

Employment Law Exchange

Date: February 19th, 2021

Venue: Online Zoom Meeting

Special Topic:

**Introduction**

This is likely to be a very busy time. Changes look likely to be afoot regarding COVID-19 with growing anticipation of some return to ‘normality’ following the roll-out of vaccination, and we have legislative developments, such as IR 35 changes, pay gap reporting etc to ‘look forward to’.

At the same time, there has been increased debate on the future of employment legislation. The promised Employment Bill, following the Matthew Taylor ‘Good Work’ report in 2017 has not fully appeared, leading to Taylor’s own departure as head of Labour Market Enforcement. (NMW, gangmasters etc legislation etc). His contract with BEIS was not renewed, so he is back at RSA, but very vocal, as he sees it, about the ‘failures’ of the government’ to implement his report, the government having accepted virtually all of his recommendations.

At the same time, the proposals, following BREXIT, to review aspects of employment law affecting, it is thought, the 48 hour week, holiday pay, breaks etc and TUPE etc have been quietly dropped. The reasons are disputed but it is thought that opposition from CBI, IoD, TUC etc that employers (and unions) want stability, not further changes to employment law was the main reason to oppose the change. Note, however, that the Expert Panel examining the relationship between the European Convention on Human Rights and the European Court of Human Rights and UK courts appears to be continuing, though we have very little information.

There have, though, been further changes to the furlough scheme, which I will briefly touch on. I will also clarify the position regarding employment law following BREXIT. But before turning to them, can we just check that the 2020 legislative changes have been implemented by you.

In April 2020, major changes were required to the ways in which and to whom employment information was required to be given. If you recall, ‘workers’, ie some self-employed people, are now included, written information is a ‘Day One’ right and the information that has to be provided is increased, especially as regards so-called precarious workers. With COVID-19, I am sure that many considered that there were more important employment issues than Section 1 Statements-the provisions of which are still only fairly weakly enforced. However, with the possibility of some sort of normality returning, including more claims reaching ETs and many people feeling aggrieved, can you check that you have updated systems, especially as regards ‘workers’ and so-called precarious work. (I will send part of the Notes for January 2020 Notes which has the detail).

The other legislation that was recently implemented was the Immigration Act. Are you ‘up to speed’ on this or do we need to check how it is impacting on recruitment?

What is the current position and advice concerning EU employment law following BREXIT?

It is an obvious point, but we now have no ability to participate in law-making procedures in the EU, though we may, as Norway and Switzerland have, a role in some EU institutions, such as the European Foundation, OSHA, CEDEFOP etc, but it depends on the topic and the policy of the institutions. However, EU legislation and case-law remains a part of our so-called ‘retained law’ until such time as it is repealed etc. It is also possible for the Supreme Court rules a particular provision as being ‘non-binding’ though we unclear on what basis.Further, the TCA signed at the end of 2020, states that the EU has a right to impose measures(!) if trade and investment are affected by ‘social dumping’, eg UK actions to reduce employment protections so as to give UK employers a competitive advantage in terms of labour costs.

There is still considerable uncertainty about this but it seems unlikely that EU derived legislation, such as health and safety, atypical work-part-time, fixed term and agency working, working time are repealed, but it should also be borne in mind that many areas of UK employment law are advanced/more extensive than EU laws, especially family rights and, anyway, we were always able to exceed EU protections.(Equal pay gap reporting being one example).

Many legal commentators consider anyway that the EU has been largely inactive recently in protecting workers-the only significant legislative intervention being a rather lack-lustre amendment of the Posting of Workers Directive. UK developments have been far more extensive!

What legislative changes do we have to prepare for?

With the fairly recent moves to focus on only April and October for changes, there is much to be done(If not done already) in the short term.

Recent Treasury Directions(January 2021) provide for further modifications. The CJRS (furlough) has been again extended, this time to the 30th April. It is intended that the scheme is only to be used by ‘viable’ businesses. If businesses are not viable, staff should be declared redundant. It is estimated that one in eight employees(C 13%) in the UK are still on the scheme.

The basic rules remain the same, eg as regards the maximum monthly payments, employees covered must have been on the payroll on a specified date, employee consent must have been obtained, the full amount due must have been paid to employees, and you can furlough foreign nationals so long as they have a visa.There are complex rules as regards maternity and child care responsibilities of employees and their pay entitlement and training can be undertaken during the furlough period.

