Selwyn's Law of Employment
20th Edition

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CHAPTER 1

The EU Transparent and Predictable Working Conditions Directive, which applies to workers and employees, has been agreed. It is not clear yet if this will apply to the UK, depending on what the future relationship will be. Member states will have to implement it by 2022. The Directive is expected to set out, among other things, new minimum standards to ensure that all workers, including those on atypical contracts, will have more predictability and clarity in relation to their working conditions.

Following the Taylor Review and the Good Work Plan, the Government announced proposals for new, single labour market enforcement agency which will have the powers to enforce minimum wage and holiday payments.

CHAPTER 2

2.2, 2.56 Uber BV & Ors v Aslam & Ors [2018] EWCA Civ 2748 appeal was dismissed by the Court of Appeal, and the drivers were confirmed to be workers. (Note that there has also been a reference from Watford Employment Tribunal to the CJEU as to whether Yodel couriers were workers. The reference includes the question of whether the right to use a substitute means they cannot be found to be a worker).

With the rise of new business models and the gig economy, following the Taylor Review, the Government has stated in the Good Work Plan that the law needs to be more transparent around the employment status of individuals, to reflect the reality of modern working relationships. It intends to align the current framework or employment and taxation, and provide greater clarity. It is not yet known what form this will take, (although there is legislation extending the operation of the off-payroll working rules (IR35) to private companies from April 2020). There are also plans to allow workers to request a more stable contract after 26 weeks, but again it is not known when this will happen.

2.56 Foster parents were found not to be workers Sindicatul Familia Constanţa and Others [2018] EUECJ C-147/17.

2.90 A cabin crew worker who worked 53.5% of the number of days of her full time comparator was entitled to the same ratio of pay, and not 50% British Airways Plc v Pinaud [2018] EWCA Civ 2427.

2.93, 3.107-117 The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 extends the rights to written particulars from 6 April 2020. Most of the information becomes a day one right, but some of it can be provided separately within two months of the employment commencing. Employees who started before this date have the right to to request a written statement and to be notified of changes to terms included in any additional information.

In addition the Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No. 2) Order 2018 extends the right to a written payslip to workers (as well as employees) from 6 April 2019.

2.154 The Court of Appeal in Kocur v Angard Staffing Solutions Limited [2019] EWCA Civ 1185 held that agency workers were not entitled to the same number of contractual hours of work as those of a permanent employee comparator. While the purpose of the Directive is to ensure the equal treatment of agency workers and permanent employees, there is nothing to suggest that it is intended to regulate the amount of work which agency workers are entitled to, otherwise the effect would be contrary to the whole purpose of making use of agency workers, which is to afford the hirer flexibility in the size of workforce available to it from time to time. Flexibility is the rationale for the use of agency workers, which is expressly acknowledged in the recitals to the legislation.

2.154 Following the Taylor Review, the Agency Workers (Amendment) Regulations 2019 will come into force on 6 April 2020. They revoke regulations 10 and 11 of the Agency Workers Regulations 2010, which allowed agency workers to waive their rights to the same pay (and so get a lesser pay in comparison) if they signed a contract giving them pay between assignment, and making them a permanent employee of the employment business, which was known as the 'Swedish derogation'. Agency have to give a statement by 30 April 2020 to agency workers who were subject to the derogation that they have the right to equality of treatment from 6 April 2020.

The Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2019 (known as the Conduct Regulations) will also come into force on 6 April 2020. These will require employment agencies to provide a key information document setting out their terms and benefits to those looking for agency work to those who are looking for work. These key facts include the type of contract, the rate of remuneration and holiday entitlement, who is responsible for their employment, any pay from an intermediary, any fee and any benefits.

This new requirement will be overseen by the Employment Agency Standards Inspectorate.

CHAPTER 3

3.13 Although the basic rule is that the law does not uphold illegal agreements, the Court of Appeal in *Okedina v Chikale* [2019] EWCA Civ 1393 found that where an exploited Malawian national (who had been paid less than £5 per day) outstayed her visa and was therefore employed illegally, could still bring a claim for unfair dismissal and unlawful deduction from wages. The Immigration Asylum and Nationality Act 2006 imposed penalties on those who employed people illegally, and did not deny a remedy to the employees themselves.

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CHAPTER 4

4.16, 4.76 In Chief Constable of Norfolk v Coffey [2019] EWCA Civ 1061 the claimant suffered from a degree of hearing loss which had never caused her any problems in doing her job and which did not constitute a disability within the meaning of the Equality Act 2010. She was refused a transfer because her hearing fell, as the medical adviser put it, 'just outside the standards for recruitment'. She claimed that that she had been discriminated against because of a perceived disability. The Court of Appeal found that it was discriminatory to refuse the transfer because of a perception that the hearing loss would affect her ability to work in the future.

