

Employment Law Exchange

Date: 9th December 2016

Venue: NYK Group, Canary Wharf.

**Special Topics**

HEALTH, SAFETY AND WELLBEING; AND A SHORT GUIDE TO THE COMMON LAW OF CONTRACT

1. **News From Europe**

Unsurprisingly, there is again little to report. It seems that BREXIT has already happened in the sense that the UK government is not participating in many on-going developments. However, it does seem there is some developments on freedom of movement, at least insofar as the UK appears to be supporting existing EU nationals resident in the UK.

As time goes on it becomes all the more apparent that things are not going to be easy. For us, the status of the decisions of the ECJ is very important, and the future of EU employment legislation dependent on the so-call Great Repeal Bill. Opinions appear to be hardening across member states and if access to the Single Market is a priority, there will have to be many compromises by the UK government.

Meanwhile, the other member states are pressing ahead, as is the Commission on dealing with the so-called gig economy and ensuring that the economic improvements of the last few years are maintained.

Questions?

**Case law from the ECJ**

Sometimes it is worthwhile remembering how much more progressive our law, especially case law is than that of the ECJ. For example, on age discrimination where our case law has focussed on older people asserting rights.

**Gorka Salaberria Sorondo (2016) C-258/15**

This case concerns the security services in the Basque country. Entry is limited to those under 35. Such a rule was held to be justified so; as there are sufficient younger people to undertake ‘physically demanding tasks’. The older workers can then take on less demanding tasks.

**E Lange (2016) C-548/15**

This is a Dutch case. Under Dutch tax law the training costs for, in this case, being a commercial pilot are tax deductible. However, if the taxpayer is over 30, the tax deduction is limited to 15k Euros. It was argued this was age discriminatory but the ECJ held the rule to be justifiable as most costs for training are incurred when young and the arrangement was ‘proportionate’.

As we know, data protection has become a ‘hot’ topic and the next case possibly helps with the definition of ‘personal data’ whereby employers have limitations on what they can store.

**Breyer (2016) C-582/14**

This concerned the practice of an employer in storing IP addresses and the consents needed. B had more than one IP address used at work. They were all stored without consent. The ECJ ruled that if the employee has one work IP and that is stored for any other information consent must be obtained. So, email addresses (Facebook? Other networks?) Beyond the work one need to be treated carefully. The principle appears to be that if the employer has one way of getting in touch that is enough, unless staff gives consent. A breach entitles the employee to compensation.

(It might be noted that the ECJ has also recently held the requirement from the Netherlands that UBER be registered are unlawful, as they are an Internet platform. This does not bode well for the ‘big’ case coming up on what is UBER-being part heard in December and is at variance with the Uber driver case recently decided here-see later).

**2. UK Policy Development And Law**

Once again, there is not a lot to report on specific legal developments, though the Chancellor’s Budgetary Statement did have some relevant issues.

We have touched on some of these already but now they have a reality. Mostly and unsurprisingly, the changes are to do with tax. The major changes are;

* Corporation tax to be reduced to 17% by 2020.
* Changes to tax thresholds, including high rate tax threshold
* Increases in the NMW-April 2017 and increase in penalties and measures to ensure compliance.
* Removal of the Employee Shareholder tax advantages. This includes the Capital Gains exemption being removed and tax relief on shares ended on 1st December. This is only for new schemes-old schemes are unaffected
* Increased moves towards harmonising tax and NIC
* The tax advantages of salary sacrifice schemes to be ended, except for a few benefits, including pensions and childcare. Changes to take effect in April 2017 but current arrangements for cars, accommodation and school fees are protected for 4 years
* New Basic tax relief on child care costs
* Contractors, consultants etc. to be taxed as employees if working for the public sector
* Comments/issues?

