

Employment Law

Exchange

Date: 21st September 2018

Venue: GoodmanDerrick, 10 St Bride St, London EC4A 4AD,*with thanks to Jean*

Special Topic:

“Terminating contracts within the Law”

(With an emphasis on capability and conduct matters)

**Introduction V1**

Before we get going there are a few other matters to deal with. Some were highlighted in the invitation to this meeting. We need to confirm the rest of the autumn’s sessions. Working backwards, we have our special Christmas meeting at Canary Riverside Plaza Hotel, on 7th December, where our topic will be Health, Wellbeing and Safety at Work. Our November meeting on 9th November can be on TUPE/redundancy and other termination issues. Is this still OK or are there other pressing issues? We do not yet have a confirmed venue for this meeting, so please make an offer if you can.

I suggested that we might like to have a more informal session in October; perhaps to discuss current concerns more generally, hot topics in the news and, generally, matters we have not had time to deal with. The 12th or 19th might work?

1. News about and from Europe

As you will have seen from the August Gavel, 2018, although the media may well have been dominated by political happenings and BREXIT, the law courts have been very active. This includes the European Court-still binding on us. They have come up with some really important decisions, several of considerable importance for our topic today. There have also been some developments in legislation and policy-making. We need to therefore, briefly, consider them.

* At a EU level, we noted in Gavel that at long last the Posting of Workers Directive amendment has been adopted by the Council of Ministers. Contrary to many statements regarding BREXIT the Council (With representation from the governments of member states) is the only law making body in the EU. It adopted the amended directive in July. This is quite an important directive, not least because it mirrors even more the legal approach of the Agency Work legislation. Although seeing competition as an important element in EU policy, especially cross border competition, the final version of the legislation clearly shows commitment to banning competition based on undercutting the working conditions of posted workers. This is in comparison with the working conditions of nationals of the country in question. It is due for implementation in member states by 2020 and will clearly affect the working conditions of workers supplied by agencies and other intermediaries, including through secondment.

Clearly, so much it ‘up in the air’, not least transition possibilities, but it is important in recognising that digital intermediaries are also covered. It is maybe also part of the policy agenda about the alleged abuse of power by some MNCs and business models that make identifying and making culpable the ‘employer’ when things go wrong. Will await the EU’s response to UBER and other similar businesses.

* There has been no weakening in the approach of the ECJ to the need to treat fairly atypical workers-here a fixed term worker treated less well than a permanent worker (Ayovi v. Consorci Sanitari de Terrassa, 2018 C-96/17)
* Back in the UK, the Home Office has issued further Guidance on the employment of non-EU/EEA nationals who have been in the UK since before 1988. It deals with matters such as what to do if they have been resident in the UK without acceptable right to work documentation. And what to do if you already are employing such people. The Guidance also reminds us that Croatians now have a right to work in the UK.
* The Company (Miscellaneous Reporting) Regulations, 2018, are operative from 1st January 2019. This requires reporting-much as for equal pay, of executive pay. If there are problems with what to do, please raise this. It might be noted that the CIPD has recently published a report on Executive Pay. This shows an overall rise of 23% since 2016(2-3% for ‘ordinary employees)
* ACAS’s Annual Report shows there has been a 30% increase in ET applications in the year ending March 2018(This does still not ‘replace’ the lost numbers’ following the introduction of fees). There has been an increase in the demands on the ACAS Conciliation services. ACAS has also recently published a Guide to References
* There has been an interesting report from the Women and Equalities Parliamentary Committee on the failure of employers and others to deal with discrimination against older people. This is both in terms of not wanting to employ them but also problems with flexible working. Two things worth noting. First, there has been a considerable increase in numbers of people working beyond state retirement age, but second, government statistics are still only based on those aged 18-64.

