more able to claim. It is likely claims will rise, though the ACAS Conciliation Scheme remains in place. The increase is likely to occur in the ‘cheaper’ A claims, such as holiday pay, unlawful deductions and attitudes may well change towards settlements. Potential claimants may well be less wiling to settle and hold out for higher payments by way of settlement.

However this re-enforced notion of ‘impeded access to justice’ may have far wider implications.

We have noted at ELE several times recently, that more subtle barriers have been put in place to reduce claims. The most obvious example is that of the three-month limitation on claims for unpaid holiday pay. I have always said to you that this was a risky strategy by the government, because paid holidays are a health and wellbeing measure and should the issue be raised in the ECJ it was likely to be successfully challenged. Now, of course, the issue can be raised here on the ‘access to justice’ principles outlined in the Unison case. I would also see the provisions for claims under the Agency Work Regulations, whereby respondents can easily delay claims, and other ways in which claimants have not been able to come forward. As you know-there have been only three claims under those Regulations since 2011!

I am not saying the ‘floodgates’ will open, but this is a momentous case where clear markers have been set down. If government is sensible, it will reflect on the case and note that the ‘rule of law’ has been clearly restated and courts are alive to the fact that denying access to justice can come in very subtle forms.

1. **The Taylor Report on Modern Employment Practices**

In theory, few topics of employment law could be more important than the major changes affecting the nature of employment relationships in recent years. We have seen the rise of the so-called ‘gig’ economy, whereby work is accessed and undertaken through digital platforms, the significant rise in self-employment, the beginnings of robotisation and AI and many other developments.

A massive review has been on-going since 2016 regarding these changes, with meetings, debates, written submissions. So what are the outcomes?

There are a number of recommendations, but little optimism that in the current climate many, if any, will be implemented.

The main recommendations are as follows:

* Some of the notionally self-employed will be renamed ‘dependent contractors’, so long as they are ‘controlled and supervised’ by the client.
* They will need to be provided with an equivalent of a S 1 Statement and will be entitled to the NMW, sick pay and holiday pay but will be taxed as employees
* There will be a new statutory definition of employment status
* Workers on zero-hours contracts will be able to request fixed hours after a year of employment
* Agency workers will be able to request a contract with an end user if they have been on assignment there for at least 12 months
* Status issues to be an ET fee free zone (Ah well-too late was the cry).

Overall, this is a very limited response by Taylor, though most employers and their organisations have responded positively. Others have been less positive, see many of the proposals as weak at best and unlikely to lead to improvement at all.

So: what should we think? Clearly, the issue of status, worker status and sham contracts is still a hot topic. The extent to which we will see practical outcomes must be doubted, not least because Taylor was only dealing with employment, as opposed to fiscal law. I don’t think ELE members should be worried about this. However, the major problems do remain and sometime they will need to be responded to.

Have a lovely summer. I am off to the athletics in London next week. Look out for me in the 400 metres hurdles!

Pat