Interesting other developments include cancellation of the Job Support Scheme, and the publishing of the names of employers who have received payments, at least for 1st December 2020.

As may be known, and a matter we have discussed, there is mounting concern about the cost of the scheme and the fact that, as in other countries, for example Australia, there are suspected many fraudulent or inaccurate claims. There, a very high number of ‘voluntary ‘repayments has caused the government to investigate further. This includes examination of company profits and senior staff bonuses-Toyota is one of the companies being investigated!. There will likely be a review of the scheme in the UK, and it could well be that his will prove its most interesting aspect. I guess we also want to know what will happen later this year when the scheme ends……….And we might then think about a different way of dealing with a future crisis!

Equal pay gap reporting

As you know, aspects of this legislation were suspended in 2020, though 2020’s experience is still very important. For 2021, employers of more than 250 employees have to report on the ‘gap’on 30th March for the public sector and 5th April for the private and voluntary sector.

Fresh Guidance was issued on 14th December 2020 (GOV-UK), specifically to look at the impact of Furlough payments etc.(We know that there has been considerable controversy over the refusal of some employers to use the scheme where lack of schooling presented major problems for employees who are also parents of school age children. Charities report over three quarters of female employees were refused). This maybe compounds the position where a reported 75% of male employees had their 80% ‘topped up’, compared with 65% of women. In addition, 23% more of female staff lost their jobs compared to males.

The reporting for the last year differentiates furlough staff from non-furloughed staff. The former are considered ‘on-leave’ for typically one day a week and subject to ‘snapshot’ reporting. For employers who did not use the scheme, the requirements for reporting are the same. Perhaps unsurprisingly, it was recently reported that only 451 employers had reported for 20121 out of an estimated eleven thousand. There is this time no requirement to report on ‘bonus related calculations’.

Do we need to consider this further? It is interesting to note that despite there being no legal requirement, some 23% of employers are reporting on the ethnicity gap. The advice given for the year 2020-21, which is inevitably going to be difficult to report on, is to use the narrative to explain as much as you can.

IR 35 changes.

It seems like a small industry has been established to advise employers on what to do before the changes occur. The changes were always going to be controversial when, say, a consultant, contractor, gig worker is declared to be an employee for tax purposes but unable to claim the full range of employment rights.The second reason for controversy is that in many countries, not just the UK, it has proved notoriously difficult to agree on what really differentiates the employee from the self-employed.

 The CEST test has been widely criticised and also, though now a little less complex, it is still not ideal. We have only a statutory definition of ‘worker’, ie the self-employed who have access to(A very limited) collection of employment rights. Neither employees and the self-employed who are not workers are also defined.

It is thought that the driver for IR 35 was the view that the government was losing tax income from the self-employed.(This took no account of the inherent risks of self-employment, not least being having no work, being unable to work etc). The responsibility is now with the employer to ‘get it right’ or face the consequences.

What to do? We could devote a session to exploring this, or build it in as a significant aspect of our next session. The advice that is being provided by consultants in tax law is widely available, but, of course, consultants etc are also seeking advice. It is tempting to ‘play safe’, ie deem the consultant etc, as an employee and taxed accordingly. Public sector experience has been that consultants etc are unwilling to work, for example, on a short or variable contract for the same pay-they say they still have the risks to contend with.. Judgements then have to be made on economic and organisational reasons as well as legal ones.

The advice that is the ‘preferred’ approach is to apply the ‘old’ employment status test on ‘control’. We have noted that in recent case-law. Sometimes it is referred to as ‘ultimate control’ which seems attractive but what does it mean-ending the contract?

What do you think? (I can send a copy of my paper for the House of Lords when they were considering it if you are interested!!! I see one of the probmes as being that self-employment is such a diverse category-gig workers right through to medical consultants etc)

One or two other bits of information about what’s been happening in employment.

