**EMPLOYMENT LAW:**

**AN INTRODUCTION**

**UPDATE**

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**Astra Emir**

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**INTRODUCTION**

The past year has been the quietest we can remember as far as new statutes in the field of employment law is concerned. Parliament has been completely preoccupied with Brexit and related matters, resulting in the shelving of all planned new employment legislation of any consequence. Following the general election it is likely that we will now enter a period of much greater political stability in which it will be possible for employment-related legislation to be brought forward, debated, amended and passed into law in the normal way. Changes to immigration law are likely to be the most high-profile in coming months, but we can also now expect progress to be made on legislation relating to the various measures recommended in the Taylor ‘Good work’ Review of 2017.

Despite the paucity of new legislation, there has been plenty of action in the courts, and we can also anticipate some significant future developments. So, it is on these that this update will largely focus.

A point to note by way of introduction is the continued rise in the number of claims coming to the employment tribunals in the wake of the abolition of tribunal fees in 2017. The number still remains well below its previous levels, but this is probably as much due to the persistence of historically low levels of unemployment and tight labour market conditions as any reluctance to litigate or upsurge in a willingness of the parties to settle cases before claims before they come to court. The following table demonstrates how the quarterly number of claims has fluctuated in recent years. It is important to appreciate that this table summarises the number of claims, not the number of claimants. As you will read below, there is one very substantial claim involving thousands of claimants currently in the system:

The number of claims being made to employment tribunals continues to be low by historical standards. There was an increase after the removal of tribunal fees in 2017, but the total remains very much lower than it was in the years prior to their introduction in 2013. This is probably more due to benign economic conditions and low levels of unemployment than to any legal reason, but time will tell:

2011 / 2012 186,300

2012 / 2013 191,541

2013 / 2014 99,704

2014 / 2015 18,784

2015 / 2016 18,396

2016 / 2017 18,121

2017 / 2018 30,440

2018 / 2019 41,829

**Consequences of Brexit**

No major changes to existing EU employment regulation are likely to occur in the short term as a result of the UK’s departure from the European Union. Until the end of 2020 (at least) during the transition period, the UK will remain part of the single market and will apply all existing EU employment laws in the usual way. After this it will be possible for Parliament to repeal, amend or add to EU law. Some relatively minor changes will be necessary simply because they are inherently cross-border in nature (eg: European works councils, TUPE transfers within the EU etc), but no major bonfire of EU employment law is planned. It is very likely that the terms of any future trading agreement between the UK and the EU will involve a level of regulatory harmonisation, including in the employment field. It is, however, unclear as yet precisely what form this will take. There are three broad possibilities, assuming of course that a deal on a formal future relationship is negotiated:

1) Mutual recognition

The UK will have the right to diverge from existing EU employment law, but will need to ensure that there is no undercutting of standards such as might give undue competitive advantage. This might result in changes being made to *how* employment rights are guaranteed, but would ensure no erosion of those rights.

2) Alignment with existing law

The UK will agree to preserve all existing EU employment regulation that is on the statute book as of 31st December 2020. Some form of arbitration body would then be established to which complaints could be made if the agreement was breached.

3) Dynamic alignment

The UK would agree not only to preserve existing EU employment law in our statutes, but also to introduce new rights as and when they are introduced in the EU. This would preserve the so-called ‘leving playing field’ and help ensure that a very liberal free trading arrangement was possible.

The third option is the one the EU negotiators appear to be seeking and was that envisaged in the Political Declaration that was agreed by Theresa May when she was Prime Minister. The wording was then significantly changed by Boris Johnson in his re-negotiation last October, so we can assume that the newly-elected government will look to negotiate one of the first two options. A further possibility is that some form of dynamic alignment will be agreed, but only for a fixed period of time, for example five years.

The question of enforcement will also need to be negotiated, determining to what extent future judgements of the European Court of Justice on matters of EU law will or will not apply in the UK after 2020. In any event, it has already been made clear that no lower court in the UK will have the power to alter any existing interpretation of EU law. Only the Supreme Court (or Parliament via legislation) will be empowered to take such steps.