4.87 When considering the issue of 'long term' in Nissa v Waverly Education Foundation Ltd and another UKEAT/0135/18 the ET had focused on the question of diagnosis rather than the effects of the impairments and had adopted a narrow approach, rather than looking at the reality of risk - whether it could well happen - on a broad view of the evidence available.

4.100 In a claim for discrimination arising from disability, although the Respondent did not know about the Claimant's disability at the time of the dismissal, they may have acquired actual or constructive knowledge of it before the rejection of her appeal and the rejection of the appeal formed part of the unfavourable treatment of which she was complaining; so that the dismissal was discriminatory even though the employer did not know of the disability until the internal appeal hearing - Baldeh v Churches Housing Association of Dudley & District Ltd [2019] UKEAT 0290/18.

4.232 In respect of claims presented on or after 6 April 2019, the Vento bands are as follows:

- a lower band of £900 to £8,800(less serious cases);
- a middle band of £8,800 to £26,300(cases that do not merit an award in the upper band);
- an upper band of £26,300 to £44,000(the most serious cases),

with the most exceptional cases capable of exceeding £44,000.

4.247 In the case of Re an application by Lorraine Gallagher for Judicial Review (Northern Ireland); R (P, G & W) v Secretary of State for the Home Department; R (P) v Secretary of State for the Home Department [2019] UKSC 3, the Supreme Court found that the scheme of disclosure in the Rehabilitation of Offenders Act 1974 and the Police Act 1997 was lawful art 8 of the European Convention on Human Rights and, and the categories employed in the scheme were not disproportionate. There were however two exceptions: the multiple conviction rule and warnings and reprimands for younger offenders, the purpose of which was instructive and specifically designed to avoid damaging effects later in life through disclosure.

Following on from this, there are proposals that rehabilitation periods could be amended, such as the suggestion that some sentences of over four years will no longer have to be disclosed to employers after a specified period of time has passed. This change will not apply where offences attract the most serious sentences, including life, or for serious sexual, violent and terrorism offences. Legislation is expected.

CHAPTER 5

5.9, 5.60 The Court of Appeal decision in Brierley & Ors v Asda Stores Ltd [2019] EWCA Civ 44 has confirmed the EAT decision that female employees in retail stores were able to compare themselves with higher paid men working in distribution centres, as their work was of equal value. There were common terms applicable to each job.

CHAPTER 6

6.48, 18.61 As part of the Good Work Plan, in July 2019 it was announced that protection against redundancy for mothers returning to work will be extended by six months, and that this will also apply to parents returning from adoption and shared parental leave. It is likely that this will extend regulation 10 of the Maternity and Parental Leave etc Regulations 1999.

6.67 Note that an employer can enhance statutory maternity pay above the SMP limit. It has been held that it would not be discriminatory to do this just for women on maternity leave, and not for men on shared parental leave (*Ali v Capita Customer Management Ltd* [2019] EWCA Civ 900), as maternity leave is there for the health of the mother to deal with the trauma of having a child, and cannot be compared with shared parental leave. This appears to be a practical decision, avoiding the effect of companies withdrawing such enhanced pay from women.

The Parental Bereavement (Leave and Pay) Act 2018 will bring in Regulations to provide bereaved parents following the loss of a child under the age of 18, or a stillbirth after 24 weeks' pregnancy, with the right to two weeks' paid leave paid. These regulations are expected to be in force in April 2020.

CHAPTER 7

7.44 Following the recommendation in the Taylor Review that statutory sick pay be seen as a basic employment right, comparable to the National Minimum Wage, for which all workers are eligible regardless of income from day 1, there are likely to be reforms to this and to its enforcement, but it is not yet known what form this will take.

7.54 In CCOO v Deutsche Bank SAE [2019] EUECJ C-55/18 the CJEU held that employers must keep records of actual hours worked to fulfil the obligations under the Working Time Directive.

7.75-92 The Good Work Plan led to the The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018, which come into force on 6 April 2020. They amend s16 of the Working Time Regulations by changing the reference period from 12 weeks to 52 weeks for calculating an average week's pay for those with variable remuneration. Tn the case of a worker who on the calculation date has been employed by their employer for less than 52 complete weeks, the number of complete weeks for which the worker has been employed.

7.86, 8.22, 8.32 In a case that concerned historic arrears of holiday pay, the Northern Ireland Court of Appeal found that Bear Scotland v Fulton was wrong in holding that a gap of more than three months broke the series of deductions. This is not binding on English tribunals, but readers should be aware of it in case of any future appeal.

7.99 Where regulation 24 requires compensatory rest for a 20 minute rest break, such compensatory rest does not have to be continuous in every case (Network Rail Infrastructure Ltd v Crawford [2019] EWCA Civ 269).

