

Employment Law

Exchange

Date: 8th DECEMBER 2017

Venue: GoodmanDerrick, 10 St Bridges Street, London, (Thanks to Jean)

Special Topic:

“Health and wellbeing at work”

1. **News from Europe.**

Estonia now holds the Presidency, i.e. the policy directions of the EU. Their priorities have been the co-ordination of social security regimes, the new Social Pillar, posting of workers (I.e. supply of workers cross border, mostly in construction and often supplied through UK companies), \*the Carcinogens and Mutagens’ Directives (Updating existing laws), responding to the harms caused by alcohol, and the cross border movement of health data. (Quite a health and well -being agenda!).

At the Employment etc. Council Meeting on 7th December the Council will consider amendments to the Equality and Work Life Balance Directives and will likely reach agreement on the revised Posting of Workers Directive. It is thought that c 1.2 million workers will be affected. They will be entitled to equal pay with equivalent ‘host country’ workers, there will be a normal 12(18) months limit to a ‘posting’. The employer remains from the posting country but they must pay according to the rule set out above. This, in reality, brings posted workers in line with agency temps.

The Estonians are keen that the law should not be too cumbersome, though it is explicit that ignorance of the rules is no defence for an employer.

Given that the Withdrawal Bill, currently being debated in Parliament requires continuity as regards case-0law from the CJEU etc. post BREXIT, the case law from the court remains very important. We have at least one very important case:

**King v. Sash Windows Workshop (2017) C- /16**

(We considered the Opinion of the A-G earlier this year) K was a Consultant and was paid by commission. He had rejected suggestions over the years that he become an employee. He took holidays but they were always unpaid over the 13-year period he worked for the company. When he stopped working for the company he claimed for unpaid holiday pay as a ‘worker’ for the full 13 years. He had not asked for pay during his time working. The UK ET had accepted he was a worker and, in principle could claim. The CA referred the case to the CJEU. It was accepted that entitlement to holiday pay could be carried over, for example, due to sickness, but this is limited, it is thought to 18 months.

Could he claim? How much could he claim for?

The CJEU referred to the European Charter of Fundamental Rights, which requires that if EU rights are denied there should be ‘effective remedies’. He won £27k compensation on the basis that for 13 years he had been denied his rights. It was irrelevant that he had not asked for leave, or that the employer did not know he was covered by law as a worker.

So: the cases now return to the CA for implementation. The decision seems clear and also seems to have very wide implications.

* First, clients of self-employed people need to be clear about the criteria for ‘worker’ status. (And to note the proposals in The Taylor Report for changes to the definition that we considered in November. Specifically the proposal that ‘personally executing work’ requirement be removed)
* Second, the need to be clear about the position on holidays. The simplest thing is to agree how and when holidays are to be taken. It is inevitable that if self-employed people are to gain access to more social protections that they will be thinking this way themselves, especially if tax changes kick in
* Third, the issue of the back pay is a tough one. I have been saying for a while, not least in terms of equality rights that attempts by government to limit remedies was contrary to EU law. It has not yet been tested here but that is one issue the CA will have to deal with
* Fourth, holiday entitlement, as you know, is part of health and safety legislation. You will need to bear in mind all the other aspects of both that law generally and the working time provisions in particular, e.g. as regards rest breaks.
* And to note generally that there is a move towards including. Marginal people’, including the self -employed within the employment and fiscal law framework.

**Espadad Recio (2017) C-98/15**

This is a relatively simple decision of part-time work and the application of the Directive that requires ‘no less favourable treatment.’ plus the Equal Treatment directives. Most workers worked as cleaners, doing two and a half hours for 3 days a week and longer on a Friday. The claimant worked only on one day a week but for many hours. She claimed that those who did more hours on one day a week (‘vertical part –timers) were treated better terms of pay and social benefits for unemployment benefits as they had fewer ‘workless days’. The Court decided that if the ‘verticals’ were predominately women a claim might be possible.

(It might be just worth checking whether there are any patterns of part-time (And other ways of working) that might lead to less favourable treatment (Public holidays will have been dealt with?)

**Marques da Rosa (2017) C-306/16**

This case concerns the Working Time Directive’s requirement for 35 hours consecutive rest break per 7 days. The claimant worked in a casino (3pm to 3 am on weekdays and 4pm to 4 am at weekend. He often worked weeks without a break. Despite the nature of the business, the CJERU held that the law had been broken. There is no flexibility, in that you look at the 7day period and check that within it a 35-hour break has happened.

**Note.**

Over the years, especially when dealing with health and well-being issues, the CJEU has been robust in applying the law strictly. A break has to be time when you are not ‘at the disposal’ of your employer. Whether it has been sleepovers, holiday pay or breaks, the law has been firmly applied. The wish of an individual not to take a break, a pregnant woman not to change her role/work, the wish of to work high numbers of overtime hours has not been seen as relevant. The law is there to protect people!

1. **Government and legal Developments in the UK**

Many of the developments have involved directly or indirectly matter of tax, often involving employment status. Some we have considered before, but it is clear from the Autumn Statement that tax revenues have fallen and the government is keen to increase the tax ‘take’.

So, here are some highlights.