Rather quietly the major changes to apprenticeships has been moving forward. The new Levy comes into effect in April 2017. The scheme seems very complex but appears designed to cross subsidise training by smaller firms by larger ones. It only applies if the payroll costs exceed £5 m. pa. This is on top of any pre-existing industry levies. It is 0.5% of payroll and creates a fund, which organisations can draw on. What is very interesting is the wide definition of apprenticeships, as many professions, including solicitors and accountants, and training for the HR role are included. The scheme only applies to England. Is this something we should explore more closely?

However, interestingly, one area of significant policy development happens to be around health and wellbeing at work.

\*On 11th November the Government published a Green Paper entitled ‘Improving Lives’. DWP and DH publish it jointly. It has taken the form of a Consultation, which closes on 17th February 2017.

The backdrop to the document is a well-known one. It includes the underemployment of disabled people, the fact that 1.8 million workers have long-term health problems, and we have continuing very high sickness absence problems, with half being caused by mental, as opposed to physical health illness. We know that there have been developments in law in recent years, including;

* Expansion of the definition and scope of ‘disability’, with courts and tribunals being generally supportive of claimants
* The introduction of a scheme of independent health assessment available to GPs and employers where a worker has been off work for at least 4 weeks
* The introduction of the Fit Note which, in theory enable GPs to suggest a more flexible or appropriate return to work.

The Green Paper reviews the evidence we have and Chapter 4 discusses the role of employing organisations. It suggests;

* Working to improve organisational culture such that health and disability issues can be more easily discussed.
* Raising awareness of information and support facilities on health issues.
* Improve and develop employer networks and groups of employers to share and develop policies and practices.
* It is vital to retain regular contact with employees off sick, including or especially regarding income concerns, and working towards a phased return (The longer people are off the less likely they are to ever return).
* Improving and extending income protection insurance.
* A review of the Fit Note scheme, which is not considered yet effective.
* Increased funding for the independent health assessment scheme.

\*ACAS Guidance on Managing Mental Health. Although this appears under the ACAS ‘banner’, in fact it is an interesting research report, which explores the attitudes towards mental health and work practices. It contains some very useful case studies and examples, with Chapters 2 and 3 being especially useful.

These deal with important issues such as;

* Raising awareness of the nature and implications of mental health problems.
* Ways to tackle the stigma of mental illness.
* The importance of early detection and then responses.
* Sources and uses of help and advice.

Interestingly, the legal issues surrounding health, including stress etc. at work are only rarely mentioned, but it is important to bear in mind the duties in the law of negligence and the possible implications for contract law, including breach of the implied term regarding health and safety, and trust and confidence. Given that the causes of work related stress are now well understood and include such matters as long hours at work, work intensification, confusions about role and duties, and about the management of tasks and output, violence and personality clashes, bullying and harassment, having the right policies in place is NOT an optional extra. Research from OSHA would suggest that a ‘macho’ organisational culture, organisational change and possible redundancies and other changes are also typical stress triggers.

UK case law in this area remains valid. In terms of negligence it requires the employer to be aware of the risk of stress etc. and if they did or ought to have reasonably foreseen that risk to a particular individual and then failed to take reasonable care, the law may well have been broken. The contract of employment will also have been broken and probably repudiated if the employer fails to respond to warning signs of stress. This will then trigger the opportunity for the employee to hand in their notice and claim constructive dismissal (See a case later).

In terms of negligence, the law remains as it was under the 1994 case of Walker v. Northumberland CC. Cases are never easy to win, not least because the recent context of H&S law has been to weaken it. For example, by requiring fault by the employer in a BSD claim, removing protections from the self-employed (And yet the fatal injury rate went up again last year). It might be added that the 40+ EU directives and Regulations is one of the most critical, yet largely ignored aspects of BREXIT. (See Supreme Court decision in **Kennedy v. Cordia, 2016 UKSC 5**)

Here, a carer when visiting a client, slipped and broke her wrist as it was icy and snowy. The employer failed to provide cheap and available; non-slip footwear and were fully aware of the weather risks involved. They were held liable).

