

Employment Law Exchange

Date: 18th January 2019

Venue: GoodmanDerrick, 10 St Bridge St, London, EC4A 4AD

Special Topic

“Contracts change and related matters”

Preamble

Can we confirm or change the Special Topics for 2019.

What has been suggested so far is;

* *March*- Pay and rewards
* *May* -Data, privacy, confidentiality and whistleblowing
* *June* -Equality law update
* *September*-managing performance
* *Novembe*r- Misconduct and suspected misconduct
* *December*-Health, safety and well-being (Or not!)

Thank you for some ideas that have come forward. Perhaps we can now re-consider?

1. **News about and from Europe**

Whatever happens with BREXIT, we anticipate the EU rules will continue to apply for a while, and the Convention and case-law of the ECHR will continue anyway as it is nothing to do with the EU. This means issues of ‘privacy’, ‘degrading treatment’; ‘family life’, right to a fair trial etc. needs to be checked still. In addition, the Convention and case-law are very influential in providing ideas for legislation, including of the EU. The General Data Protection Regulation is a case in point.

From the EU-again influenced by the ECHR, we have the Copyright Directive-part of the on-going battles between the EU and the ‘big tech’ companies, especially Google. It is said that, ‘the very principle of copyright is at stake’ without it.

The EU has Parliament Elections and a new Commission from May 2019. It will be interesting to see what happens and especially who will replace J-C Junker.

Clear if we leave the EU in March, following a so-called ‘hard BREXIT we will need to look at the law and HR implications in some detail.

In the meantime, the Bulgarians have taken over the Presidency……….

1. **UK Government Policy And Law**

Perhaps it has been inevitable that little has happened since our last meeting. However, there is one major item and that is the Government’s response to the Consultations following the publication of the **Taylor Review** in June 2017. I suggest we use this as an Agenda for Change for 2019, as many of the items are relatively straightforward and easy to put into effect and have, anyway, been widely forecast. We will do this at the end of this section.

**We have a few other items to note;**

* APSCO has reported a recent 3% decline in demand for permanent talent, and 6.1% for contingent workers.
* CIPD’s program ‘Future Work is Human’ has reflected on the responses to the equal pay gap reporting exercise of 2018. (It is repeated this year). Many employers are still reporting problems and misunderstandings with the methodology. Some appear not to understand ‘mean’ and ‘median’ and some of the ‘narratives’ were very limited. This time two things might happen-less publicity but also growing expectations about the measures to close the gap.

One specific recommendation was to move away from paying minimum rates when recruiting. Women appear less able to negotiate than men. The point to note was that evidence is now piling up that diverse workplace cultures do add up to ‘winning cultures’.

* The updates on the **Taylor Review.** It will be recalled that the review was very wide-ranging and focused mainly on what many consider to be unfair or poor practices, legislation etc. This was followed by four Consultations, and finally the publication on 17th December of the government’s response in the form of the Good Work Plan. Of the 53 proposals emerging from Consultations, the government accepted 51 of them! This has set our Agenda for 2019

**The Change Agenda for 2019.**

It should first of all be noted that a few items are seen as ‘core’ they are;

* To clarify the rules on ‘employment status’ so as to reduce ‘bogus self-employment’ and to do this by strengthening notions of ‘control and supervision’
* The three categories-employee, worker and self-employed to be retained
* Better provision of work information. This is to be a Day 1 right for workers as well as employees. Fines will be imposed for non -compliance. Detail awaited
* A new right for gig and other intermittent workers to ‘request’ a permanent contract and/or guaranteed hours
* Abolition of the Swedish derogation for agency temps
* Lowering the threshold for I&C purposes to 2%, making requests for independent representation. Still a minimum of 15 staff required

**What about the document itself?**

It is somewhat unusual, for although it foresees legislation it is not a White Paper and, generally is more aspirational than specific. It foresees further consultations. However, it does state its on-going commitment to a ‘flexible labour market’. We do still have relatively high employment levels and low unemployment along with increasing diversity but we also have income insecurity, regional imbalance, declining wages and emerging inequalities. The aims of the document are stated to be to achieve;

* Worker satisfaction
* Good pay
* Participation
* Well-being, safety and security
* Voice and autonomy.

In the future consultations, it is anticipated that the ‘new’ Director of Labour Market Enforcement will be pivotal.

