

 DMH Stallard

Employment Webinar

2020 Annual Review and Look Forward to 2021

Legislative changes in 2020

Simon Bellm

Brexit

- The European Union (Withdrawal Agreement) Act 2020 received Royal Assent on 23 January 2020
- Implemented the EU-UK withdrawal agreement of October 2019 into UK law
- EU law continued to apply during transition period (to end December 2020)
- From 1 January 2021:
 - A body of retained (or existing law) is created and becomes UK law
 - UK appellate courts (Supreme Court & Court of Appeal) can depart from it “when it appears right to do so”
 - EU law no longer has supremacy – Parliament free to create new legislation

Covid

- March 2020 - various emergency measures were implemented as a result of the pandemic
 - New rules on statutory sick pay
 - Relaxation of holiday carry-over rules
 - Furlough scheme to prevent job losses

NMW rates (1 April 2020)

- National Living Wage £8.91
- Standard adult rate Age 25+ £8.36
- Standard adult rate Age 21+ £6.56
- Development rate Age 18-20 £4.62
- Young workers rate Age 16-17 £4.30

The Employment Rights (Increase of Limits) Order 2020 (SI 2020/205) (6 April 2020)

- Maximum compensatory award in Tribunal £88,519 (or a year's salary if lower)
- Maximum week's pay (for purposes of redundancy/basic award) £538

The “Swedish derogation” in the Agency Workers Regulations 2010 (6 April 2020)

- Right of agency worker after 12 weeks to equal pay as direct employees
- Derogation allowed temporary worker agencies (TWA) to avoid pay parity between agency workers and direct employees if certain conditions were met:
 - Where the TWA provided the agency worker with a permanent contract of employment with minimum requirements and
 - Paid them a minimum amount between assignments when they were not working for a hirer
- Derogation removed

Key information documents for agency work seekers (6 April 2020)

- Temporary work agencies must provide agency work-seekers with a Key Information document, including:
 - Whether the work-seeker will be engaged under a contract of service, an apprenticeship or a contract for services
 - The identity of the employment business
 - The minimum expected rate of pay
 - How they will be paid and by whom
 - Any non-monetary benefits to which the work-seeker will be entitled
 - The nature and amount of any deductions, costs or fees that will be taken
 - Details of any entitlement to annual leave and to payment in respect of such leave
 - An illustrative example of what this might mean for their take-home pay

Section 1 Statements (6 April 2020)

- S 1 Employment Rights Act
- Statement of main terms of employment to be provided no later than the beginning of the employment
- Right extended to workers as well as employees

Holiday Pay (6 April 2020)

- Calculation of holiday pay where a worker has variable pay or hours
- Previously, holiday pay was calculated using an average from the last 12 weeks in which they worked (and thus earned pay) prior to holiday
- Difficulties if seasonal variations
- Reference period for calculation therefore increased to 52 weeks
- If a worker has not been in employment for long enough to build up 52 weeks' worth of pay data, their employer should use however many complete weeks of data they have

Holiday pay cont.

- Limiting how far back employers should look
- Previously employers looked back as far as necessary to get to 12 weeks' worth of pay data to complete the reference period (as they ignored weeks in which no remuneration was payable)
- From 6 April, a limitation on how far back employers should look has been introduced. Any weeks that are before the 104 complete weeks prior to the first day of the worker's holiday are not included

Cases 2020

Rebecca Thornley-Gibson

Vicarious Liability

- Barclays Bank plc v Various Claimants: Employer not liable for sexual assaults of self employed doctor on the bank's employees. Self employment cannot give rise to vicarious liability on the part of the engaging organisation (Supreme Court)
- WM Morrisons v Various Claimants: supermarket not liable for the unauthorised breaches of the DPA by an employee. Wrongful disclosure of payroll data was not so closely connected with acts the employee was authorised to do and therefore were not to be regarded as being done in the course of his employment (Supreme Court)

Turning the tide on vicarious liability?

Discrimination : Age

- Heskett v Secretary of State for Justice (CA)
- Can a deliberate slowing of pay progression disadvantaging younger employees be justified?
- Yes, where there is a need to reduce staff costs to balance the books during a public sector pay freeze this is capable of being a legitimate aim capable of justifying indirect age discrimination
- Costs alone cannot be used to justify discrimination
- However a “costs plus” argument where cost is taken into consideration with other factors can be used
- The other factors beyond cost in this case was the need to reduce staffing costs “ to live within its means”
- Arguably still costs related but enough to get home on!