The ‘golden rule’ of the law remains as ever-‘The greater to risk, the greater the care to be taken’. This applies not only to work conditions, as here, but to the claimant themselves. For example, young workers, trainees, newly recruited people, and pregnant women and older people that may well need more care (See HSE Report on negligence and the older worker).

Questions/comments?

It has recently been announced that ET decisions will soon be available on-line. This will be helpful, so long as we can easily access them.

A final piece of information is linked to the first item of UK case law. This is that there used to be an Enquiry into the Gig Economy and non-standard working more generally. Led by Matthew Taylor it is seeking views. This links also to new report by OTS seeking views on employment status. (Guess who IS replying!).

**3. UK Case Law**

**3.1 Contracts and related matters.**

**The UBER Case (Aslam and others v Uber (2016) ET2202550/15.**

I realise that this case is only an ET decision and that the facts are rather dramatic, concerning a new and hitherto untested issue here (Though it has been tested across the world). You will know the facts-which take up half of a 40 page law report. The drivers in the case were held to be ‘workers’ as they were claiming, inter alia the NMW and paid holidays. They were not, as claimed by the BBC etc. found to be employees. They never asserted that they were.(Remember we have two basic employment categories, but three status group for the purpose of accessing statutory protections). What I want to draw to your attention was some strong language of the EJ, who clearly had no time for Uber in claiming the drivers were ‘; partners’ or; sharing’ their car or who simply used Uber as an agent to find passengers for them. The judge was highly critical of complex, legalistic documents being used, especially where a high % of the drivers did not have English as their first language.

The wider importance of the case-which is on appeal lies in a few things.

* That courts and tribunals will cut through any attempt to obfuscate the real nature of the employment relationship or business model.
* Interestingly, **Autoclenz v. Belcher-the car valeters** case decided by the SC, was approved of. This requires analysis of the ‘realities’ and the process will often override documents.
* The judge approved of the idea that we must look at the imbalance in bargaining.
* That Uber is a transport company and subject to regulation.
* That drivers activated a contract when they switched on the app, not when passengers got in. Even this analysis leaves massive room for debate on the question of continuous employment, necessary for many rights at work and other benefits.

So? (And don’t forget the case is going to the ECJ)

**Working Time.**

**Grange v. Abellio (2016) UKEAT/0130**

The claimant was entitled to a half hour break from work. It was unpaid but he tended to take it. In 2012 he was told that it was ‘expected’ that the break would not be taken. He had not formally requested a break; and when he claimed the employer resisted it by saying you need to ask for a break for it to be a breach of law.

The EAT said there was no requirement to ask and in any case, they were mindful of the policy objectives of the Directive that was there to protect health.(This is the teleological approach to interpretation applied through EU law but not so critical in the common law here)

**3.2 Equality and related topics**

**Snell v. Network Rail (2016) UKEAT**

A simple sex discrimination case arising out of shared parental leave. Enhancements that were given to the mother but not the father= sex discrimination.

An interesting case, in effect, on detriment is that of;

**X School v. HMI (2016) EWCA 2813 Admin**

The case concerned a Muslim school, where boys and girls were separated from the age of 9. It was noted in the case that some Jewish schools have similar practices and sexual segregation is becoming a major issue in other workplaces and education establishments. There had been problems with OFSTED inspections, with major concerns voiced about the segregation practice. Inspections continued, but there were allegations that the conduct of the school had been a sham, with both girls and boys expressing concerns about the social consequences of the segregation but not being listened to.

The CA held that there had been no breach of the Equality Act as there was little direct evidence of discrimination/detriment. The reasons put forward were societal, rather than purely educational.

The case is on appeal………..