It might also be noted that the same Committee has proposed an extension of Reporting on Pay to all employers with 50+ employees, and the publication of measures to respond to any pay gap. It also calls for an Enquiry into claims under 2010 Equality Act

* We have also changes to Childcare Vouchers (No new ones) and limits on existing beneficiaries. And what could be an important TUC report on Monitoring of Staff

1. Important recent case-law
   1. Some significant changes affecting litigation

Much of this is from the Court of Appeal and the Supreme Court. It is important to note the impact of the new regime of ‘pooling’ judges from a range of tribunals to hear cases. This means that the judges in the EAT are not necessarily experts in employment law. The declines in the use of lay members in both EAT and ETs is another factor bringing about important change. It is also important to note that there is a continuing shortage of Employment Judges. Many were retired, following the introduction of fees and the major decline in claims. Inevitably, many of the new judges are less experienced.

The overall effect is that judges more familiar with both common law rules and other areas of law are deciding more and more cases. The increase in the number of employment cases going to the EWCA is noteworthy. It is important to be aware of these developments because the traditional view that employment claims are ‘special’ and are set in a distinctive context that reflects workplace ‘realities’ may be changing.

The implications for HR professionals are that awareness of basic common law rules, as well as the statutory employment law framework is important and that matters familiar to employment practitioners cannot be taken for granted and need to be spelt out clearly.

So far, the decisions of both the EWCA and the SC have been., broadly, sound and helpful. However, there seems less awareness of the jurisprudence built up by the European Courts(See the cases on defining ‘working time’, in particular).

So, we are in for a period of change and we do need to be aware of the trends in and implications of the changes

* 1. Some important relevant cases

(Not all to do with termination)

Our first case to reflect on the possible practical implications is a case in the law of tort. This liability, where negligent statements relied on by a claimant who then claims for economic loss. This is also known as liability under Hadley Byrne v Heller.

**Banca Nazionale v. Playbor Club Ltd (2018) , KSC 43**

A credit reference was sought by an organisation that was acting on behalf of an ‘undisclosed’ client. This client relied on the credit statement, which had been negligently provided and suffered major financial loss. The claim was lost, as the bank had no evidence that their statement would be relied on by anyone other than the organisation that sought it.. However, had the bank known that there was someone else who could rely on the statement, such as where the client is unnamed rather than undisclosed, the situation would have been different.

How might this decision have relevance to, say, vetting organisations, recruitment agencies and might it affect how you deal with them. Impact on provision of references? This is a rather strange area of law but it may be that the SC decision will draw attention to it again.

A very interesting case-again from the SC perhaps provides evidence of the ‘de-employment specialism’ change.

**R v. Chief Constable of Manchester Police (2018) UKSC 47**

The ‘claimant’ applied for a job teaching in an FE College. Clearance was sought as he worked with young people. The Enhanced Certificate stated that he had been ‘tried and acquitted’ of the rape of a 17-year-old girl. He was rejected for the job. He claimed this disclosure was a breach of the HRA as an invasion of his privacy. And human rights.

It was reported that the CPS had authorised the prosecution, i.e. there was a reasonable chance of conviction. The standard of proof for a crime is ‘beyond reasonable doubt’ which is higher than that required for disclosure purposes. In any case the trial verdict was in the public domain.

However, the court-expressed concern that there was little information about employer practices, typical responses etc to this type of information.

What would you have done if you were provided by the information? Would the type of work involved be important and how would you generally have handled it?

The case that has (justifiably) hit the headlines is the definition of working time’ for NMW purposes.

**Royal Mencap Society v Tomlinson-Blake (2018) EWCA 1641**

This was a typical ‘sleepover case’. The NMW Regulations does not define working time as such but it is assumed you are ‘available for work’, as a minimum. This, it appears, presuppose that you are awake. We have previously at ELE considered the EAT case of Focus Care Agency v. Roberts (2017) where a multi-factorial approach was applied. It suggested the definition of ‘working’ was dependent on a range of possible factors, including the level of responsibility of the individual and the type of work undertaken.

The EWCA did not refer to any ECJ cases(The case was anyway on NMW not WTR) though they could have done more in looking at possible policy directions. Indeed, the case can probably be confined to pay. However, the EWCA concluded that to claim to be working you had to be awake. The claimants have sought leave to appeal to the SC. The topic is so important, yet unclear, the court may well agree to at hear an appeal.