However, as it stands, the document is a rather ‘bitty’ and a short -term problem -solving tool. It is aiming to deal with the *symptoms o*f work problems rather than their *causes*. It gives no hint that it will aim to tackle some of the major abuses by big MNCs, or problems with outsourcing/skills supply chains, the attempts to shift risks from employer to workers etc. etc. In that sense, it is not a very radical or controversial document. A few will be helped, but a huge number of basic issues remain if, indeed, you are really seeking to address some of problems mentioned above.

**Some specifics**

1. **Employment status etc.**

As referred to above the government does intend to legislate the ways to determine status by providing a clearer outline of the task and its ‘key principles’ and to do this in ‘primary legislation’. Although the three categories will be retained, the document proposes that ‘workers’ are renamed ‘dependent contractors’ (What do you think?). For this group ;’control’ to be more important than ‘personal execution of work’

What might be the practical implications of these changes?

The document also proposes that there should be more effort to ‘align’ tax and employment law, though it says the current system works well’ There is no mention of the IR35 changes-actual and pending-which we know has caused a lot of bother. Is the policy simply to get more into employee status? There will, though, be access to the on-line ‘status’ tool (Though many have complained about it).

BEIS and HMRC to jointly consult on the matters in order to achieve’ greater clarity and certainty’. Interestingly, one of topics that really did need to be looked at is our reliance on ‘continuity of employment’ in order to access so many rights and benefits. The proposal was accepted that continuity would only be broken by a gap of one month, versus, one week. Implications?

1. **Information about work**

At present only employees qualify for an S 1 statement, which has to be provided within one month. The right should be extended to ‘workers’ ,and temps should be given better information. Workers also will qualify for pay slips. The reference period for holiday pay to be increased to 52 weeks but a proposal to permit rolled up holiday pay rejected for obvious reasons! HMRC to have increased responsibility for enforcing holiday pay and possibly a reformed sick pay scheme which should be available to all. Agency temps to be provided with a ‘Key Facts Page’ before each assignment(And abolition of the Swedish Derogation)

Implications?

Clearly, this will apply to any short -term work and so-called ‘gig’ workers. But ‘consultants’, freelancers and others who are often high skill/high pay ‘workers’ will be covered.

**(c) NMW**

They call for ‘further discussion’ on a higher NMW where non- contracted hours are worked-though I found this a bit unclear .(No plans yet for increasing s/e NIC.)

**(d) Extension of ‘rights to request’**

A taskforce will explore extending the right to request flexible working to a Day 1 right, i.e. no qualifying period.(And during recruitment?) Zero-hours workers to be able to request stable hours, and temps to be able request permanent contract with clients after an assignment of 12 months. Well?

**(e) Enforcement of law**

This may well be the most important area of change, not least because there are so many ideas dealing with different issues. Sometimes it is the question of who and with what powers, will enforce, e.g. over NMW, sick pay and, interestingly, the EAS to cover all forms of ‘intermediation’ (Uber? Upwork? AirBNB?)

An important change is that in ETs, the burden of proof in ‘qualification’ issues (Including presumably, status) will fall to the respondent to refute the ability to claim. This is a very significant development and one to be carefully prepared for.

Successful claims for compensation for successful claims are going to be easier to enforce-though little detail. There will be higher penalties for ‘aggravated’ breaches and ETs will be required to assess in all cases whether this is the case; the possibility of uplifts in compensation for similar/same offences by other workers against the same employer. There little on extending ‘naming and shaming’, though corporate bodies will be required to provide information on their workforce structure, including the use of temps.

The document also covers a great deal regarding training and development-mostly aspirational, and also much improved support for the self-employed-mostly administrative measures. There is no response on the question of a right to return to the same job after lengthy sickness absence.

So-what next?

Many of the changes would be simple to achieve and quick. Is there anything there that worries you? Me for me-I still find the idea of a transparent and principled test for employment status a pipe dream-but, there we are!

1. **Case Law From The UK**

Not a massive amount but some cases of interest.

3.1 Contracts and related matters

Perhaps it was inevitable that our first case is on ‘employment status’ and it is the CA decision in Uber. This is the appeal from the first taxi cases-and the decision is now from the CA. Though they lost again, Uber has said it will appeal to the SC(The SC can itself decide whether to hear it). It was decided on 19th December 2018

**Uber v. Aslam and Farrar (2018) EWCA Civ 2748.**

The cases attracted a ‘stellar’ list of Barristers. The first argument put forward by Uber was easily rejected. This was that as Uber is registered in Netherlands the NMW etc. did not apply to it!. The language of the case is important- drivers are called ‘partners’ and passengers ‘riders’. They continue to argue they are not a transport company and that the contracts(Revised in 2015 without discussion) purport to protect UBER from any liabilities and that the ‘riders’ have to indemnify for loss. In the EAT, the argument that the contract meant that there was no relationship between Uber and drivers was overridden by the courts by applying Autoclenz v. Belcher, i.e. that the employment realities were that there was a relationship.

