

Employment Law Exchange

Date: November 8th 2019

Venue: GoodmanDerrick, 10, St Brides Street, EC4A 4AD.

*(Thank you so much, Jean)*

Special Topic: “Legal aspects of dealing with worker misconduct, (or alleged!)”

**Introduction**

Just a reminder of a few things:

First of all please sign up for the special session on December 6th 2019 at the Canary Riverside Plaza Hotel. Hopefully, a fun as well as productive session, the special topic is Wellbeing, Health and Safety. (So mind the over- hot mince pies).

Second, later this month I shall be sending out invoices for next year. There is no change in fees, it is much simpler to keep the numbers basic-math is not my strong point!

Third, we need also to think of the topics you find most interesting/useful for next year. Please give it some thought.

Fourth, don’t forget to use the website for back numbers of Notes but also the ELE Guides.

**1. News from and about Europe**

Well there is no change re BREXIT but a General Election. Meanwhile, life goes on in the EU, though UK cases are not being referred to ECJ, as maybe would be expected. The European Labour Authority has now been set up in Bratislava, Slovakia with a special emphasis of ensuring EU laws relevant for cross border activities are effective and enforced. (17 million EU citizens live elsewhere in the EU from their home state). The job of the ELA is to provide information and support. But also from an employment law perspective to ensure the basic employment protections of the Pillar of Social Rights are complied with in all parts of the EU.

We are still part of various EU schemes, e.g. for mobility, such as the ERASMUS Programme and the European Social Fund (ESF) and whatever happens with BREXIT it is very likely we will still be participating in many employment schemes, just as Norway, Switzerland and, now Northern Macedonia do.

A priority in the EU is vocational skills with considerable investment in training programs. It is reported that 80% of young VET ‘graduates’ get work immediately on completion of their courses. (The Augar Report, 2019 on Post 18 Education and Training in the UK has made some important proposals for us, such as shifting money away from universities to colleges and creating a unified post 18 structures. The proposal to lower university fees as well has got universities countering the proposals but it must be borne in mind that we are the only EU country to charge university fees for state provision and with technological change there is probably a pressing need, in order to support our skills base, to give this topic priority here also).

It might be noted that the EU has from 1st November a new Commission. New agenda’s?

Just a quick mention of a controversy re: BREXIT. This is the leaked government document on 29th October that BREXIT will provide the opportunity to reduce employment protections-a matter denied by the Ministers but nonetheless, it may be that post BREXIT there will be many changes. (We keep hearing rumors about Working Time but they are rarely specific but there may be other rights that are costly or difficult that could be in the sights of government). The issues around employment are not in the binding part of the Withdrawal Bill/Agreement. It appears that the government does not see any need for continuing participation in policy development, and that equals no need to implement any changes. We shall see! Rights given are rather hard to take away!

**2.Government News and Policy Development**

The first thing to say is that it has been especially hard to track down developments. Very few proposals have been passed and received the Royal Assent so we have little that is concrete. We have had a Parliamentary Session lasting from June 2017 to now. If Bills etc. are not passed they are usually ‘lost’ i.e. they have to start again.

What has been going on?

It is now over two years since we had the Taylor Review in 2017 and well over a year since the Government’s Responses to the Review. You will recall it was mainly about precarious work, gigs, agency working, and employment status. It will be recalled that following the Review we had four Consultations on different aspects of the proposals. The only aspect of the proposals that has really moved on is a semi-detached series of ideas about the effective enforcement of employment law. (We discussed this at September’s ELE).

Meanwhile, the number of, say zero hours contracts continues to rise.

A similar fate has befallen ideas to help health issues. We had a Report-Thriving at Work and then ideas about improvements to people returning to work after illness and some possible ideas for further changes. On 29th October 2019, the Government published Disability, Mental health and Well -being in our Workplaces. The government wants better data on this and will likely establish a formal reporting system (As a prelude to changes in law?)

On the same day, a Consultation was published by BEIS on whether employers should be required to produce references for employees? What do you think?

