

Employment Law

Exchange

Date: 09th November 2018

Venue: 1 Whitehall Pl, Westminster, London SW1A 2HE, with *thanks to Val*

Special Topic:

“Terminating contracts for redundancies and other reasons”

*(Please note the date of our LAST 2018 session – 7th December 2018, Canary Riverside Plaza)*

**Introduction**

**WELL! :** It’s been a rather exciting time for employment law-no; nothing about BREXIT but some very important policy and case-law developments! Several issues have hit the mainstream media but also have some important implications for us. We have had;

‘The ‘gay’ cake’-with some important implications for direct and indirect discrimination, but also freedom of speech.

‘ NDAs’ and sexual harassment etc. and the role of contracts, courts and Parliament(And settlement agreements?)

‘Debates on the ‘band of reasonableness’ following Reilly v Sandwell MBC (Dismissal of head teacher fair when friend convicted of a porn offence).

‘ Morrisons to appeal to the SC regarding their vicarious liability for senior managers data ‘loss’.

AND Niamh voted UK’s Young Female Athlete of the Year!

So, despite BREXIT we have some interesting policy and legislative developments, and, ideally a good period of time for some ‘challenging’ case studies.

1. News about and from Europe

The EU is in reflective mood. Not just about levels and responses to migration but employment matters, especially the impact of technology, new business models and how to protect/sustain the so-called European Social Model.

So! Little of importance for us one CJEU case of relevance as it deals with TUPE.

**Colino Siguenza (2018) C- 472/16**

This case held that a five-month gap between termination of contract with transferor and employment by the transferee did not prevent it being covered by the legal provisions.

Fixed term contracts have become a popular topic for case law. It will be recalled that the 1999 Directive and the 2002 UK regulations require no less favorable treatment and there should be abuse of the workers. (Most other EU states have rules about when one can be set up and the legitimate reasons; we have limits on renewals.

An interesting case-DI (2018) C-129 confirms that the end of a probationary period is not the ending of an FTC.

Sciotto 92018) C- 331/17 concerned an opera singer engaged on a series of FTCs. Italian law excluded certain artistic occupations from protections. As this left her without protections it was held to be contrary to EU law.

We also have an interesting H&S case on night work.

Castro (2018) C-41/17 where a breastfeeding security guard whose duties were partly at night was held to be covered by EU law requirements to undertake risk assessments for night workers (She was also covered by maternity protections) And see recent TUC data showing significant increase in night working.

1. UK Policy and Law

* We are in the midst of some major changes in the justice system, some of which we touched on last time. They are mainly about the way cases are handled, the use of technology and the ways staff are deployed. There is little as yet on ETs, though there are proposals/Consultation on an extension of the 3-month period 6 months within which to lodge claims. There had been concerns about claims where potential claimants have been on maternity leave but it may be that a general extension will give more certainty. It should be remembered that for claims for breach of contract the limitation period is six years and for negligence, three years.
* A related topic is that of a Law Commission Paper on employment tribunals which questions whether they should be able to hear concurrent non-employment issues and whether the £25 cap on breach of contract claims be lifted.
* ACAS has published statistics on Early Conciliation. It reports that currently 85% of recent claims are still being dealt with; 13% withdrawn or settled and 23% going to hearing. What might this mean?
* The Trade Secrets legislation is now in force. It implements a EU Directive. This is a complex area but in no way confined to patents copyright etc. It is about confidential information and establishing an offence of divulging confidential information and an entitlement to compensation. The potential coverage is wide and includes not just technical data but any information that might of interest or advantage to someone else. So! financial data, salary data, marketing strategies, and maybe some aspects of personnel data. ‘Secret’ is simply defined as having ‘commercial value’. To benefit from the law it is important to see that the information is confidential and that reasonable steps are taken to keep it so. This has clear HR implications, for although we already have laws on both confidentiality and IP this spells out the rights and duties more clearly. It provides an alternative means of redress as well.