Following the Taylor Review and the Good Work Plan, the Government announced proposals for new, single labour market enforcement agency which will have the powers to enforce minimum wage and holiday payments.

CHAPTER 8

8.14, 14.4 In October 2018 it was announced that the government planned to introduce legislation to ban employers from deducting staff tips, but this has not yet occurred.

8.47 The appeal in Royal Mencap Society v Tomlinson-Blake [2018] EWCA Civ 1641 (which found that for workers who had to sleep in their place of work the only time that counts for NMW purposes is time when the worker is required to be awake for the purposes of working) will be considered by the Supreme Court in December 2019.

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CHAPTER 9

No important updates

CHAPTER 10

10.74, 19.29 It is expected that there will be new legislation to tackle the misuse of Non-Disclosure Agreements (NDAs)/confidentiality clauses, including those being used to cover up sexual harassment, racial discrimination and assault. BEIS has stated that the forthcoming legislation will prohibit NDAs being used to prevent individuals from disclosing information to the police, regulated health and care professionals, or legal professionals, such as a doctor, lawyer, or social worker.

It is also expected to:

- Ensure employers make clear the limitations of a confidentiality clause, in plain English, within a settlement agreement and in a written statement for an employee, so individuals signing them fully understand what they are signing and their rights.

- Extend current legislation so that individuals signing NDAs will get independent legal advice on the limitations of a confidentiality clause – including making clear that information can still be disclosed to police, regulated health and care professionals, or legal professionals regardless of an NDA.

- Introduce new enforcement measures to deal with confidentiality clauses that do not comply with legal requirements - for example, an NDA in a settlement agreement that does not follow new legislative requirements will be legally void.

10.74 The EAT took the opportunity to give a full overview of the law relating to whistleblowing in the case of Dray Simpson v Cantor Fitzgerald Europe [2019] UKEAT 0016/18, and is worth having a look at.

10.106 In two useful decisions relating to Christmas parties, first the High Court in Shelbourne v Cancer Research UK [2019] EWHC 842 considered the extent of the duty of care at such a party. The employer had undertaken a risk assessment which took account of the fact that alcohol would be consumed, and took action to restrict access to laboratories during and after the party. It was found that the employer was not vicariously liable, the court stating that 'the ascertainment of what social justice requires, which lies at the heart of the law on vicarious liability, is not a journey down a one-way street. The desirability of enabling those who have suffered injury at the hands of others to recover adequate financial compensation needs to be balanced against the wider social consequences which may ensue from achieving this result through the imposition of vicarious liability'.

There were two questions which had to be answered: first, what field of activities had been entrusted to the employee, and second, whether the connection between that employment and the wrongful conduct sufficient to make the employer liable having regard to social justice.

The above case can be contrasted with the Court of Appeal decision of Bellman v Northampton Recruitment Ltd [2018] EWCA Civ 2214, where a managing director, John Major, arranged an after-party at a different venue to the main Christmas party, and punched the claimant while drunk, causing serious injury. He was the directing mind and will of the company, with a wide remit, was responsible for the Christmas party himself and was in a supervisory role at the party. There was therefore sufficient connection and level of control which made it just that the company should be vicariously liable.

CHAPTER 11

No important updates

CHAPTER 12

12.4 An employer does not generally need to wait for the outcome of a police investigation before starting a disciplinary hearing (*North West Anglia NHS Foundation Trust v Gregg* [2019] EWCA Civ 387).

12.4 An employee was dismissed on the basis that findings in an earlier decision by an Employment Tribunal about his credibility meant that the Respondent could no longer employ him. It was found that in these circumstances, an investigation before dismissal was not necessary – Radia v Jefferies International Ltd UKEAT/0123/18, although the EAT pointed out that this was not the best possible procedure which could have been adopted by the Respondent in the circumstances, and that there are many good reasons why it is better to have a separate investigatory and disciplinary stage.

12.69 The Court of Appeal in London Borough of Lambeth v Agoreyo [2019] EWCA Civ 322 overturned the decision of the High Court, holding that while suspending an employee can be a breach of the implied term of trust and confidence depending on the facts of the case, it was not the case here.

CHAPTER 13

There are plans to extend the time required to break a period of continuous service to four weeks, but it is not known when this will happen.

CHAPTER 14

8.14, 14.4 In October 2018 it was announced that the government planned to introduce legislation to ban employers from deducting staff tips, but this has not yet occurred.

CHAPTER 15

No important updates

CHAPTER 16

No important updates

CHAPTER 17

17.187 If an order is made for re-engagement, or reinstatement, and the former employer refuses to comply with it, there is no power to force the employer to do so. (*Mackenzie v University of Cambridge* [2019] EWCA Civ 1060).