The practical implications of this are major. How is being awake proved? How will employers be able to recruit people if they are, say, at a hospital/on-call/ etc yet get one hour’s pay or even none at all? The EU definition is time when you are ‘at the disposal’ of the employer, i.e. you can’t do anything else. What do you think?

(Interestingly, the EAT in the recent case of Flowers v. East of England Ambulance Trust (2018) UKEAT 0235) has emphasised that holiday pay must fully compensate you for your normal pay when you are on leave. In other words you need to be, financially, in the same place as when you are working.

**Now for some ‘dismissal’ cases.**

**Doy v. Clays Ltd (2018) UKEAR 0308.**

D was a ‘casual’ worker whose contract was based on annual, though varying hours. He was unhappy about the way he was paid for night shifts though his complaint was rejected.. He was upset and while with work colleagues made some very offensive remarks about his managers (He ‘hoped they would die’ and their children ‘get cancer and die’. When management learnt of this they suspended him for ‘threatening behaviour’. He was invited to a disciplinary meeting and was accompanied by two union reps. before the meeting he had written to apologise. He was called to another meeting and before he went in he made further threats against a manager. These appeared so serious that the manager in question had moved his family out of their house.

Once again he apologised, saying he was very upset by the poor treatment of casual staff. He was found to be in breach of disciplinary rules; he appealed but lost, throughout continuing to apologise. He said he was under stress. Management stated that he appeared unaware of the effect his actions had on others, although it appreciated no one had been hurt.

At his ET hearing he said other people had done worse things. He cited a woman who had punched managers in the face more than once but was not disciplined .He lost at the ET

At the EAT the employer argued that he had not raised the issue of ‘consistency of treatment’ as regards the woman. His appeal to the EAT was successful and the case was sent to be totally reheard.’ Fairness’ must take into account treatment of ‘comparable’ situations.

What can we take from this case? Consistency –yes, but what of the original conduct. How would you have responded?

Perhaps the most important, yet difficult case is;

**Patel v. Folkestone Nursing Home (2018) EWCA Civ 1641**

P started work in 2008. A letter for misconduct summarily dismissed him. Specifically, it was for falling asleep on his shift and then falsifying patient records. The letter was sent on 2nd April 2014. He appealed, following the contractual procedure. He was told by letter on 24th June 2014 that his appeal had been successful. He was not happy with the letter and refused to return to work.

On 17th July he files an ET claim for unfair dismissal. The question was whether there had been a dismissal. The ET said ‘yes’. The appeal did not ‘undo’ the dismissal and he was not obliged to accept the outcome of the appeal and return to work.

P was not happy about the appeal letter because it did not deal with the more serious of the complaints. This was the alleged falsifying of patient records.. The employer appealed to the EAT and won. It held that the successful appeal meant that he should not be considered as having been dismissed. The contract had continued to be ‘alive’ pending the outcomes of the appeal.

Interestingly, the EAT, though rejecting his claim invited him to submit a claim based on constructive dismissal. The grounds for this were seen as the employer’s failure to deal with the serious issue of records falsification.

What are the implications?

If the appeal had not been successful, when was he dismissed? And what is the EDT?

What is the status of the ‘dismissal letter’?

Do you expect successful appellants to return to work and what if they don’t?

If the contract remains ‘alive’ what are the obligations of the parties?

1. Some basics of dismissal law.

* The contract and its ‘incorporated documentation’ remain at the heart of lawful dismissal. You can only do what the contract provides for, both in terms of alleged ‘failures’ by the employee and how you deal with it. It should be noted that in the light of Taylor(And possibly changes at EU level), there will soon be a need to amend documentation or check it see that it contains all the matters that it needs to.(We await Taylor responses from government on this, but it will happen and it then provides the opportunity to review all contract processes)
* Although we tend to focus on unfair dismissal claims, wrongful dismissal remains a useful legal avenue for some claimants, especially those without 2 years’ service. This applies where a dismissal provides no or less than required notice to terminate.(There is no mandatory conciliation and up to six years to bring a claim!). Quite a few reported recent claims have concerned wrongful dismissal not least because it is always an option for constructive dismissal situations.
* It is important to consider the possible legal outcomes of other employer actions, including;
  + withholding pay/not awarding a bonus etc.
  + demotion
  + suspension, and how it is managed
  + and generally the role of the implied term of trust and confidence.