What is also important is that measures you take to protect ‘secrets’ do not infringe ‘freedom of expression’(!) or ‘freedom of mobility’ e.g. prevent some -one getting a job. Clearly, the links between this and the long -standing rules we have on restrictive covenants and restraint of trade need to be looked at.

So, it is suggested that the following tasks be undertaken, if not done already.

* Develop a clear sense of the range of materials etc. that are covered by this new law
* Assess what is currently done to keep information ‘secret’
* Check links with both contracts and disciplinary processes
* Check if other people might be useful to be included to protect data etc. (Agencies, marketing organisations, websites etc.)
* Bear in mind that the ‘freedom’ rights may need to be taken into account, especially in terms of references, restraint clauses etc.
* Overall, consider the relationship of this law with;
  + The implied term of trust and confidence and of faithful and honest service’
  + Whistleblowing
  + NDAs/settlement agreement.
  + Maybe, aspects of equality law and human rights law.
  + Maybe, variation of contracts

QUESTIONS?

* Details of the post BREXIT EU Settlement Scheme have been published. Details from the Home Office! Is this a topic to discuss further?
* Employment of self-employed contractors/consultants/freelancers where they are employed by an intermediary, such as PSC, agency etc. (Or even a ‘posted worker’!) The government has consulted on the extension of IR 35 public sector provisions to the private sector. The reason is set out. The government reckons it misses out on £1.2 billion per year. There are debates and disputes about the impact of the public sector scheme-many say it has gone badly. Remember where the self-employed person is a sole trader they are not covered by this and the current law applies. The practical effects are that the client assesses status (See below) and collects tax for government.
* The Parental Bereavement (Leave and Pay) Act, 2018 will come into effect probably in 2020. It covers the situation where an employee suffers the loss of a child under 18 or a stillborn child. Both parents are entitled to two weeks leave, and pay at 90% of average pay of £140.98 a week, whichever is the lower. The payment is by the government. The leave has to be taken within 56 days of the death and is subject to a 26 weeks qualifying period. It only applies to employees.

Much of the detail has yet to be determined, including a definition of a ‘bereaved parent’. It is very complicated-a little like shared parental leave.

* Taylor Review follow-ups. As will be recalled the Review reported in June 2017, followed by 4 Consultations, which have closed. These were on employment status, transparency in the labor market, agency working and the enforcement of protective rights. The CBI and TUC responses to, say, the employment status Consultation make interesting reading. Basically, the CBI wants to leave things as they are and supports a statutory definition based on case law. The TUC-and most employment lawyers don’t want this or see it as impossible. The TUC wants to merge the ‘worker’ status into employee status so as to give access to all employment rights. We await the government’s response but whatever, this will continue to be a highly contentious area, further complicated by the tax/IR 35 issues.

1. UK Case Law from the UK.
   1. Contracts and related matters

It should be noted that the Mencap decision by the CA that we considered recently I likely to go to the SC. This had held that ‘sleepovers’ where the individual is allowed to sleep cannot be working time for NMW purposes because being asleep means you are not available for work.

The implications of the CA decision go way beyond traditional care homes etc. working and are also inconsistent with CJEU case law and other UK case-law. If you have to be ‘available for work’ and therefore, ‘be at the disposal of the employer’ by not making yourself ‘unavailable’ there are practical implications that we touched on before.

**Argawal v. Cardiff University (2018) EWCA 2084**

This was an unlawful deductions claim. A was a medical expert. She had a 50% contract with the university, a clinical academic contract, and 50% contract with the local health board. She became ill and the health board refused to pay the university for her services and it, in turn withheld 50% of her salary to A.

The complexities of the arrangement required careful construction of the contract. Could an ET do this? Yes. This is an important role for ETs as it has been unclear to date whether they had this power.

**Morrison v. Aberdain Considine (2018) UKEATS 0018**

An employment status case! A solicitor salaried partner claimed to be an employee. Though this could be situation in England and Wales, under Scots law you cannot be both. Partners are self-employed (Or ‘workers’).