It is not always misconduct for an employee to make a covert recording Phoenix House v Stockman UKEAT/0284/17 - such a recording is not necessarily always undertaken to entrap or gain a dishonest advantage, so an ET is not bound to conclude that the covert recording of a meeting necessarily undermines the trust and confidence between employer and employee to the extent that an employer should no longer be required to keep the employee. An ET is entitled to make an assessment of the circumstances, looking at the purpose for which it is made, what is recorded, and the extent of the employee's blameworthiness. That said, we consider that it is good employment practice for an employee or an employer to say if there is any intention to record a meeting save in the most pressing of circumstances; and it will generally amount to misconduct not to do so

CHAPTER 18

18.61, **6.48** As part of the Good Work Plan, in July 2019 it was announced that protection against redundancy for mothers returning to work will be extended by six months, and that this will also apply to parents returning from adoption and shared parental leave. It is likely that this will extend regulation 10 of the Maternity and Parental Leave etc Regulations 1999.

CHAPTER 19

19.29, 10.74 It is expected that there will be new legislation to tackle the misuse of Non-Disclosure Agreements (NDAs)/confidentiality clauses, including those being used to cover up sexual harassment, racial discrimination and assault. BEIS has stated that the forthcoming legislation will prohibit NDAs being used to prevent individuals from disclosing information to the police, regulated health and care professionals, or legal professionals, such as a doctor, lawyer, or social worker.

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- Ensure employers make clear the limitations of a confidentiality clause, in plain English, within a settlement agreement and in a written statement for an employee, so individuals signing them fully understand what they are signing and their rights.

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- Introduce new enforcement measures to deal with confidentiality clauses that do not comply with legal requirements - for example, an NDA in a settlement agreement that does not follow new legislative requirements will be legally void.

19.33, 19.48 In a confirmation of the 'blue pencil' test, the Supreme Court in Tillman v Egon Zehnder Limited [2019] UKSC 32 overruled Attwood v Lamont [1920] 3 KB 571. There court was faced with two differing approaches, in Attwood and Beckett Investment Management Group Ltd v Hall [2007] ICR 1539. It approved the Beckett approach, which uses three criteria for severance:

1. Whether the unenforceable provision is capable of being removed without the necessity of adding to or modifying the wording of what remains – the 'blue pencil' test.

2. The remaining terms should continue to be supported by adequate consideration. This will not usually be in dispute.

3. The removal of the unenforceable provision must not so change the character of the contract that it becomes not the sort of contract that the parties entered into at all. This is the crucial criterion. It is for the employer to establish this, and the focus is whether the removal of the provision would generate any major change in the overall effect of on all the post-employment restraints in the contract.

CHAPTER 20

Following the Good Work Plan, the Employment Rights (Miscellaneous Amendments) Regulations 2019 amends section 12A of the Employment Tribunals Act 1996 to increase the maximum level of penalty that Employment Tribunals can impose in instances of aggravated breach (such as gross oversight, malice or spite towards the claimant) to £20,000. This came into force on 6 April 2019.

There will also be an obligation on Employment Tribunals to consider the use of sanctions where employers have lost a previous case on broadly comparable facts.

In addition, from 18 December 2018, a naming scheme was introduced whereby employees can register employers with BEIS who have failed to pay at least £200 of a tribunal award (note that this does not extend to ACAS conciliated settlements).

The employer will have 14 days from the date of the naming notification letter to make written representations to BEIS outlining whether they fall under any of the exceptional circumstances for not being named under the scheme. Representations may be accepted if they meet the following criteria:

•Naming carries a risk of personal harm to an individual, their family or other employees;

•There are national security risks associated with naming in this instance;

•Other factors which suggest it would not be in the public interest to name the employer (employer to provide details);

•Where the employment tribunal has been paid in full and proof is submitted and verified.

CHAPTER 21

21.49 In the case of *Kostal UK Ltd v Dunkley & Ors* [2019] EWCA Civ 1009 an employer made a one-off offer to the employees over the heads of the union, but crucially intended to continue to negotiate with the union. The Court of Appeal found, on the specific facts of this case, that this was not an unlawful inducement under section 145B. The wording of the offer was simply to break the impasse. If the employer had in fact made a direct offer which the employee could accept directly then that would have been contrary to the legislation. It is expected that this decision will be appealed.

CHAPTER 22

No important updates

CHAPTER 23

23.144-160 The Employment Rights (Miscellaneous Amendments) Regulations 2019 amend the Information and Consultation of Employees Regulations 2004 by reducing the threshold required for Information and Consultation arrang,ents from 10% to 2% of employees. This comes into force on 6 April 2020.