

Employment Law Exchange

Date: 19th January 2018

Venue: The National Liberal Club,

1 Whitehall Pl, Westminster, London SW1A 2HE

Special Topic

“Performance Management”

1. News about and from Europe

Despite the ‘excitement’ about BREXIT, the EU’s legal and policy agenda is moving quite quickly at the moment. Of course, it is only in the areas where the EU has ‘competence’, so many issues, such as contracts, pay, industrial action are beyond its ‘competence’.

It is clear that employment levels etc. in the Eurozone are at last improving, even in the southern states that have been a cause for much concern. The recent agenda items have been:

* Worker participation on supervisory or administrative boards
* Co-ordination of social security across member states
* Risks associated with carcinogens
* Work-life-balance issues for parents and carers
* Driving times
* The services eCard
* A pan- European personal pension
* Social Protection of Workers in the Platform Economy-a study commissioned by the Employment Committee of the European Parliament, Nov 2017. This is, to an extent, like the Taylor Report

The issues around the implications of BREXIT for employment law have not become any clearer, along with role of the CJEU and its case law. Indeed, it is arguable that the future position has, if anything, got less clear in recent weeks with increasing political uncertainties and the UK business community becoming slightly more vocal in its concerns.

Any questions?

* 1. **Case-Law From European Courts**

We have a particularly interesting and useful case from the CJEU on data protection, specifically, the concept of ‘personal data’. It is a case from Ireland.

**Nowak C-434/16**

This deals with the provisions of Directive 95/46-the ‘old’ directive on data protection. Nowak was a trainee accountant who had passed most of his exams to become a chartered accountant. He failed the final examination 4 times. He challenged the decision of the examiners and wanted to see his paper.

He submitted a data access report on the data held by the Chartered Accountants Ireland (CAI). He was able to access some data but not the paper, as ‘it did not contain any personal data’.

The Data Commissioner agreed, but this meant that court action could then be brought. Ireland’s Supreme Court asked the CJEU to clarify the scope of the provision,’ relating to an identified or identifiable natural person’. The CJEU confirmed that the legal requirements are ‘very wide’. In deciding that the law did apply, the court asked whether the material/data was ‘linked to him as a professional person’ and ‘whether it has considerable practical significance’. It was decided that it was irrelevant that the markers did not know the identity of the candidate. They thought it was ‘personal’ and therefore he was entitled to see the paper.

*Does this change your understanding of what ‘personal’ means?*

(It may be of interest that the latest case law in the UBER saga has come from the CJEU. It decided in a case brought by Spanish Taxi drivers that UBER was a transport company, not a communications company and as such it was outside the Services Directive that provided for free competition-an interesting case).

THE ECHR has recently decided an important case on the meaning of ‘right to private life/privacy’.

**Antovic v. Montenegro C 70838/13**

This case has considerable relevance for employee surveillance/monitoring.

The case concerned the surveillance of two university professors in a university auditorium/lecture hall. Cameras were installed by the Dean to ‘ensure safety of property and people and the surveillance of teaching’. Data was to be stored for a year and was adequately protected.

The professors claimed violation of a right to a private life. They argued that the lecture hall was not a ‘public place’ as it only involved students enrolled on a particular course and created a particular relationship between teachers and students. They said that there was an 'expectation of privacy’. In deciding that the ECHR had been breached, the court again emphasised the difference between public and other places. They did not say that surveillance cannot be lawful but stated that:

* The use of it needs a proper legal basis (Why being done)
* The scope of the surveillance is appropriately limited
* There are guarantees against abuse

Interestingly, 3 judges dissented, indicating this was a controversial decision. They said this was expanding the law too far and the ‘expectations’ of people are not necessarily the critical issues.

*What might be the implications of this decision here?*

In terms of: Performance management, and/ or in the light of technology facilitating surveillance of various sorts.

1. UK Government Policy And Law

**2.1 Health and Safety**

First of all I should like to do a quick follow-up to our last session on Health and Safety in December. This is because of a flurry of activity recently over health issues at work and some important changes or upcoming changes to health management and the workplace.

There has been an outpouring of research and policy papers, some of which have useful, practical ideas. It is estimated that ill health costs the economy £100 billion a year; 34 million lost working days a year due to minor illnesses and 49% of ESA claimants are said to have a mental health condition.

It might be recalled that in 2016 we had a Green Paper Improving Lives, then in October 2017 Thriving at Work: A Review of Mental Health and Employers, followed by in November 2017, Improving Lives: Future of Work, Health and Disability. Dame Carol Black is still cracking on and also in 2107 she produced the Independent Review into the Impact on Employment Outcomes of Drug or Alcohol Addiction and Obesity.

So: a lot of issues and concerns. The key messages emerging are that these issues are, in part at least, the responsibility of the employer. The reports call for, inter alia,

* Reform of the Fit Note System-only 6.6% of Notes use the ‘maybe fit’ option, and
* Reform of SSP so it does not act adversely on flexible working
* More responses by employers to health issues
* Reform of work capability assessments (Note, the Assessment Scheme under the Fit for Work Scheme ended on 15th December 2017.)