1. There has been some slight increase in the National Living Wage-£ 7.83 from £7.50: for those 25+then down to £4.20 for 16/17 year olds. Comes into effect in April 2018
2. There appear to have been some delays in the changes to NIC contributions announced earlier
3. The will be a Paper, following up Taylor on a statutory test for employment status
4. Employee expenses have also been under consideration. In 2018 there will be a Consultation on self-funded training, designed to extend tax relief for education and training. The Government is considering further discussions about the workings of the law on employee expenses more generally, but especially for travel and subsistence. I think the aim is for simplification.
5. It is likely that the most contentious area will be the plans to amend the IR 35 rules, whereby a self-employed person is supplied to a client via an intermediary. This could be a PSC, an agency, an umbrella company etc. The language has changed-the Budget referred to ‘disguised remuneration’ where the pay was received via a close company gateway. There will be a Consultation in 2018 on the extension of the ‘deeming rules’ for the self –employed when working for a public sector employer to the private sector. In other words, all self-employed people will be ‘deemed’ employees for tax purposes. The controversial aspect of this is that the government sees no need to pro ide access to employment rights for this group.
6. An interesting development is the promised publication of another Consultation on Corporate Tax and the Digital Economy. As will be known, there has been a great deal of concern raised over practices which enable very successful digital companies to register for tax purposes in low cost or even in tax havens. Yet, their income is generated across the world. The OECD is leading the share here. It is suggested that tax should be raised where the companies’ undertakes its value generating activities’.
7. Of greater practical interest is the recently published Research Paper 7/17 by ACAS on Early Conciliation. There is a special focus on those that after Conciliation neither settle nor go to tribunal. What happened?

It appears that most claimants had tried to resolve a problem internally, including through using the Grievance Procedure. Some felt that they were ignored during this process. The reasons for them then claiming were;

* They felt that the employer had behaved especially badly
* They were nearing the end of the limitation period
* Trade union or family/friends direct encouragement to claim
* A ‘strong sense of injustice’

Many reported they had not gone ahead after a ‘failed’ conciliation, as they were frightened of antagonising their employer. However, the majority did begin the process with a view to achieving a settlement (Rather than winning a case). Some of these people were unhappy with the role of ACAS, whom they considered ineffective. (Agent of the employer?). The perceived barriers to going ahead and claiming were, unsurprisingly, cost, a lack of confidence in success (They saw employers having far more power) and the emotional impact of litigating.

The views of ACAS were generally positive, though less so if they saw ACAS as ‘their’ agent. The report concluded by recommending better communication systems, better management of expectations, improved and regular feedback.

The report is very interesting in the light it shines on the perception of potential claimants at critical points. The conduct and attitudes of employers are clearly very important, as potential claimants seem well versed in picking up ‘clues’.

1. We have agreed to spend some time on ensuring that Gender Pay Gap Reporting is well in hand (Even where a business is smaller than those required to formally report, it is likely that pressure will mount to provide comparable data)

Last month the government reported on a survey of 900 employers on what they have been doing in terms of the legislation. It is 90 pages long as is the result of a telephone survey. It is a very interesting, yet somewhat concerning report. Some of the key findings are:

* 98% reported ‘awareness’ of the law; 48% reported they had a good understanding of the regulations, though of these many were less knowledgeable than they thought when questioned. Many had confused the law relating to equal pay, with the gender pay gap. The GPG is based on hourly earnings etc., whereas equal pay is based on individual jobs that should be paid if they are ‘equal’, ‘broadly similar or of ‘equal value’.
* Awareness was higher in the public sector and the largest employers
* The researchers concluded that; ’in reality levels of understanding were mixed and somewhat superficial’
* One third had undertaken a; dummy exercise; most had sent information to the top of their organisation and in some cases HR had revised some practices (38%)
* Only 11% had published results, mostly public sector bodies
* There was evidence of much complacency, a reluctance to publish a plan. Inso far as changes have occurred they have been mainly to increase flexible working and FF policies. 32% felt they did not need external advice or support and only 20% in tend to report beyond the minimum. Many were unsure about publication generally
* It’s a good read ([www.gov.uk/government/publications](http://www.gov.uk/government/publications))

1. One or two other bits of news. First, that the government has announced ‘settled status’ for other EU national who have been here for 5 years. Second, there has been a dramatic fall in apprenticeships-59% fall in starts. It had been thought that the levy would encourage apprenticeships. 58% of employers have signed up for digital accounts-42% not. Many employers have reported concerns about the requirement for the 29%’off the job training’

10. Some recent research from FreshfieldBruckhausDeringer has reported that 58% of managers would not report wrongdoing as a ‘whistle-blower’ for fear it would damage their careers. Rather ironically, the reluctance was especially acute in the Arts and Culture sector!

1. And finally, ACAS has reported a 10% rise in calls for support on grounds of pregnancy and maternity discrimination. (Don’t forget, as we discussed last time, what a failure to conduct a risk assessment can= discrimination)

**3. Case law from the UK**

Not an extensive list but some interesting and practical cases.

**3.1 Contracts and related issues.**

As many will know, the latest appeal by Uber re holiday pay and worker status was unsuccessful.

**Uber v. Aslam and Farrar (2017) UKEAT 0056/17**

The case was run again on the basis that Uber was simply the agent for the driver in contacting passengers. Always an unconvincing argument, it failed again and the drivers were held to be ‘workers’. Remember they did not claim to be ‘employees@, though many feel that had they done so they would have been successful.

Uber has appealed, i.e. to the CA, where they think they may get more support, but it is likely the case will simply go to the SC, or?

**Further Actions**