There is a requirement of fairness and reasonableness of the procedures applied in the above(And other situations) which can give rise to free standing compensation claims and, of course, constructive dismissal. Injunctions (Jones v. Gwent) can be obtained sometimes if disciplinary and other procedures are applied wrongly, unfairly or in a biased manner. This is important ,for although recent decisions, especially Edwards v. Chesterfield Royal Hospital, 2011 SC,have confirmed that compensation for the statutory claim for unfair dismissal does not cover compensation for unfairly/unreasonably applied disciplinary procedures, if procedures/actions can be ‘detached’ from the actual dismissal compensation can be awarded.(McCabe etc; Yapp v. Foreign Office,2014).So care must be taken with suspensions, warnings and other ‘non-dismissal’ actions.

This whole area is currently very controversial and contested. Some point out the anomaly that under the Gwent decision an injunction can be obtained for wrongly applied procedures prior to a dismissal but there is no compensation under unfair dismissal law for the manner of the dismissal itself.

* For both wrongful; and unfair dismissal there must have been a dismissal, i.e. communication of the decision to terminate the contract. In theory and sometimes in practice this is done orally but this often leads to disputes as to whether the language used was unequivocal. So, better to communicate in writing and if done orally, with witnesses.
* It is important to bear in mind the growing list of circumstances where qualifying periods are not required
* It is also important to remember the ground for a fair dismissal(The rules for wrongful dismissal are not defined but it must be for ‘repudiation’ of the contract). Capability and misconduct are clearly the major reasons used, but statutory reasons, including prevention of illegal working remain important. It is also important to note that SOSR, although more open ended has recently been subject to a decision that confirmed that the burden on the employer to justify SOSR is no higher than that for other grounds.

4 Some typical problematic areas.

Many of these are ‘at the edges’ of capability or misconduct (Or SOSR or repudiation). Another area is that of termination for refusal to accept contract terms changes, along with redundancy terminations that are arguably not for redundancy at all(Recently, the question of offering ‘suitable alternative employment’ has become more prominent).It is important always bear in mind the statutory definition of ‘redundancy’(To be considered more fully at our November meeting)

Capability as regards health issues can be problematic, not least because of the possibility of disability claims-many of which have been successful in recent years. We know that employers are not assumed to be aware of a disability without some evidence, but that once they do, the statutory requirements kick in.

A short and perhaps useful case is that of **Pulman v. Merthyr Tydfil College(2017)**

An FE college lecturer became depressed. However, his work relationships with colleagues and managers also seriously deteriorated, with frequent clashes with his line manager. Often in front of other staff and students. He went on sick leave. He stated he did not wish to return due to the ‘personality clashes’. He was dismissed for ‘persistent absences’. He claimed he had been bullied and the college was proposing no changes. He brought a disability claim and lost. Despite the lack of mediation etc the u/d claim was also lost. Maybe the employer was a bit lucky?

How long must jobs be kept open for?

**O Brien v. (2017) EWCA Civ** is a case we considered recently. A head of Department in a school was assaulted by a pupil and injured. She was off work for several months and unwilling to return as she thought she was still at risk. She indicated she would be fir to return ‘soon’ when asked by the school. She was dismissed, largely because the school felt the impact on the school of her absence could not be sustained. Her u/d claim was won at ET, lost at EAT and won at CA. Much of the discussion was that the CA was not convinced by the arguments about the impact of her absence. So-make sure there is evidence of the practical impact of long absences or other conduct.