What is likely to happen-how will employers be affected?

One message that comes from the reports is the need for employers to tackle ‘presenteeism’, which they define as people coming to work when not fit to do so. It calls for the better development of support skills, especially to manage phased returns to work (Taylor had called for a ‘right to return to the same job after long illness absence).

The Fit Note system is being reformed. It needs to be ‘an enabler for conversations about health’. It also needs to be:

* More comprehensive, e.g. about the nature of the job, work, availability of specialist support etc.
* More helpful- too many just say ‘not fit for work’ and no more
* Subject to the development of competences necessary for writing effective Fit Notes-all this should be part of standard medical education
* Reflect the Guidelines on the 5 key reasons for absence
* Be appropriate for small as well as large organisations

This is quite a big agenda. Clearly, the system wants to see more action from employers, especially in terms of greater flexibility regarding returns to work, increased knowledge about health matters generally. The reports do not deal with the related questions of work-related stress, long working hours and increasing difficulties in separating out work and private/home life. Insofar as there is an in-house or external OH facility, these matters need discussing. The loss of the government funded health assessment service is a problem, perhaps especially for small firms.

These health issues are not going to decline, any important ideas for a Check List?

**2.2 Gender Pay**

As a prelude for our next ELE session on Gender Pay reporting and related topics, the Government Equalities Office has produced a useful guide for employers entitled, GENDER PAY GAP: Closing it Together Actions for Employers

(<http://gender-pay-gap-service.gov.uk/Viewing/search-results>)

There has been considerable discussion on the relationship between equal pay itself and pay gap reporting. This is a debated area, but whatever the situation; pay for a woman is currently a very high profile topic.

**2.3 A new and useful service by government has come into effect.**

It is an updating service for key employment legislation-really useful. It covers

* Employment Rights Act, 1996
* Equality Act, 2010
* TULRA (Consolidation) Act 1992

Access it through [www.legislation.gov.uk](http://www.legislation.gov.uk)

**2.4** **A draft Bill following the report A Framework for Modern Employment (Taylor).**

**The key proposals are:**

* Employers who use ‘zero-hours’ workers will have to pay a premium on the NMW and NLW (Bear in mind that zero hours, conceptually, is by no means limited to delivery drivers and the like but covers nurse, carers, supply teachers and contract workers of various sorts).
* Continuity of employment- a critical concept for both SS and employment law would be preserved so long as ‘gaps’ are no longer than one month-rather than one week
* The creation of a ‘worker’ by default’ model (?)
* ETs to be able to impose fines or impose other penalties for ‘serial’ breaches of law
* S 1 Statement to cover ‘workers’ as well as employees (Again just be clear who would be covered). Note also that the ‘personally executing work’ requirement is likely to go.
* 'Workers’ to be included in the 50 people threshold for ICE Regulations
* An end to the ‘Swedish Derogation’ in the Agency Regulations.
* It might also be noted that it is the government’s intention to require tax data to be provided monthly not annually, and to be done digitally

**2.5 Finance Bill 2017-19**

Payments ‘in lieu’ (of working) will be seen as ‘earnings’ and taxed accordingly. ‘Injury to feelings’ compensation is outside the rules on personal injury and other payments.

There have also been delays on reforming NIC contributions. Watch this space.

**2.6 Immigrations rules changes**

These took effect on 10th January 2018. Interestingly, they broadly appear to relax some of the rules to date. There is a 100% increase in Tier 1 ‘places’: a consolidation and speeding up of processes for ‘Entrepreneur’ migrants, and a considerable increase in the Tier 1 ‘exceptional talent’ numbers.

Students who have ‘research positions’ move to Tier 2.

**2.7 Social Security Rates are seeing increases.**

E.g. Maternity allowance now £145.18; along with Adoption, Maternity and paternity Pay. SSP £92.05.

**2.8 And finally, look out for Consultations on:**

* Training related costs for employees and the self-employed
* The proposal to replace bespoke expenses with ‘benchmark rates’, e.g. for subsistence
* Put overseas accommodation and subsistence rates onto a statutory basis.

1. **Case Law From The UK**

This is beginning to build up a bit with a few more cases going to the EAT and the numbers rising for ET claims. Today, we have some really interesting decisions, not least of relevance for our Special Topic. In the meantime, we have to look forward to the SC hearing of the combined cases of UBER, and Smith v Pimlico Plumbers on the question of ‘worker’ status. There is also the appeal by ASDA on the equal pay case heard last year that accepted that retail workers in shops could compare themselves with distribution workers. Many experts also anticipate more holiday pay claims, in the light of the King v Sash Windows decision, especially on the question of back pay.

**3.1 Contracts and related issues.**

There is a growing volume of case law on dealing with poor performance or other disputes and how employers often make some basic errors. Often this is because the implied term of trust and confidence has a very wide ‘reach’. (A case we dealt with in December-Rawlinson v. Brighthead was one such. Here an under-performing employee was allowed to work out his notice as the employer told him that his work was going to be subject to a TUPE arrangement, which was untrue. Despite the good intentions of the employer, the conduct was held to be constructive dismissal due to the breach of trust and confidence).