We are still waiting for information of clarifying maternity provisions-it will be recalled that concerns had been raised about aspects of rights for pregnant women.

We have had publications on the impact of robots on care work and how it will help; plus publications on the impact of climate change.

It is rumored that possible tests for employment status are being devised.

And is the ethnicity pay gap the next are for legal development?

But what is clear?

Parental Bereavement (Leave and Pay) Act, 2018 is in force. It will be recalled that this is to provide protections to employees (Only) who have suffered the loss of a child, or a stillborn baby. They are entitled to two weeks leave paid. This pay is either c£140 or 90% of pay. Whichever is the lower? the leave has to be taken within a specified time. How will/is this working out?

It seems the expansion of the IR 35 rules are set to go ahead next April as regards the private sector. I assume this could change if we have a change of government? What questions should we be dealing with? What can we learn from the public sector?

We know that S1 Statements have to be provided for ‘workers’ (How is that working out and how might it be linked to the ‘status definitions’ more generally?). Are you clear about where we are on defining employment status of workers?

From 6th April the Employment Rights (Employment Particulars and Paid Annual Leave) Regulations will be in force. We will consider this in more detail in early 2020. However, we do need to note the basic changes, which may well be more significant than just adding topics to S 1 Statements. Please note that there is as yet no finalised version of the Regulations. The key provisions of change are:

A statement is a Day 1 right for all employees and workers.

The information should be:

* In a single document.
* Should tell you how long a job is expected to last or is a FTC
* Notice periods
* Eligibility for sick pay and for other paid leave
* Information regarding a probationary period
* ‘Remuneration’-not just pay but vouchers, bonuses, and benefits therefore with a monetary value
* What days you are expected to work and whether flexible
* (Training entitlement-in some documents but not others)

***Implications?***

And finally, the Government published on 21st October a Consultation on Designing self- and co-Regulation Initiatives: Evidence on Best Practice. This was only days before the Grenfell Tower Report, which highlighted the regulatory failings

**3.Case Law From The UK**

**3 (a) Contracts and related matters**

First of all two rather unusual cases on employment status;

**Gilham v. Ministry of Justice) 2019) UKSC 44**

G was appointed a District Judge in 2006 and taxed via Schedule E. She raised concerns about excess workloads, security, administration errors and cost cutting. She argued she was bullied and undermined by colleagues and other for ‘whistleblowing’. He health suffered and she claimed disability discrimination.

Her ‘employer’ argued she was, as a judge, an office holder and not covered by worker or other rights. Whistleblowing is only UK not EU law.

She won and the reason for this is important, despite the rather strange facts. It was held there was no intention to exclude office holders from legislation. She could claim worker status (If not employee status) as she was personally executing work and not doing it on a B2B basis. So: even if legislation does not expressly refer to workers (Or other groups?) it is possible to claim if you were not expressly excluded. This is a bit revolutionary!

**Pontoon Ltd v Shinh and National Grid (2019) UKJEAT 0094**

The claimant was supplied by an agency to work for Pontoon to work for National Grid. The contract could be ended at any time for any reason. He alleged he was a whistleblower. National Grid told him to leave, as he was ‘uncooperative’ there was then a meeting between Pontoon and the agency and his contract with the agency was ended. He was also blacklisted by Pontoon and the Adecco Group.

The concerns he had raised were about the security of smart meters. He lost the claim but on a refusal to let him amend his claim. Had they allowed it, the agency would have been liable, maybe, for a whistleblowing claim and yet had no part in the decision. Here we have an interesting Working Time case that is not to do with holiday pay!

**Pazur v. Lexington Catering (2019) UKEAT 0018**

Here is another agency situation. P was a kitchen porter. He was refused a break on a long shift by one of Lexington’s clients He then refused to go back to the client. He was dismissed by the agency. Was this a detriment and could he claim for wrongful dismissal? Yes, he won both claims. (He could also have brought a health and safety claim).

So here taking ‘direct action’ did him no harm.

