

Employment Law Exchange

Date: January 17th 2020

Venue: TSSA, Devonshire Buildings,

16-17, Devonshire Square, EC2M 4SQ.

*(With thanks to Val)*

Special Topic: ’Documenting contracts: IR35 Employment status and all that’.

**Introduction**

1. A quick overview of recent case law and what case law is likely in 2020.

A quick reminder of some recent decisions; For holiday pay, we learnt that it is not unlawful if the arrangements at a particular workplace are that part-timers, compared with full-timers are paid more: that voluntary overtime, if paid, should count for holiday pay: that to comply with the WTRegs the 20 minutes break does not have to be taken in one ‘go’ and a bungled suspension as part of disciplinary procedures can break the implied term of trust and confidence.

We have also seen an increasing number of cases on ‘belief’-rather than religion. We now know that veganism is a belief, providing it meets the legal criteria and is ‘ethical veganism’. We know that vegetarians cannot claim the same.

A very recent ET case has caused a lot of comment.

**Forstater v. CGD Europe Case 2200909/2019.**

The claimant alleged she was discriminated against for her ‘belief’ that a person’s sex is immutable, despite re-assignment, issues of identity etc. The decision is a very long one and considered the Gender Recognition Act, 2006 that provides for a change of legal status. She rejected this and insisted on her right to refer to trans people in their birth sex. She also said she must be free to challenge legislation that does not provide for wider issues, such as the effect on changing rooms and other intimate situations. She lost her claim (Which will likely be appealed) as her claim was ‘incompatible with human dignity’ and the fundamental rights of others.

Commentators have pointed out the inhibiting effect this could have on freedom of speech. It has obvious implications for disciplinary procedures that refer to harassment and bullying etc.

We learnt on 10th January 2020 that another high profile equal pay case against the BBC by a female presenter has been won. It seems that there are many more cases in the pipeline. The rush of cases has, we think, been caused by the BBC’s requirement to publish salaries-so one can see the importance of information!

Another important case, this time on dismissal, is already indicating that the Djuti case we considered last time regarding genuine and ‘sham’ reasons for dismissal is setting a trend.

**Cadent Gas v. Singh (2019) UKEAT 0024**

S had worked for the respondent for 29 years and had an unblemished record. He was a TU Rep and H&S Rep. He was a gas engineer who job was to respond to leaks. At 1.13am he was called out despite the fact that he had been working long hours before and had not had time to eat. He stopped on his way to the ‘leak’, was a minute late according to the Service Level Agreement. He was dismissed for gross misconduct. It appeared he had submitted a number of grievances against managers, one of whom was the manager that undertook the disciplinary investigation. He alleged that the real motivation for his dismissal was his trade union activities. The EAT held that if the activities, ’played a part in the (Employer’s) reasoning’, he could win.

The moral of this case is clear. Be careful who investigates matters, note the impact of grievances, even if they are rejected, be careful with evidence and don’t use one act of misconduct and an opportunity to ‘get back’ at an employee. The stated reason for dismissal must be the genuine one.

***What cases are on appeal in 2020?***

Ones for us to look out for include;

* **Uber v Aslam-worker status, to be heard by the SC**
* **Asda equal pay case, to be heard by the SC**
* **The ‘gay cake’ case from Northern Ireland is going to the ECHR (It was lost in the SC)**

1. An overview of important policy and legislative changes

We live in interesting times! Taken, together the last few months have probably seen more significant reform of employment law than the last twenty years. Mostly, the changes come into effect on 6th April 2020, but there is much else in the pipeline. The new Government is strongly supporting the reforms initiated by the Taylor Report, 2017 and its follow-up-the Good Work Plan. This generated four major Consultations on;

* Employment status
* Transparency (Information)
* Agency Working
* Enforcement of employment rights

Although it is unlikely we will have a statutory definition of employment status, the three other Consultations have led to legislative changes.

The General Election of 12th December 2019 has had the effect of confirming measures to see the UK leave the EU and this has massive legal implications, including for employment law. However, relatively little will tangibly change until next year, though we are seeing migration issues becoming both more important and controversial. Although, pending legislation is ‘lost’ when one Parliament ends before a General Election, pre- legislative activities, such as Consultations can still go ahead. At the moment, we have a number of important Consultations ‘in the pipeline’. These include;

* Ill health and job loss
* Pregnancy/maternity and redundancy
* Equal pay reporting
* Enforcement of employment law
* Employment status? (The research by BEIS on this is interesting. It

Estimates in 2018 the ‘gig’ economy’ covered 4.4 million workers, most in the London area, young, averagely educated, relatively low paid. It excluded agency working and self/employment using a PSC (170k). The focus was on delivery work and the report, sadly, excluded agriculture, hospitality, nursing and retail work. Perhaps the narrowness of this research seriously limits its value). It is unclear what is happening about this Consultation. So; for the moment we need to rely on existing case law on both the employee/self-employed divide and the self-employed/worker divide.