So;

* Make sure the facts re: the health situation are obtained; consider possibility of disability and its implications
* Keep in touch with the employee
* Ensure return arrangements are OK-what changes might need to be made to ensure a positive return? Is flexible working possible etc?
* Consider and ensure there is evidence regarding the impact of long-term absence. What steps have been taken, what are the risks to other staff, are there any other options?
* Consider the ‘best’ outcome for the employee in terms of termination-though the law does not require enhanced payments, accelerating a pension etc.

Questions?

Capability as regards performance can also be very problematic. Clearly, contracts, job descriptions, performance appraisals etc are critical, and where there are perceived problems it is unwise to delay a response. Courts and tribunals are generally supportive of measures to protect employment, customer service, and efficient productivity, along with prevention of reputational damage (Sometimes there is a fine line between ‘capability’ and ‘misconduct’, especially where major errors are concerned, such as financial errors.

Much also depends on the nature of the employment and occupation, with often ill -defined social and cultural issues intervening. These include the expectations of senior and experienced staff, versus newer staff, higher standards of conduct, for example from teachers, care workers and others dealing with younger or more vulnerable people, those with professional standards applying to them etc. We also looked at the impact of managerial roles. **Adesokan v. Sainsbury’s (2017,CA)**.It will be recalled that a senior manager was lawfully dismissed, despite a long and unblemished record when a junior manage ‘fiddled’ employee engagement forms.

There are always factors to bear in mind, beyond those of previous record, and other matters that should always be considered.

SOSR is not, of course defined but the grounds still do need to be ‘substantial’. Personality clashes are the most common reason, but also lack of co-operation, possibility of risk to the business and its reputation can provide grounds(Remember ‘mutual trust and confidence’ is not a one-way street). A recent example of SOSR is

**Ssekisonge v. Barts Hospital (2017,EAT)**

S was apparently of Ugandan origin though she seemed to have UK citizenship. Her status was challenged by the HO-but they thought she was someone else. Some 7 years later in 2014 the HO revoked her passport. He employer asked her to explain what was going on but she did not reply. She was suspended and then dismissed for SOSR. It was a fair dismissal.

**Activity:**

Here are 18 some case studies for discussion. Assume you are the HR Director

(a) Tom, aged 54 has worked as a ‘mobile sales consultant’ for Pusshit Ltd, for the past 11 years. He works mainly in the office but also visits potential clients/customers. His managers consider Tom an ‘adequate’ employee. Recently, it appears he has a difficult relationship with a colleague, Martha-they argue, complain about each etc. In January 2018, following a car accident, Tom has been diagnosed as suffering from ‘anxiety and sleep problems’. He was off work for two weeks following the accident. His work performance has declined, and he often fails to meet sales targets. Jim, the office manager speaks to Tom who reassures him that he is getting better but that the accident’ really shook me up’. Jim says; ‘ This situation cannot go on. You really do need to sharpen up’. Tom suspects that Martha had been accessing his IT system to sabotage his sales figures and contacts.

Last week Tom ‘flipped’ according to colleagues. He was shouting and then threw his phone at Martha, whom it missed but it struck Tania, a new recruit. When Jim hears the uproar he comes to the office. He tells Tom, ‘this is the last straw. Please leave now. There is no place for your behaviour here: Go’ Tom says ’I am so sorry-I don’t know what came over me’.

.Later that day, another colleague, Jake, seeks a ‘confidential meeting’ with you. He tells you that Martha and Tom had had a ‘fling’ in 2017. She had ended it, telling whoever would listen that ‘Tom was an inadequate shit’. She also told people, ’He mucked me about and will pay for it’. Tom has apparently sought the advice of a lawyer.

What are your thoughts on the manager’s actions and the legal issues that may be relevant.