**3 (b) Equality laws**

**Bessong v. Penine Care NHS Trust (2019) UKEAT O247**

B was a mental health care worker. He was badly assaulted and insulted by a patient on racial grounds. It was accepted in the case that the employer had failed to record racist incidents. There is now no explicit Third Part liability on harassment etc. cases. Despite the patient having well known racist and violent tendencies the case was lost. (This approach is so much in contrast with a recent ECJ case where an employer declared he would not employ a gay person. And even though there was no vacancy at the time, this was held to be unlawful.)

It is also worth noting that in whistleblowing cases that to claim successfully, the alleged detriment must link directly to the whistleblowing. Proving complaints were made is not enough; they must ‘trigger’ the employer’s action.

The next case highlights some of the problems of the effective use of flexible working, performance management and possibly arrangements to assist those with health problems. The aims are laudable but……….

**Solomon v. University of Hertfordshire (2019) UKEAT 0258**

S is a black woman who was an internal auditor at the university and had three very young children She asked to work some of the time at home but there were growing concerns about her work performance (She appeared to have worked bizarre hours e, 3-5 am!) Attempts were made to improve things but her relationship with her line manager broke down. She claimed for sex discrimination but lost. It is an interesting story of how the expectations of flexible working, if not clearly agreed to, can go wrong.

**A simple case on disability discrimination**

**Northumberland and Wear NHS Trust v. Ward (2019) 0249**

W suffered from ME. An adjustment was made so that the performance management procedure did not kick until after 5 days of absence, compared to the usual 3. The employer then for reasons that are not clear withdrew the; ‘concession’ this constituted an act of discrimination and she won when she complained of the 3 day procedure being applied to her.

**3 (c) Termination of contracts**

It’s rather strange but we have more cases than usual this time. Keep in mind two areas of law that have been important recently.

First, the case law on how long the contract is keep alive for, even though notice to dismiss or even summary dismissal has taken place. Be especially careful applying disciplinary rules and remember the implications of the contract still being ‘alive’

Second, be careful about arguing, especially where there is a personality clash or complaints that the courts are scrutinising arguments about ‘breach of trust /confidence’ so the contract can’t continue. The relationship may well have broken down but it is legally wrong to assume the fault lies only with the employee.

**Dronsfield v. University of Reading (2019) UKEAT 0130**

This is a ‘misconduct’ case. Dronsfield, an academic, had an affair with a student. He failed to report the relationship to the university and following an investigation he was dismissed. The disciplinary code included ‘lack of a duty of care’ to the student, and ‘abuse of power’-both difficult to clearly define. Although the dismissal was held to be fair, the EAT did comment on how difficult it might be to judge ‘abuse of power’. Better to go for more concrete reasons, such as the failure to report the relationship!

And now we have a redundancy/trial period case……….

**East London NHS Trust v O’Connor (2019) 0113**

O was told he was redundant. He was offered a trial period as a Care Coordinator, but he disputed it was ‘suitable’ for him. He took out a Grievance but it was rejected and the post was again offered to him. He refused, so he was dismissed. Could he claim? Was he within time? Interestingly, he did not claim for redundancy (For understandable reasons) however, it was held that when told he was redundant and offered the trial period this did not amount to termination of the contract. It is a continuum.

Another example of how important it is to communicate clearly what the position is. In law the trial period and the redundancy are seen as two separate ‘acts’ though linked. If the offer is unreasonably rejected and was a suitable offer, the redundancy claim is lost. However, the status of the contract needs clarification.

And finally;

An interesting H&S case

**Markham, v. ASDA Stores (2019) UKEA 0287**

M was dismissed allegedly for TU activities. He was an HGV driver and a GMB safety rep. He tried, as was his right, to arrange a health and safety inspection. This was refused and he was then ordered back to work and this was refused and was suspended then dismissed. He argued that he was not claiming infringement of his TU rights but what the employers did was a breach of health and safety law. He could therefore claim protections for reps, but could have also advised other people to leave work if they were exposed to risks. The EAT agreed and case remitted.

**Further Actions**