Another case on appeal is that of the important vicarious liability claim in **W M Morrisons v. various claimants (2018) EWCA 2339.**

We have considered this earlier- the company was held liable for the loss of personal data of employees, which had been, carried out by a senior IT manager who had been ‘entrusted with payroll data’. Conduct of this sort can be criminal under data laws.

He had been disciplined for unauthorised use of postal facilities and received a verbal warning. The data had been passed to a local newspaper-that did not go public with it. Arguments that all this was done a personal non-work manner failed(He had used his home computer to send data and on a Sunday!)

It is understood that the grounds of an appeal are that he was on a ‘frolic of his own’, i.e. had personal reasons/vendetta for his actions. To date, these arguments have failed, for long as what he was doing was related to his work that is sufficient to make the employer liable.

This is now a very ‘hot’ topic. What can organisations do to protect themselves. Is there a link with the ‘secrecy’ rules we looked at earlier?

3.2 Equality and related topics.

Clearly, the ‘gay cake’ case has hit the headlines. As will be known, the claimant, who is gay and active in organisations to promote gay rights ordered a cake and asked that it be iced with the message supporting Gay Marriage’. The cake shop owners who are deeply committed Christians refused the order which it was then claimed was contrary to legislation on grounds of sexual orientation.

The case was won in NI and referred to the SC where it was lost. The court decided that as initially the cake shop owners did not know a gay man was ordering the cake, it was the objection to the slogan on the cake that was the problems insofar as it contradicted their religious beliefs. It was an objection to the cake and its slogan that was the root cause of their actions, not the claimants’ own characteristics.

The decision was a bit of a surprise, though has received support from those arguing for the widest possible freedom of expression. However, there are some problems in that some argue if you have claims based on ‘association’(For example disability discrimination not of the claimant but of a child of the claimant) similar rules should apply here.

What might be the practical implications for, say recruiters, from the judgment?

Again, case law shows how hard it is to succeed in sex discrimination claims.

**Sheikholeslami University of Edinburgh (2018) UKEAT 004**

S was recruited in 2006 as Head of Chemical Process Engineering. She had been promised an upgraded lab. to work in but nothing happened for two years. (A man recruited at the same time was provided with adequate lab. space).He was made Chair of Examination Board-she argued she had more experience. She suffered from stress and did not return to work. The university undertook a review headed by Prof Jo Shaw into allegations of sexism. She identified that in recent times four female professors had been appointed which had not met with the approval of male staff.

There were attempts to find S another role but they failed. Things deteriorated further when staff were instructed not to contact S. Work was taken off her and the university did not take steps to apply for a visa extension.

Her claim was lost. It was said that the grounds for her complaints were ‘unconvincing’.

Do you think undertaking an investigation may well have helped the employer’s defense?

The definition of ‘disability’ is still causing some issues.

**Martin v. University of Exeter (2018) UKEAT 0092**

It will be recalled that the statutory definition of disability is quite technical, has several elements, all of which need to be present for a claim.

Problems need to be ‘substantial’ and they must last or be likely to last for one year. The claimant here suffered a range of symptoms, including sleep problems, loss of concentration, not wanting to go outdoors, demotivation and, ultimately he was diagnosed with PTSD. The legal questions were around when, precisely, did he become disabled and was the condition ‘long term’?

There was a lot of medical evidence but could it be put together to amount to disability? In particular, at the time of claim, even if a start date could be identified the condition had lasted only nine months. However, if ‘it was likely to’ last a year then he can claim.

The EAT confirmed that the ET was correct to try to make sense of the medical data as best they could and that ‘likely to’ should be given its usual meaning of ‘could well happen’.

Implications?

3.3 **Termination and related issues**

Last time we looked at the question of when a dismissal occurs. We have one more case on this topic indicating the need to be unambiguous when ending contracts. Last time we looked at the decision around the impact of appeals, especially successful appeals on the reality and of the dismissal and the EDT. As this matter has not moved on or been further clarified it is very important to note the implication of the ‘reactivation’ of the contract following an appeal. And to ensure appeals are undertaken and determined as quickly as possible.