The next case deals with the question of vicariously liability for employee wrongdoing, which in turn hinges on the nature and scope of the employment relationship.

**Various claimants v. Morrison’s Supermarkets (2017) EWCA 3113**

(The ‘various claimants number c 5.5k!). This is a very topical case for our Special Topic and shows what care must be taken with personal data stored by employers.

Someone accessed and put on the Internet personal details, including bank details, phone numbers, addresses, pay etc. of around 100k employees. Although data was released to newspapers they did not use it. It appeared that an employee, subsequently found to be innocent, had accessed the data. Another employee whose role was as an IT auditor had framed him. He was charged and sentenced to 8 years in prison for breaches of DPA. The employee is question also ran a private business supplying slimming pills. One day some arrived in the post room of Morrison’s headquarters, and a white power was spilt on the floor when the package fell open. This caused consternation and the employee was disciplined. It appears that this treatment was the trigger for his accessing the personal data.

Claims were brought by the thousands of employees who had ‘lost’ data. The question was whether Morrison’s was liable for the employee’s conduct. They brought claims under the DPA and common law rules and in the CA, they won. It was held that the employee was still within the scope of his employment, albeit engaged in grossly unlawful conduct. Was his ‘vendetta’ against his employer relevant i.e. did it take him outside the scope of his employment? Applying the case of Mohamud v. Morrison’s (Yes!) where an employee at a petrol station had abused a customer and physically attacked him, the motivation of the employee was held irrelevant.

What can employers do? (The case may be appealed)

**3.2 Equality etc.**

**Walters v. Vista Employer Services ((2017) UKEAT 0127/17**

This case illustrates how complex this area of law has become. It was a claim for race discrimination. W is of Afro-Caribbean origin; her manage is of Bengali origin. At a team meeting in December 2013, the manager threw chocolates at the team, saying the chocolates represented their personalities. She threw a Bounty Bar at W and said. ‘I wasn’t saying you are a coconut’. She laughed it off when W was surprised and the other team members appeared to not understand what was happening. The ET Judge explained that a coconut is someone who is black on the outside and white on the inside, suggesting they are a collaborator. W was off sick for a few days. She was then put on a PIP in May 2014, and resigned claiming race discrimination and CD. She lost her claim at the ET, because she had not provided a white comparator! And there was a long time lag from the chocolates incident and her resigning.

The EAT upheld her appeal. There was much discussion on devising an hypothetical comparator, and how you found one that was comparable to the ‘coconut’ slur. The EAT held that regardless of all the complexities; the conduct of the manager ‘indicated a particular racial attitude’.

What does this case tell us?

Now we have a disability case that is also quite complex.

**Coffey v. Chief Constable of Norfolk Police (2017) UKEAT 0260/16**

C had worked as a police officer in Norfolk, and then moved to work in Wiltshire. She had hearing problems, but managed to do her work OK. She applied to transfer back to Norfolk, who rejected the application because they said it was not safe to employ her. She had hearing tests that said that although there was a problem she could do her work. In Norfolk the CC said that that was not the point. Her hearing problems would affect staff deployment, already difficult due to resource constraints. She said that officers now need to be ‘Omni competent’. The UKEAT said the CC had not fully understood guidance on health issues, especially that people could work even though they had a disability, so long as they had support. The EAT, in accepting her claim was quite sceptical of the conduct of the CC-‘she would be a liability to the force’.

The error here was to downgrade the role of ‘reasonable adjustments’ and to take too literal a view of the hearing test results.

**3.3 Termination**

Interestingly, both of the cases here deal with whether or not a contract of employment had ended and contain some useful practical guidance.

**Feltham Management v. Feltham and others (2017) UKEAT 0201/16**

This is a real small firm/family business soap opera! The office manager had an argument with a colleague whom had had an affair with her husband and for whom he was leaving her. She was fairly briefly off ill, and it was assumed she had resigned (In 2013) and she received no pay. On 30th October 2014 she did ‘walk out’ but denied she had resigned in 2013.She claimed for unfair dismissal. The EAT re-asserted the legal point that resignations should be ‘plain and unambiguous’. Without that, the contract remains ‘alive’.

And finally,

**Basra v. BJSS Ltd (2017) UKEAT 0090/17**

This case is even more ‘messy’. B was an architect who had been the subject of client complaints. The employer wanted him to leave but as ‘painlessly’ as possible. He was offered 3 months’ pay so long as he signed a settlement agreement. This was in a formal letter. He was told to sign quickly but if he did not do so the employer would institute disciplinary action. He replied by email saying that he was leaving and accepting the offer.

He was chased for a formal reply-he must reply in three days. One day before the three days were ‘up’ he submitted a Fit Note saying he was suffering from stress. He was told his contract had ended. He replied saying when he was better he would be back at work. He then claimed unfair and wrongful dismissal having received a letter from the employer’s solicitors ending the contract. He lost at the ET as it was held that the contract had not ended. He won at the EAT as the court held that he had not resigned but had been dismissed. He did not know the content of the ‘deal’ so he could not have voluntarily resigned.

**Further Actions**