

Employment Law Exchange

Date: March 20th 2020

Venue: The National Liberty Club:

*Postponed due to COVID-19*

Special Topic: ’Flexible Working/Contracts and IR 35’.

1. **Introduction**

Once again we have relatively little case law, certainly from the EAT, despite the number of ET claims being, apparently, high. Policy areas have been dominated by the virus, though there have been some interesting discussions of the employment law situation/consequences. Clearly, there will continue to be much fall-out.

At a European level, there has been continuing concerns about ‘undeclared work’-much as we have had here, not so much ‘undeclared’ as we see it more in terms of the ‘wrong’ tax and NIC. But also continuing concerns to see some basic right provided for precarious workers. Just as we in the UK are seeing an increased role for enforcement authorities, the new European Labour Authority is being given a very active role. But who is the villain? The person who benefits from the work, or the worker, or both?

We have one case of interest, though it is as yet only the Opinion of the Advocate General and not a decision of the European Court. It is Case 762/18

An employee had claimed in his national court for what we would call unfair dismissal. He won and an order for re-instatement was made. He then claimed for paid holidays for the period between his dismissal and re-instatement. The AG recommended he should win. The reason this case is interesting because it deals with a matter we have been discussing recently-though in the context of dismissal and internal appeals. Is the contract kept alive and or brought back to life following an appeal? Or is this a case, which deals with a self-contained right, which should not have been lost?

Here, the AG’s advice was that the employee was entitled to paid holidays for the ‘gap’ and that any legislation that disbarred an individual was unlawful. We shall see-though; as re-instatement is so rare it is unlikely to be a major issue here. Though, the issues around ’when, precisely does a contract cease to exist and what happens to employment rights seems to run and run.

2. **UK Government and Other News**

The news has been dominated by the virus and the implications for employers and people at work. We know that there has been a scheme in place to encourage self- isolation, which was promoted as covering the self-employed, though this is less clear. SI 2020 287-The Statutory Sick Pay (General) Coronavirus Amendment) Regulations 2020 refer to ‘persons deemed incapable of work’ and also if people are off work with the virus, plus payments to be available from day 1. Details are sketchy and in any event the sum per week is only £94. The self-employed are not expressly referred to in the 2020 Regs, so, I guess we have to assume the rules only apply to employees that qualify. What has been the reaction as regards occupational sick pay? At least in terms of the self-isolation? If there was a refusal to pay, what might be the legal implications?

There is an obligation to support staff for ‘domestic emergencies’, i.e. they should not be penalised but we have virtually no case law on it (It comes from EU health and safety Framework Directive 1989). It would likely only apply to 1 or 2 days and then, unless there is a scheme covered by contract; there would likely be no entitlement to pay.

What do you think would be the legal response to the following situations?

* An employee refuses to come to work because they are ‘not feeling 100%’ and they have to travel to work on a very busy tube/train?
* An employees refuses to work closely with a colleague who has just come back from skiing in a part of Italy with a high incidence of the virus?
* A staff member who comes from China has complained to you that other staff have referred to her as ‘pestilent’, a ‘plague carrier’ and are avoiding her
* John, the father of six children, when told he should work from home in future, says ‘this is my workplace-I can’t work at home with all those kids around-I want to stay here’.
* A rumour spreads that Antonio, an Italian national, has a large family in Italy whom he recently visited and staff demand that he is suspended and does not attend meetings etc.
* Mary tells you ’in confidence’ that Brian, who has been off sick with the virus for two weeks, ‘is absolutely fine-he was playing football yesterday with his mates’.