An ambiguous ‘resignation’ also gives pause for thought.

**East Kent Hospitals NHS Trust v. Levy (2018) UKEAT 0232**

L worked in the Records Office but was unhappy there. She was made a conditional offer to work in the Radiology Department. She then had a row in Records, and wrote’, please accept one month’s notice from the above date’. Her manager wrote back to same day accepting her ‘resignation’. However, this was not followed up with any other information such as accrued holiday leave/pay etc. The Radiology offer was then withdrawn due to her sickness record. She asked to retract her ‘notice’ letter but this was refused. She claimed for constructive dismissal

It was held that the ‘notice’ was ambiguous and could have simply meant she was leaving the department not the Trust. So she won.

Implications?

It is not hard to see why the Trust reacted as they did but…

**Sattar v. Citbank (2018) UKEAT 0336**

This is a hugely complex case (The ET judgment was 74 pages long!) It deals with the dismissal of a very long serving, senior employee of the bank and revolves around notions of trust and what can be expected of senior, in particular, employees.

He was covered by a detailed Code of Conduct that, inter alia, required him to avoid conflicts of interest and outside matters that might act to the detriment of Citi’s reputation. The Code urged caution, identified some of the risks and asked staff to seek advice if unsure what to do. He was the trustee of a charity and sole donor (£4.5m). The trust was to support young people of Indian sub continent origin. In 2011 he directed a pension settlement pay out to the charity and claimed 30% rebate in tax. He had another charity registered in Pakistan, which had been subject to a money laundering investigation. In 2013 HMRC went to his house and arrested him. Citi began its own investigations and he was suspended. He was called to a meeting. He said he was unwell with a brain tumor, though he had not had any time off work. S objected to a health assessment by OH because the person was not a doctor, though they did accept that he was disabled. He was dismissed for gross misconduct. He appealed that the reason for his dismissal was undue fear of HMRC but failed to turn up to the hearing.

Citi concluded he had used bank facilities for private use-the charity beneficiaries were his family. Dismissal held to be fair.

The case is good because clearly the bank was well advised, handled the issues well, and did not behave in a nasty way. At ELE we often see poor standards but here they looked professional, thorough and fair.

*Now for some cases on our Special Topic.*

We have had few cases of note on what might be called ‘ordinary’ redundancy. Bear in mind that most of recent case law has dealt with whether there really was a redundancy situation (Or the dismissal used it as a pretext), the implications of offers of suitable alternative employment and some issues around consultation.

However, it looks like we may be seeing more case law in the area, especially involving the leisure industry and retail!

Most recent cases have concerned TUPE/SPCs, especially areas such as personal care.

Our first case concerns pre-transfer information

**Born London Ltd v. Spire Production (2017) UKEAT 0255**

The information provided by the transferor. This included information about a Christmas Bonus, referred to as non-contractual’. The transferee argued it was contractual and binding. It was held that that did not matter as Reg 11 requires general information not just contractual material. So, information about discretionary bonuses, holidays etc. should be provided in any event,

Most cases concern ‘organised groupings of workers’, and their link to the ‘principal purpose ‘ of the contract.

**Tees Esk v. Wear Valley NHS Trust (2017) UKEAT 0173**

This confirmed that the ‘organised grouping ‘ for work purposes does not have to be the ‘sole’ purpose

The major issues have been around changes to the way work is performed following the change of owner/employer. The case law is highly difficult and fact specific. It depends on two major factual areas. First, the extent of changes, e.g. to the value of work, number of people needed and sometimes the way it is performed. Second, has been the overall performance of the work and the extent to which it is subject to ‘fragmentation.’

In March 2018 we looked at Carewatch v. Henry. This concerned care packages provided by LB of Haringey delivered by Carewatch. They had had the contract to deliver 168 packages between 2004-2011. Many of the staff was on short term or zero hours contracts. They ended the contract, which was then performed by 4 other organisations. It was held that the changes were sufficiently major for this not to be seen as an organised grouping of workers.

**Further Actions**