Many research and professional bodies have been regularly reporting on the effect of COVD-19. Some have reported on matters that we have discussed at ELE

* It has been reported that 40% of employers are willing to dismiss if employees refuse to be vaccinated. It was reported that Pimlico Plumbers said that was their position for client-facing roles. Is that the only circumstance? Do you now have a policy?
* The IES, that has been monitoring workplace issues during the pandemic, has reported on the growth in the incidence of stress but also suggests ways to respond. Their report ‘One for the Road’, the numbers of staff turning to alcohol has grown-again they have advice.
* It is reported that organisations are reluctant to recruit over 50 year olds and there has been greatest impact in terms of job losses and reduced working conditions for low paid, precarious workers, eg ‘on-call’ staff.
* The crisis has increased the use of technology at work, not just communications and monitoring technology, but AI. The last raises major issues of employment law, not least consent, privacy, discrimination law. It is a hugely important topic that we must return to.(ICO Report 18/02.2020)
* Overall, as we have noted before, COVID-19 has produced winners as well as losers, along with much tension regarding often disadvantaged staff. When workforces do come back together there could well be considerable fall out……….

CASE LAW

There is now a growing volume of case-law, including from ETs but also other courts. Claims in ET’s appear to be the traditional ones, rather than those that are virus related. So we, as yet, have little to go on regarding the conduct of employers regarding H&S, treatment of specific groups, whether consent was obtained to changes etc etc.

 We have just one case today where lay members were used,

1. Contracts of employment and related issues

**Gordon v. J and D Pierce Ltd (2021) UKEAT /0010/20**

The claimant alleged constructive dismissal. This was specifically for breach of trust and confidence. He alleged that the employer failed to consult with him, appointed someone to a new role who could have been a rival. He tried to find out what was happening but refused to attend a directors meeting as he was so upset by that time. He argued that for constructive dismissal it is not necessary for the employment relationship to have been destroyed but substantially damaged. He had resigned but used the appeal procedure. Does this amount to ‘affirmation’ of the contract, ie it has not ended? No; the EAT decided that employment relationships are complex and it is possible that key aspects have been destroyed but some aspects continue. Although the case was lost by him it did establish that for CD it is sufficient that the relationship is seriously damaged, and also that by using grievance or appeal procedures does not necessarily mean that the contract is alive! The message of the case is aggressive behaviour by the employer saying that contacting them, or appealing means a claim based on dismissal is not possible ,is to be avoided.

Now we have a ‘*whistleblowing* case-they may well increase;;

**Dobbie v. Felton Solicitors (2021) UKEAT (2021) 01310/20**

The claimant had her consultancy agreement with a firm of solicitors terminated.. She argued that the reason for this was that she had made comments that the company had been overcharging clients. She lost the case because, as is known, the legal demands for a ‘protected disclosure’ are both many and demanding. It was held here that she had no ‘reasonable belief’ in the fact that this was a matter of public interest.

**Equality cases** have kept going;

**Cumming v. BA (2021)UKEAT 0337/19 2201.**

C was a crew member. She took parental leave. An accepted PCP by BA stated that for each 3 days of parental leave she would have to lose one day’s paid leave. She claimed discrimination. She said that more female staff that qualified took parental leave, so it had a disproportionate effect on female staff with children than males.

**Sargeant and Others v. London Fire Commissioner and Others.(2021) UKEAT/00137/1202.**

Pensions reform in the fire service had a transitional period which, it was alleged had a discriminatory effect on grounds of age. On this occasion the discrimination was allegedly suffered by younger fire officers. The employer argued that the scheme had bee introduced by national governments in the UK and so it was not the fault of the fire services that discrimination had been caused. This did not work. The various fire services against whom the claim was brought had options so that they could have mitigated the discriminatory effects.. They were therefore still in breach. You always have this responsibility, whether problems caused by public or private sector arrangements.

Termination cases have, as yet, been few and far between, including for redundancy. But watch this space…..

We have one interesting unfair dismissal case.

**Hakim v. Scottish TUC (2021) UKEATS/0047/19.**

H won and unfair dismissal case. The ET reduced his compensation by 30% as his own fault. The employee appealed on the basis that the’ broad brush’’ reduction was unfair, but this was rebutted by the employer who stated that the failure of the claimant to have a new job confirmed after a probationary period indicated that the reduction was at least fully justified. The SEAT decided that when making reduction, tribunals should do it in a very scientific way, not just impose a vague reduction.

An interesting jurisdictional case now follows. Who can bring a case in UK courts and tribunals?

**Crew Employment Services Camelot v. Gould (2021) 0330/19/1501**

G was captain of a ‘superyacht’ registered in the Cayman Islands. A rich client, based in the UK told him where to sail, despite not being his employer. The respondent company had an office in Channel Islands but no office in the UK. G was based in the UK, and was in UK waters 50% of the time. Claim in the UK?-Yes. He had sufficient links with the UK. What other options were there?