Discrimination : PCPs

- *Ishola v Transport for London* (CA)
- Will one off acts be enough to establish a PCP (Provision, criterion or practice)?
- Not when there is no indication that the one off act would happen again with the same decision in the future
- In this disability case a failure to resolve a grievance did not amount to a PCP of requiring the employee to return to work without a proper investigation into that grievance
- Clarification that elements of repetition required for a PCP to be established
- However whilst claims for failure to make reasonable adjustments or indirect discrimination in respect of one off acts are unlikely to succeed the risk of direct discrimination and discrimination arising from disability remain

Discrimination : Sex

- Ali v Capita Customer Management Ltd / Hextall v Chief Constable of Leicestershire Police (Court of Appeal)
- Is it indirect or direct sex discrimination to not pay male employees enhanced shared parental leave where enhanced maternity pay is available to female employees?
- No direct discrimination because the correct comparator would be a female colleague on shared parental leave and not a woman on maternity leave
- No indirect discrimination because the correct pool for comparison could only be employees on shared parental leave and any disadvantage to the claimant would have been justified as a proportionate means of achieving a legitimate aim of the special treatment of mothers in connection with pregnancy

Unfair Dismissal : Procedural Issues SOSR

- Gallacher v Abellio Scotrail Ltd (EAT)
- Can you dismiss fairly for SOSR without following any procedure?
- In this case yes
- A breakdown in working relations between the manager and claimant led to the claimant being told at her annual appraisal that she was being exited due to lack of trust which had been brought to her attention on two prior occasions
- Following procedures would have been futile, potentially exacerbated matters and the claimant had no interest in repairing the relationship
- The employer was allowed to dispense with procedures

Safe to apply the principles in this case? NO: rare example of where procedures can be dispensed with on the basis of them not making any difference to the outcome

Unfair Dismissal : Procedural Issues

- Evans v London Borough of Brent (EAT)
- Can a tribunal claim for unfair dismissal continue even when there is no prospect of a financial award
- In this case yes
- The employee's gross misconduct and money due to the employer would have resulted in no compensation to the employee
- However there was a value to the claimant in a finding of unfair dismissal on procedural grounds and it was not an abuse of the tribunal process to continue with a claim on this basis

- Worrying principle set for claimant's who may want "their day in court"

TUPE

- Ferguson v Astrea Asset Management Ltd (EAT)
- Does the general prohibition on contractual changes by reason of a TUPE transfer apply to all changes i.e those beneficial and detrimental to the employee?
- Yes insofar as this case is concerned
- At odds with the BEIS guidance that an employer may vary terms “when changes are entirely positive from the employee’s perspective”
- At odds with the TUPE Regs purpose of ensuring employees are not disadvantaged on a transfer
- However this cases involved a deliberate attempt by the 4 transferring directors to change their contracts pre transfer to their advantage and disadvantage the transferee
- Useful case to consider when reviewing changes made pre transfer to employees’ contracts

Legislation for 2021

Adam Williams

Immigration

- 31 December 2020 (11pm) end of Brexit transition
- EU/EEA nationals coming to UK from 1 January 2021
- Approved sponsor status
- ‘Skilled Worker’ visas
- 30 June 2021, deadline for applications from EU/EEA nationals already in UK by NYE, under the UK’s EU Settlement Scheme
- Right to work checks from 1 July 2021

Covid

- CJRS to end March 2021
- Will JSS then be introduced?

Statutory pay rates ([4th]/6th April 2020)

- SMP, SPP, SHPP and adoption pay expected to rise to £151.97
- SSP is also expected to increase from £95.85 to £96.35 on 6 April

The Government Response to Gender Recognition Act 2004 consultation

- Applications for 'GRCs' to be improved
- Impact on Equality Act 2010?
- Gender fluid/non-binary and s.7 of EqA 2010

Gender Pay Gap Reporting

- 4 April 2021
- Fewer reports in 2021 or 2022?

Off-payroll rules for the private sector (IR35)

- Delayed to 6th April 2021
- Medium/Large businesses
- Start looking at status determinations

Commission Report on changes to ET Hearing structures

- Published 30 April 2020
- 23 recommendations
- Covid
- Increase time limits to six months for all claims
- Contract claims damages increased to £100,000

Employment Bill

- Queen's Speech Dec 2019
- Publication expected 2021
- Labour Market Enforcement Body
- Tips/service charges
- Right to request stable contract
- Redundancy protection
- Neonatal care
- Employed carers

Post-termination restrictions



- BEIS consultation on reform (February 2021)
- Proposals to mandate continued pay for period of non-compete
- Statute to make non-competes void