**Other developments**

1. There are changes for ET compensation maxima-a week’s pay is now £538-up from £525, and the maximum for compensation is now £88,519-up from £86,444. In reality, average awards very, very rarely go to these heights!
2. The National Living Wage is now £8.72 an hour-up from £821. This represents an increase for a full timer of £930 a year.
3. The key on-going legislation has been that to deal with ‘off payroll working’ (See below) We have little else to report on any changes arising from the 2017 Taylor Report.
4. The Parental Bereavement Leave Regulations 2020 also come into effect on 6th April 2020. A parent of a child that dies under the age of 18 is entitled up to two weeks paid leave. This is to be paid at £151 a week or 90% of salary. There are very complex notification provisions, but the definition of ‘parent’ is very wide, though excludes people paid to provide child-care. There is a lengthy period during which the leave has to be taken, but, I have to say, the notification and related issues appear highly demanding-perhaps not appropriate, given the topic.
5. The Government Equalities Office is reminding employers that the 30th March is the submission date for Gender Pay Gap reporting, but still only for employers with 250\* employees. It has also launched surveys on sexual harassment. Interestingly, it has reported on the composition of FTSE 100 and other companies’ boards. A third of board members are now female-up from 12.5% a decade ago. However, there is still concern about the lack of women in key director roles, such as CEOs and Finance Directors. For example, it is reported that only 15% of Finance Directors are women. In HR, 66% are women! And 40% of company secretaries are women.
6. We are promised shortly an Employment Bill-covering improved protection from redundancy etc. of pregnant women and those on maternity leave. Interestingly, it will also aim to make flexible working a default position. However, GEO and other surveys are showing increased hostility to women who work in senior roles
7. The Equality and Human Rights Commission has produced two very interesting Reports. The first is Preventing Sexual Harassment at Work: A Guide for Employers. The second is The Use of Confidentiality Agreements in Discrimination Cases. Both are quite a good read.
8. A Bill introduced in the House of Lords-largely to test the waters, is a major reform of the Equal Pay Act. Worth keeping an eye on as gender issues are gathering momentum. I will report later on this if it looks worthwhile.
9. ACAS has produced an excellent report entitled ‘My Boss the Algorithm: an Ethical Look at algorithms. March 2020. The research was undertaken by IPA. I have to say I found it a bit worrying but it is useful in that it focusses on management not so much worker issues. It reminds us that these practices were often confined to the so-called platform economy but are now becoming widespread.
10. The contract documentation and IR 35 changes have been subject to a lot of comment and analysis-especially the IR 35 proposals. I have suggested that they need to be looked at together, because what is the documentation could be highly relevant for IR 35 assessments of self-employed ‘workers ’now entitled to documentation. This means, of course, that you need to be clear about whom a worker is-a self-employed person who ‘personally’ executes work and does not operate on a B2B basis. We have quite a lot of case -law on the first point, especially around the reality or otherwise of a ‘worker’ being able to send a substitute and on what conditions, but only one significant case on the b2B point (Hadawi v. World Duty Free). I suggest if the documentation is provided, along with other comments below, you ensure that you are providing the documentation to comply with amendment of the Employment Rights Act but with great care.

Two other issues have been raised. The first is puzzlement as to why self-employed people should need to be provided with information on disciplinary and grievance procedures, and also probationary periods. (I might add also the provision about continuous employment). I suggest for both items you put on the statement -‘There are not disciplinary etc. rules applying’ and ‘there is no probationary period as this is a contract of self-employment’. If you do not want the documentation to be use against you in an IR 35 case, it is important to make this point clear. Also, for example, when dealing with ‘remuneration’ to use ‘fee’ or similar but not pay or ‘wages’. Be careful also when referring to training-it is fair to see training as a ‘workers’ own responsibility, though you might want to make reference to, say H&S training that they should attend.

We covered the bones of the new documentation laws last ELE session. I guess, it is important to keep in mind the key changes which is:

* As said above, the documents have to be provided for ‘workers’ (I suggest a clearly separate document, especially if you have many ‘workers’)
* Documentation should be provided on Day 1 for new staff
* Most terms have to be provided in one document-the main exception is information about pensions
* Don’t forget that existing workers/employees have a right to a ‘new’ statement of terms. You have on month to respond.

Comment

There has been talk of sabre rattling in terms of tighter enforcement of this area of law, but nothing specific has yet emerged. What has emerged is a growing awareness of the confusions in this area of law. Some we have picked up above about what looks like a simple change-providing S 1 Statements for ‘workers’. We can see the confusions continuing, not least because there is on-going case law about ‘recognition’ for collective bargaining purposes of the new trade unions that have in membership self-employed, typically, gig workers. We have some Court of Appeal cases pending.

**Where are we on the IR 35 private sector reforms?**

You will know of the intention to extend the duty of determining status by a ‘client’ where an apparently self-employed person is supplied by an intermediary (PSC/agency/umbrella) and to deduct tax/NIC accordingly. The policy underpinning it is supposedly to counter ‘sham’ self-employment, whereby an individual either colludes with a client to ‘create’ that status, or is forced into it as a worker by the client.

There have been a number of criticisms of the proposal. First-where is the evidence of ‘sham’? Second, the CEST tool to help clients determine status is generally considered too complex and any skewed to a finding of ‘employee’ and third, although many will as result be taxed as an employee, they will generally not be able to claim the core employment statutory rights or, say maternity, unfair dismissal etc., though will likely be able to claim just the worker rights.