**STATUTORY DEVELOPMENTS**

***Increases to redundancy and unfair dismissal compensation limits***

From 6th April 2020 the maximum figure that can be used to calculate 'a week's pay’ when calculating the appropriate statutory redundancy or basic awards in cases of unfair dismissal is £538. The maximum compensatory award for unfair dismissal is £88,519. The maximum basic award now stands at £16,140.

***National Living Wage and National Minimum Wage***

As of 1 April 2020 hourly rates increased as follows:

* National Living Wage (for over 25s) £8.72
* National Minimum Wage (21-24 years) £8.20
* Development rate (18-20 years) £6.45
* Young workers rate(16-17 years) £4.55
* Apprentice rate £4.15

***Vento compensation guidance***

In September 2017, the Presidents of Employment Tribunals took the step of issuing updated figures to be used by tribunals when determining compensation for injury to feelings in discrimination cases. They also announced that from now on the figures will be updated on an annual basis. The new figures are considerably higher, representing increases well in excess of inflation. This is commonly known as ‘Vento guidance’ as a three-band approach was first introduced in the judgment of the case Vento v Chief Constable of Yorkshire (2003).

As of 6 April 2019, the bands and ranges of compensation are as follows:

Band 1: £900-£8,800 – for one-off occurrences

Band 2: £8,800-£26,300 – for more serious cases and discrimination occurring on more than one occasion

Band 3: £26,300-£44,000 – for 'severe' cases involving a lengthy campaign of seriously discriminatory actions.

The April 2018 guidance also states that in ‘the most exceptional cases’ compensation is ‘capable of exceeding the upper band’.

***Payslips***

As of 6th April 2019 employers have been required in law to provide fully itemised pay slips to all workers (ie: subcontractors, casual staff, agency workers etc) as well as employees.

Moreover, when an employee or a worker is paid on an hourly basis, the new regulations specify that the number of hours worked must also be stated on the payslip. This makes it easier for people to check whether or not they are being paid at the level of National Minimum Wage / National Living Wage.

***Executive pay gap reporting***

In January 2019 new regulations were issued which will soon require UK listed companies, or groups of companies, which employ more than 250 people, to publish additional information about executive pay in their annual reports. The first reports will relate to financial years that start in 2019 and will thus need to be published in 2020.

Companies are already required to state how much their chief executives are paid each year and to express this in the form of a single figure. The new obligation will be to show how big the gap is between chief executive pay and that of the average employee. Further figures will have to be

published showing median pay for employees (in other words, the pay of the person at the 50th percentile of all employees in the organisation) and also figures for those positioned at the 75th and 25th percentile point.

Three alternative ways of calculating the figures are set out in the regulations, two of which allow companies to draw on the existing figures they have compiled for the purposes of gender pay gap reporting. Administratively, therefore, the additional burden of work is being kept to a minimum. In addition to including these figures, annual reports will also have to provide some commentary on which of the three methodologies was chosen and why, an explanation as to why the executive pay gap has either increased or decreased over the year, and whether or not the gap is consistent with the company’s wider remuneration policies.

It is inevitable that adverse press comment and, potentially, damaged corporate reputation will follow the publication of these statistics in 2020 where pay gaps are unusually or unjustifiably high. A failure to provide a full and adequate explanation in annual reports will make this situation worse. There are also significant potential knock-on effects for employee engagement. Considerable care will thus need to be taken preparing for the first publication date.

**MAJOR DEVELOPMENTS IN THE CASE LAW**

**Whistleblowing**

***Okwu v Rise Community Acton (2019)***

***Ibrahim v HCA International Ltd (2019)***

***Gilham v Ministry of Justice (2019)***

Since 2013 it has been necessary for a disclosure to qualify as protected under the Public Interest Disclosure Act for a claimant to satisfy the tribunal that it is in the public interest. In other words whistles relating to ‘wrong-doing’ on the part of an employer can only be blown while giving the whistleblower legal protection if the matter is sufficiently serious to constitute something the general public might have a legitimate interest in knowing about.

For some years it has been established that the whistleblower only needs to have reasonable suspicion that what they are disclosing constitutes a breach of law or a regulation of some kind in order to be protected. In other words, the employer may not actually be guilty of what is alleged.

The first two of these rulings extend the same principle to the issue of public interest, thus widening the number of potential situations in which the Public Interest Disclosure Act may be used to deter an employer from causing a whistleblower some form of detriment in response to a whistle being blown. Provided the whistleblower reasonably believes that their disclosure would be in the public interest, that is sufficient.