What has hit the headlines has been the extent to which employment legislation will be repealed-both from the EU and UK legislation. The Withdrawal Bill no longer has any guarantee to retain rights, so we may well see much more change. Legislation on strike action is thought by many to be likely.

However, there is continuing strong commitment to increase the National Living Wage. The target is to have it c 66% of the median wage. On 6th April it will rise to £8.72 and is rising far more sharply than wages generally.

**Reactions?**

It is still perhaps too early for general reactions to be gauged. Unsurprisingly, the TUC has expressed a range of concerns. CIPD broadly defends the status quo but is not calling for existing rights to be withdrawn. It also wants a campaign to raise awareness of rights, improved enforcement (That may well be on its way), to more closely align employment law and tax law, for clarification of the laws applying to employment status, and for more training for managers on the topic. IPA welcomes the idea of a unified enforcement body, to include HSE and EHRC and suspects that there will be reduced ‘worker’ rights or certainly no extension, better support for self-employment but also warns that in seeking a trade deal with the EU, the risks of ‘social dumping’ if employment protections are lowered or withdrawn will make a deal harder to achieve. The EU will not want a low wage, less protected workforce competing on a lower cost base next door! This will undoubtedly give rise to a major battle.

**2. The Key New Legislation**

* The extension of the IR35 changes to the private sector on 6th April. Where an individual is supplied to a client by an -‘intermediary’ (PSC, agency etc.) the client or agency is required to assess the employment status of the person and deduct tax and NIC accordingly. The Government asserts that this has, to date, raised c £550m ‘extra’ from the application to the public sector.
* The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations, 2018.This makes major changes to what and how contractual information is provided for employees and workers. Also increasing from 12 to 52 weeks the reference period for calculating holiday pay, or if less than 52 weeks service, the actual weeks’ service. The right to information is a Day 1 right and applies to some self-employed who are ‘workers’- i.e. who personally execute work but not on a B2B basis. With some exceptions the information must be in a single document, and must now include information relating to;
* Whether or not a fixed term contract and relevant information
* The terms relating to a probationary period
* Notice periods
* Eligibility for sick pay and other paid leave
* Remuneration-not just pay so anything with a monetary value
* What days you are expected to work and whether flexible
* Information about aspects of training.

It is very important to note that existing employees have the right to make one

request to receive the same information and this must be responded to within one

month. The extraordinary thing about the regulations is that in extending the right

to workers, i.e. self-employed people, they cover ‘disciplinary rules’ and ‘pension’

provision. However, if the self-employment contract covers the topics required by

the regulations that will be OK.

* Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations, 2019.

**This requires;**

* More information to be provided for temps etc. before contracts are signed and about whether an umbrella company is involved, who is the payer
* Tightening up of fines etc.
* Abolition of the ‘Swedish Derogation’
* 12 week threshold retained for ‘equal pay’

Taken together, what does this legislation add up to?

I cannot stress enough how important it is to see this as an interconnected package of measures. This can be hard because a lot of the changes are ‘bitty’ and the policy reasons behind them are sometimes hard to work out. What can we say with certainty?

* There is a clear intention to gain more tax revenue, based on an assumption that some people have been deliberately avoiding tax. The method chosen to deal with this seems not to be to improve HMRC processes but to off load responsibility to clients/employers but also to put more pressure on legal definitions that many have argued have been complex and controversial for many years. There are no signs of any alignment between employment and tax laws so the anomalies will grow. There has been little pressure to make these changes other than by government but the tax changes will clearly spill over into employment law.
* There is a clear relationship between the IR35 changes and the contract documentation matters. At the very least the contracts are evidence. The on-line CEST test for IR 35 emphasises the core indicators of status. It is bad news for contractors/freelancers if they have long and renewed contracts, work only or predominately for one organisation, are integrated into it/strongly identified with it. If people are then told that the disciplinary processes applicable to employees also apply to them, or they qualify for a pension, the task of applying IR35 gets easier. Language is going to be very important, not least in keeping a distance between the client and freelancer/consultant. (There are many different ways of describing remuneration…). Another problem is that often the contracts for freelancers etc. are informal, short and many matters are often well understood but not articulated. The ‘bureaucratisation’ of the relationships is a major change.
* How the changes are responded to will depend on how they are viewed-both by clients and individuals. It is said that many apparently self-employed people want security and therefore probably employee status. (This is not backed up by convincing research findings, though may well have validity for low-paid and insecure workers). At the same time government policy is said to be to encourage self-employment. Aside from gaining more revenue it is unclear what the underlying policy objectives are, as this legislation takes a broad brush approach, not just concerned, as Taylor might be seen to be with ‘victims’ and people who are ‘exploited’.
* It seems important to reflect on the implications, not least in terms of identifying risks but also in terms of the overall composition and effectiveness of the workforce. What are the real differences and merits of using employees versus freelancers? Has it been habit/tradition that has led to current practices or more? Some occupations have long been populated by freelancers; E.g. journalism, some medical staff, business consultants, taxi drivers, health and sports workers etc. Does this work well?
* Some simple changes can avoid risk-for example, not using people who work through intermediaries but who are sole traders. The skills provided by a freelancer are also important. If many in your organisation replicate them, this is going to raise queries. Some risk areas can be easily eliminated or reduced, e.g. by not requiring contractors/freelancer to wear your uniform, have the same security pass, a parking space etc. A real risk is simply not monitoring the use of freelancers and letting their contracts drift into regular renewals and an ever-growing ‘closeness’. What is your current organisational policy on this? Who makes the key decisions? How much of an influence are head count policies?
* One surprise, given how many disputes are concerned with it, is change to terms of work. Indeed, legal change itself, other than the need to notify of changes, is not in the package of measures as a distinct topic. However, there is no reason to exclude it if it is not there already, or to review how it is working out.