HMRC announced last week that they wanted a; soft landing’ for the reforms and that they would not take action against clients/employers unless they was evidence of deliberate wrongdoing. They said the soft landing could last a year.

The legislation has just completed its consideration by the House of Lords. I gave evidence to it on 9th March 2020 and although we as yet have no outcome on how it will respond to the House of Commons, there did seem to be recognition of many of the problems faced by clients and by individuals. We shall see. (If anyone is interested, I provided a written statement and am happy to provide it for you-on a confidential basis).

Anyway-we shall see-but anecdotally; there is a lot of anger about the changes and likely ensuing confusions and anomalies.

Please get in touch with any queries-I shall be around especially if confined to home.

**3. Some Key Case Law**

As said above, cases have been rather thin on the ground.

In terms of equality law, we a few interesting points to emerge.

**Chief Constable of Gwent Police v Parsons and Roberts (2020) 0143/18**

This is an interesting case on compensation when an employee retires on health/disability grounds. Two police officers were in receipt of a deferred pension, which was paid immediately on retirement and a lump sum. The sum was capped at 6 months pay, because they had got the pension already. Was this unfavourable treatment’? The employer argued not as the full payment would have been a ‘windfall’. It was held to be a breach of law, as they had an entitlement to the payment and to limit it was wrong.

The next case deals with the requirement for a ‘reasonable adjustment’-this time as regards how the termination of the contract was handled.

**Ishola v.TfLondon (2020) UKEAT 0014/19**

I suffered from depression and anxiety. He was off work for a year and a decision was taken to dismiss. He had launched grievances about his treatment that had not been resolved prior to dismissal. He argued that the failure to resolve them was a lack of ‘reasonable adjustment’ or was a pcp that acted against him in a discriminatory way. It was material to the decision that the employer had a good record for responding to grievances. Although it was decided that a one-off situation could be a pcp (Interesting?) he lost the case, as there was insufficient evidence of either a lack of adjustment or of discrimination generally.

Now we have another whistleblowing’ case (And maybe further evidence that courts don’t want the protection to be used too widely?)

**Leclerc v. AMTAC Certification Ltd (2020) UKEAT 0244/19**

AMTAC is a certification body responsible for checking the safety/quality of medical devices. L joined the company in 2014, and following a probationary period that ended ‘by default’, she worked on until 2016 when she was dismissed when it was decided ‘her work was not up to standard’. She submitted many grievances arguing she was a whistleblower. She said that there were 5 companies testing equipment but that the work was sloppy as the companies were also seeking work from manufacturers they were assessing. It was accepted that you can be a whistle blower when doing your job and that although the public interest must be shown it need not be the predominant motivation.

She lost the case-due to inadequate factual content and ‘specificity’.

**3.1 Termination**

Perhaps the most important case is an interesting unfair dismissal case. It follows up the hugely important case of Djuti from the Supreme Court, which we considered at the end of last year that was about the ‘genuine’ or ‘invented’ reason for dismissal. Can you please have a look at this case, and the next time we meet could you tell me what you would done, in response to the facts

**Uddin v. Ealing Borough Council; (2020).**

U argued u/d but also age and sex discrimination. In November 2016 a work team from the council had organised a drinks party at a local pub. In the group was ‘SR’ a young female on work placement with the team. By midnight only four were left in the pub, having consumed a large volume of alcohol. U and SR had been sitting close to each other and kissing. SR then went to the disabled toilet. U followed her and, allegedly assaulted her after locking the door and badly bruising her chest. Their colleagues heard shouting, banged on the toilet door and ST was released and they went home.

She made a formal complaint two weeks later. U met up with her and tried to get her to drop the allegations saying they were both drunk, both to blame (Which she forcibly denied), though she did later withdraw her allegation to the police. The matter was fully investigated. U alleged that she had been ‘put up to complain’. There was CCTV evidence of some of the incidents.

He was dismissed for sexual misconduct, intimidation and bringing the Council into disrepute. The dismissing officer did not know she had withdrawn her complaint to the police. U said that it was sex discrimination (They were both the blame) and produced some rather confusing arguments about age! Though he was able to show an unblemished record until the incident the decision was?

**Two questions.**

What do you think the court decided?

How would you have dealt with the case? Did Ealing do well?