The CA confirmed that many of Uber’s arguments were, as found by the ET ‘absurd’, including such arguments that the contract for payment was between the passenger and driver.

The case confirmed worker status and that working time is to be measured from when app. switched on, not just when driving.

The message of the case (Which was in theory Uber’s best chance of support) was that courts are all saying, first, don’t mess us about and use crazy arguments, and, second, the employment realities test is the key. It is likely that the test for worker status in the future will focus on ‘control’ more, as was the case in Addison Lee ,which we considered last year. It seems that ‘mutuality of obligation’ is much less important.

3.2 Equalities law and related topic

This case also covers contractual changes.

**The Lord Chancellor v. Mccloud and Others (2018) EWCA Civ 2844**

Two cases were joined together regarding pensions: Those of judges and those of fire fighters. It is an age discrimination claim, so whatever the allegation, the employer can use the argument of the ‘proportionate response’ to a ‘legitimate aim’.

The cases involved transitional provisions in major changes to pensions. In effect the pensions were becoming less generous. For example, until recently, they were contribution free and more generous as regards survivor’s benefits. However, the major issue was that the scheme favoured those nearest to retirement age, on the basis that they would be less able to deal with any payment reductions. And had expected to receive the sums in question and planned for it. However, the evidence was that there were far more women in younger age groups, so a sex discrimination claim was implicitly added. The CA decided that the scheme was discriminatory and that the respondents had failed to make out a convincing justification.

**Williams v Trustees of Swansea University Pension Scheme (2018) UK SC 65**

This case involves a disability claim. It is, again, an important decision. Williams suffers from Tourettes Syndrome. He had been employed from 2000 to 2013 when he retired in health grounds aged 38. He had originally worked full time, then half time and then his hours were further reduced. In 2012 he took unpaid leave for brain surgery and began a phased return to work in 2013 but then applied for early retirement on health grounds. Medical evidence was that he could not do his job. He received a lump sum and annuity based on his actual earning but also an enhanced payment based on his ‘deemed pensionable service’ to 67’.The payments were based on his full time and then part-time earnings. He argued that basing payments on part time earnings discriminated against him because of his disability.

He won in the ET, but lost in EAT and CA. The SC asked itself just two questions-as they confirmed that there is no need for a comparator, first, what was the relevant treatment and second, was it unfavourable. This means, was it ‘adverse’ as compared with’ ‘beneficial’. The SC drew a parallel with maternity provisions, i.e. no need for comparator. He argued then that he was only able to work part-time because of his disability. However; the respondent countered this saying that if he had been able to work full time he would not qualify for his pension until 67. In effect, he got the pension because of his disability.

Controversial? What might be the implications?

Now we have a whistleblowing case. Maybe it is worth reflecting on what is the purpose of this legislation)

**Office for Gas and Electricity Markets Authority(GEMA) v. Pytel (2018) UKEAR 0044**

P is an economic analyst. He alleged that in the introduction OD so-called smart meters there had been some failures in the procurement of the meters. He was seeking further information from GEMA. This was refused. GEMA argued that the Utilities Act 2000 prevented disclosures. What was the ‘intention of Parliament’.? The court could find nothing to make GEMA ‘immune’, so he won. Further, the court stated that the fact that the respondent is aware of the nature of the allegation does not mean law does not cover it. The disclosure does not have to be something ‘new’.

**3.3 Termination**

**Asda Stores v. Raymond (2018) UKEAT 0268/17**

This is another case on ‘How not to handle investigations’. R, aged 60,was a driver. He suffered from diabetes, as was known to the employer. Another employee spotted him when he was delivering goods to their Harlow store. It was alleged that he urinated on some pallets. The employer saw this as breach of health and safety rules and neglect of company property and he was dismissed. R said he had urinated ‘discretely’ and had not used a toilet because the door was locked.

His claim was won, mainly due to the incompetence of the investigation etc. No record was kept of the telephone call from a fellow employee who said he had seen the incident. A week later an ‘investigator’ approached R but he had had no warning. He did not ask why R had urinated or whether there may have been some health reasons. There was no reference to any policy containing rules on urinating. In any event he denied urinating on the pallets. So-really badly handled and R won

Further Actions