(b) Ryan is a legal assistant at RO Co. Although he is considered good at his job, he is often late for work, misses some meetings and off for short bouts of sickness, As the firm, which specialises in media law, has some high- profile clients, Nellie, the senior partner, is worried about Ryan’s lateness etc. Ryan explains that he does, indeed, have some problems he is uneasy about discussing. His partner died in 2015 and he has two young children to look after. Nellie says she appreciates his honesty but that he needs to ‘sort his domestic arrangements out’. She adds that although they have some several supportive policies, which may help, if he ‘can’t cope’ there may well have to be changes .Ryan feels upset ‘at his treatment’.

Two weeks later he seeks an interview with his line manager ,Tony. Ryan tells him that he suspects Alina, a senior colleague of passing confidential information to a rival law firm. Ryan says he thinks Alina knows he is ‘on to her’ .She has some ‘pals’ who might ‘deal with him’. So he lies low. Tony, who knows very well about Ryan’s attendance problems, is sceptical and suspects he has an alcohol or drug problem.

There are some important changes at RO Co and meetings have been called. Ryan is called to a meeting at 7.30 am and another on a Saturday. He is very annoyed and tells Tony ‘you all have it in for me. I know what the game is’ He then walked out, but went to another law firm, specialising in employment law down the road. He says he wants ‘redress’.

What are likely legal issue/outcomes here and how might they have been better handled?

(C) MyStyle is a small chain of clothing shops. It employs 210 workers, mostly in its shops, but the business is not doing well. Attempts to access more investment and ideas for possible mergers have not succeeded and there has been an in depth review of finances generally .Edward, the CEO, has decided that in order to save the business holidays will have to be reduced(From their ‘generous 33 days a year’), the Sunday ‘premium payment’ will be abolished and there would be no pay rises in ’the foreseeable future’. He added ‘staff are, of course, free to resign if they want to’, ’you will not miss out’. Elsie and Norma decided to hand in their notice, assuming they would qualify for any redundancy or other payments if the worst happened.

The financial review has yielded some interesting results .Edward concludes that Chris, the finance director, has been using the company credit car for personal purchases, amounting to over £100k.Eadward used a private investigating firm to go through the accounts. They tell him the evidence is ‘irrefutable’. Edward tells Chris he is dismissed for ‘financial irregularities’ and Chris leaves the building. He checks his contract and decides to appeal the decision as he believes the true culprit is Rachid. The appeal is heard a few months later and Chris has by then in a new job .The appeal is successful and Chris is written to with an apology from Edward. Despite having a new job, Chris feels very wronged and seeks advice.

(d) Things are not going well at Wellfield Hospital. In 2017 the senior nurse manager of the outpatients department, Amy, retired after 30 ‘glorious’ years in the role. She had been popular. Her deputy, Roxanne, has replaced her. Many staff, including senior medical staff, considers Roxanne weak, others think she is ‘divisive’ and has ‘favourites’ and yet others find her ‘abrasive and rude’. Roxanne thinks that the discontent, which she is aware of, is caused by her attention to detail, higher performance expectations and high commitment to patient care.

The hospital has received a number of grievances about her, attitude surveys have revealed low staff morale and unions and professional bodies have expressed concerns .A few weeks ago, staff stated they would walk out unless Roxanne was replaced. The hospital issues a statement expressing full confidence in Roxanne, but a well -attended staff meeting called again for her removal.

Roxanne was told to stay at home, ’while we explore our options’. She was told not to contact any staff member or the media’ though re-assured that her job was safe. In fact the hospital had contacted a recruitment agency regarding a possible replacement, though the job was described as ‘initially on a temporary basis’. The hospital began an investigation into the management of the outpatients department, led by a clinician who was a close friend of Amy’s. Roxanne was contacted at home for her evidence but not invited to an interview. After eight months, the investigation report stated that Roxanne had a ‘robust’ management style that had alienated many staff but there no question that she was committed to her work and role. Roxanne was invited to a disciplinary meeting, chaired by the head of the hospital’s pharmacy, another close friend of Amy. It was decided that it was important to make radical changes ,’ in the interests of the effective functioning of the department’ and that Roxanne should be dismissed.

Unsurprisingly, Roxanne appealed.

What would you have done and what now?

**Further Actions**