Government Kick Start Scheme

- New hires by December 2021

Review of Predictions for 2020

Stephen ten Hove

Case	Court	Subject matter	StH's prediction	The outcome
Lee v Ashers Baking Company Limited and Others	European Court of Human Rights	This is the "support gay marriage" bakery case. The ECHR will consider whether a claim of direct discrimination on the grounds of sexual orientation, religious belief or political opinion can be heard by them	The ECHR will decide it is not admissible	The outcome here is the ECHR has yet to decide on admissibility
Various Claimants v William Morrisons	Supreme Court	The Court of Appeal upheld the High Court's ruling that Morrisons are vicariously liable for a data leak by their employee Andrew Skelton. Judgment is awaited the case was heard on 6/7 November 2019	Common sense will prevail and the Supreme Court will overturn the ruling of the Court of Appeal	 Common sense did prevail and the Supreme Court overturned the ruling of the Court of Appeal
Barclays Bank Plc v Various Claimants	Supreme Court	Another case of vicarious liability. The lower Courts having decided Barclays Bank Plc is vicariously liable for the sexual assault of 153 claimants while attending a medical examination required by the Bank. To establish whether they were physically qualified for employment and life assurance cover	Barclays Bank should be successful, but it will fail	 Barclays Bank was successful

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Hextall v Chief Constable of Leicestershire Police	Supreme Court	The Court of Appeal dismissed Mr Hextall's appeal that it was either direct or indirect sex discrimination or a breach of the Equal Pay Sex Equality clause, for two employers to fail to pay two male employees enhanced shared parental pay	If permission to appeal is given by the Supreme Court it will be on the basis that the case should be heard for reasons of public policy. The appeal will be unsuccessful	 Permission to appeal to Supreme Court refused by Supreme Court on 13 February 2020
Asda v Brierley	Supreme Court	Equal pay. Asda's appealed from the decision of the Court of Appeal that it's workers in retail stores were employed under comparable terms and conditions to those working in separate distribution depots for the purposes of Equal Pay claims under the Equality Act 2010 and Equal Pay Act 1970	Asda will once again, be unsuccessful	 The case was heard by the Supreme Court on 13 and 14 July 2020. Judgment is yet to be given
Royal Mencap v Tomlinson-Blake	Supreme Court	Those who sleep in in order to carry out duties rather than actually working are only entitled to the national minimum wage when awake, held Court of Appeal.	Royal Mencap will be successful as the Court will not wish to burden employers in caring industries with additional costs	 Case heard on 12 and 13 February 2020. Judgment has not yet been given

Case	Court	Subject matter	StH's prediction	The outcome
Uber BV and Others v Aslam and Others	Supreme Court	The Court of Appeal upheld an EAT ruling that Uber drivers were workers for the purpose of the Employment Rights Act 1996, the National Minimum Wage Act 1998 and the Working Time Regulations 1998. The case will be heard on 22&23 July 2020	Uber will once again be unsuccessful	? Case was heard on 22 and 23 July 2020 but no Judgment has yet been given

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Flowers and Others v East of England Ambulance Trust	Supreme Court	Working time and time off. The Court of Appeal decided that holiday pay must include regular voluntary overtime. The case will be heard on 22 June 2021	The East of England Ambulance Trust will lose again
Adedeji v University Hospital Birmingham NHS Trust	Court of Appeal	Employment Tribunal Procedure: The Court of Appeal will decide whether an Employment Tribunal was correct in refusing to grant an extension for a discriminatory constructive dismissal claim presented 3 days late	The Appellant will be successful

Case	Court	Subject matter	StH's prediction
Addison Lee Limited v Lang	Court of Appeal	Employment status and self employment. The EAT held that drivers working for Addison Lee were workers under the Employment Rights Act, the working time regulations and the national minimum wage. They were not generally self employed independent contractors	Addison Lee will lose but the case will follow the Supreme Court's decision in Uber v Aslam
Community Based Healthcare Limited v Narayan	Court of Appeal	Self employment. The EAT held that a GP registered with CBCH was a worker under the Employment Rights Act 1996, Section 230(3)(b). This is even though Narayan was working through a limited company	The Court of Appeal will reverse the decision of the EAT, partly because of its decisions of the Supreme Court in the Morrisons and Barclays Bank cases of 2020
Conisbee v Crossley Farms Limited and Others	Employment Appeal Tribunal	Discrimination. An ET decided that vegetarianism is not a belief qualifying for protection under the Equality Act 2010. The Claimant appealed	The Claimant will lose. Note: this case may well have been withdrawn

Case	Court	Subject matter	StH's prediction
Smith v Pimlico Plumbers Limited	EAT	Holiday pay. ET held that a plumber was not entitled to £74,000 arrears of holiday pay as he had not brought his claim in time. This decision comes after the Supreme Court confirmed his worker status in 2018 (see StH's previous comments on this case)	The plumber will succeed

Quiz

Will Walsh