**3. Documenting Contracts –The Key Tasks**

**There is one important legal issue to note.**

The legislation is concerned with people’s right to know their terms of work. Strangely the law sees a difference between that and a written contract, which is legally binding on the parties. A written contract can amount to compliance with the ‘statements’ law but there is no obligation to provide a written contract. The distinction between information and legally binding documents is an important matter but rarely considered by texts, guides, advisors etc.

*Task 1: Gather information together.*

Current law provides considerable flexibility as to how information is provided. Some matters can be simply ‘reasonably accessible’ such as in a handbook, on-line, letters, policy documents etc. Then explore the situation regarding the ‘new’ topics, e.g. probationary periods, training, paid leave etc. You may already include these matters, for example, employers do tend to inform about notice periods.

(See the Checklist below)

The second task is to look at ‘how’ information is provided, as in the future, most will need to be in a single document, as well as being a Day 1 right for new staff.

The next task is to check ‘who’ is to receive it. This is ‘workers’ as well as employees, so it is essential to be clear (As we can be) about who is a worker?(We also know that for almost a year ‘workers’ have been entitled to ‘itemised pay statements’-in part for IR35 purposes) For these purposes, intermediaries are irrelevant, we just focus on the personal service element and the lack of a B2B element. The information should be in the contract-bearing in mind that many freelance contracts are short and oral only. Remember, the important thing is the ‘worker’ definition, not their self-employed status (There is little case law on. For example, the B2B exclusion)

There is then the possibility of a request from existing employees (And workers).Long serving staff might well want a new document, even though they have been notified of changes. They may like the idea of a comprehensive, up to date version. The timescale for responding is short (One month).

*Task 2: Reflect on current strategy and practice*

There is then the question of whether, as considered above, you want the document to be legally binding. There is a difference between communication (One way) and ‘contracting’ (Two way). Do you consider your documentation one-way or two-way, or is there is a mixture? For example, do you see the disciplinary rules as binding but include job descriptions, which you do not see as binding. Issues of remuneration are going to be especially important. Remember issuing a binding contract of employment is one way of compliance with the rules-but what are the practical differences between a S 1 Statement and a Contract? (Again case-law is very limited).

Another important issue to bear in mind is how terms of work are changed. This will depend on whether the document is legally binding, i.e. a ‘statement’ or ‘binding contract’. The documentation could usefully include information if it does not already on the change process and how changes are documented.

Have you experienced any problems, challenges to the documents you currently use. Are there ambiguities or inconsistencies that the changes we are looking at provide the opportunity for improvement Have you undertaken a ‘contract review’ recently? Or have things been added/changes made as needed?

**THEN:**

Then we need to look at the extent of the changes overall and how best to tackle the changes. Let’s start the process?

First, what are your current practices? Here are a few questions.

* Do you use a letter of appointment and do you see its content as discharging some of your obligations to workers?
* How is other information communicated and do workers have ‘individualised’ copies?
* How much of the(now) required information is in a core document/handbook? If not all, do you already have the required information, eg on training, probationary periods.
* The key ‘extra’ information is:
  + Details on fixed term contracts-if not fixed term, that also seems to be required (It is common is some countries for a ‘permanent contract’ to be referred to as a ‘contract of indefinite length’) .
  + Notice periods (Good practice might suggest adding edit -this has been a major topic for case law and clarification, of for example, what is the position if an appeal against dismissal is made, can it be worked and if so who decides?)
  + Provisions for sick pay and other paid leave. This could be quite a long list and include holidays, maternity, adoption, bereavement, training

leave.

* Information regarding Probationary periods. (How long? How and by

whom? key decisions are made? Outcomes of decisions?

* Remuneration how calculated etc. But it goes beyond pay as it includes any payments which have a monetary value such as vouchers, accommodation, bonuses/extra payments, expenses
* Days of work and whether flexible (But nothing else on flexible working.
* Detail on training, who provides it, who pays, implications of ‘passing’

(No right to training itself or life-long learning).

QUESTIONS/QUERIES

AND LET’s LOOK AT SOME PRACTICALITIES.

Further Actions