And now a case on TU discrimination:

**Dahou v. Serco (2016) EWCA 182 Civ**

D was a Team Leader at the London Cycle Hire Scheme He was also an RMT rep. but RMT was not recognised by the employer. In 2013 he was suspended for alleged misconduct but D said, in reality it was his TU activities. Relations between the employer and claimant had seriously declined, especially when strike action was threatened. There was bad language, threats and violence. It was alleged that D had called meetings when he was off sick. He was suspended.

The facts were not essentially disputed and clearly there had been major problems. But the CA reminded us that no matter how bad relations have become it is still up to the employer to put forward reasons for the behaviour, as it is for the claimant to show discrimination for TU activities.

**3.3 Termination etc.**

Our first case deals with the role and importance of written warnings.

Bandara v. BBC (2016) UKEAT 0335/15

B was a TV producer. There had been some arguments about a range of issues, including programme content and viewing times. He was subjected to a Final Written Warning following a dispute. Following another argument he was summarily dismissed for intimidating conduct and bad language. The employer, it was assumed, had relied on the fact of the Final Warning. In fact the B had apologised for his earlier behaviour. Can an ET consider the first warning inappropriate as final, and look at the reasonableness of the employer’s conduct overall?

Yes. So, think carefully about warnings more generally and their link with the disciplinary code etc.

Another topic which has not been litigated on recently is that of; ’third party interventions;’ in employment contracts., here involving TUPE.

**Scott v. EC Maritime (2016) UKEAT 0032/16**

S was a qualified and experienced maritime security officer who was employed by a cell company in Jersey. He was allocated to work with four other companies and worked on a series of ‘rolling’ FTCs. The company he was employed by transferred their business to another company. He had an introductory meeting with the new company, which did not go well. They did not want to employ him. His employer did not investigate the matter and did not explore whether other work might be available. It was held he had been dismissed. The EAT held it to be an unfair dismissal. It could have been a fair dismissal but the matter was handled badly. He also recovered his costs from the respondent.

Another cautionary tale comes from;

**Tycocki v. Royal Bournemouth NHS Trust (2016) 0081/16**

A long serving health care assistant was summarily dismissed following allegations from a patient that she had assaulted her and neglected her care. Despite procedural failings the ET held these had been ‘cured’ on appeal. The EAT disagreed and held that the investigation had only focussed on the patients complaints and had not sought information from other sources, such as other patients and nurses. The ET had failed to consider the overall fairness of the process, so the case was referred back.

A case that would have fitted well with our discussions at our last ELE meeting is that of;

**Lenlyn UK v. Kular (2016) UKEAT 0108/16**

(Interestingly, there were lay members sitting in the case)

K was a financial controller in a bank. The bank had contracted with another company to collect and then cash monies. It never did cash the monies and went into liquidation owing the Respondent bank £1.9 million. No one had noticed the lack of cash. K was told that it was his fault that the money had been lost but he could resign or face disciplinary action. The employer alleged they had embarked on a ‘protected conversation’ though an investigation was still pending. K was handed an envelope as a settlement. It contained a reference to £18k compensation. K said it was not enough. (He was upset as he was seriously overworked, departed colleagues had not been replaced and it all seemed rather chaotic).

The employer then told him to go home, told not to come to the bank and not to talk to colleagues. He discovered he had been deleted from the IT system.

He claimed for constructive dismissal on the basis that a decision to dismiss had already been made; he had no reasonable time to consider an offer and the threat of dismissal hanging over him (He might have added a few other things?). Put succinctly, he said ‘I was being forced out’. A hearing was set for early January which he did not attend as he had no time to prepare. He had been told that an accountant who had prepared a report for the investigation had said he had committed ‘gross negligence’, which she hadn’t.

The ET rejected his claim but this was overturned at the EAT. The ET had failed to consider the demands on K and whether these alone would have amounted to a fundamental breach. This is an important aspect of the decision, though the ‘killer’ point was that the employers conduct was anyway ‘tantamount to dismissal’, as they had prejudged the case.

Any comments.

**Action Points**