The Okwu case concerned an alleged breach of data protection regulations. The breach actually only concerned the claimant herself and could not therefore be said to be a matter of general public interest. On these grounds she lost her unfair dismissal case in the ET. On appeal this was overturned by the EAT. What mattered was that she reasonably believed that the disclosure was in the public interest, not whether or not it actually was.

The Ibrahim case concerned an interpreter working in a private hospital. He believed that rumours were circulating that he had breached patient confidentiality. He thus complained in order to clear his name. The ET and EAT found against him on the grounds that his complaint was only about a personal matter and had no wider public interest. The Court of Appeal then reverted the matter back to a tribunal to consider whether in fact Mr Ibrahim genuinely believed that his disclosure was a matter of public interest and whether or not this belief was reasonable.

The Gilham case concerns who is and is not protected under the Public Interest Disclosure Act. Ms Gilham is a district judge who became sick due to stress she suffered after being bullied and ignored by her colleagues following her decision to raise a series of concerns about the way that public spending cuts were affecting the courts system. The issue of interest concerns whether or not Ms Gilham is covered by the Act because she is classed, as a judge, as being an office holder and not therefore either a worker or an employee (the two groups covered by the Public Interest Disclosure Act). She thus lost her case in the ET, EAT and the Court of Appeal. The Supreme Court then overturned these rulings, finding that under the European Convention on Human Rights – specifically Article 10 on freedom of expression and Article 14 on discrimination for reasons of status – she should be covered in the same way as other classes of worker or employed person. The implications of this case could be substantial as the ‘office holder’ category includes non-executive company directors and members of all manner of boards in public sector and voluntary bodies. These people are now clearly entitled to bring claims under the Public Interest Disclosure Act and thus should not be caused a detriment if they choose to make a protected disclosure relating to the organisations they work for.

**Employment status**

***Chatfeild-Roberts v Phillips and Universal Aunts (2019)***

***Stuart Delivery Ltd v Augustine (2019)***

Two cases were determined this year relating to substitution arrangements in contracts and how these affect an individual’s employment status. Are people employees, workers or self-employed? ’. The distinction is important because ‘employees’ have many more rights in law than ‘workers’ who have more rights than ‘self-employed persons’. Only employees have the right to bring claims of unfair dismissal. The distinction, however, is not always at all clear and there are no clear definitions provided in the statutes.

One of the many tests that have commonly been applied in the past is whether or not claimants can send a substitute to perform their duties when they are absent. If a substitute can be sent, it is a strong indication that the person concerned is working under a ‘contract for services’ (in other words, is a worker or a self-employed person) rather than a ‘contract of service’ (an employee). This is because it suggests that there is no requirement on the individual to perform the work personally.

In the Chatfeild-Roberts case, despite Phillips having regularly sent a substitute to provide care on a live-in basis for the client (Chatfeild-Roberts’ uncle), she was found to have been an employee. This was because the substitution only occurred when she was unable to carry out the work herself (during annual leave, on scheduled days off and when called to undertake jury service). She provided the care at all other times. It was not a question of her sending someone else to substitute for her when she preferred not to work on a particular day, or was working elsewhere. She was, therefore, an employee and had a right to pursue her claim of unfair dismissal.

Stuart Delivery Ltd v Augustine (2019) focused on whether a substitution clause in a contract was sufficiently ‘unfettered’ to render the relationship one of self-employment. Both the ET and subsequently the EAT said that it was too limited in practice and that the claimant should thus be considered a worker. Employers cannot deny people basic employment rights by inserting tightly-drawn and restrictive clauses permitting a worker to send a substitute to cover a shift.

Shared parental leave

Ali v Capital Customer Management (2019)

Chief Constable of Leicestershire v Hextall (2019)

These two cases were heard together in the Court of Appeal. They both concern whether an employer should pay fathers taking a period of shared parental leave the same money they pay mothers taking periods of maternity leave.

The answer, according to the Court of Appeal, is no. The purpose of shared parental leave is different from that of maternity leave. The latter is primarily to improve a mother’s health and wellbeing. The former is to assist with childcare. Employers must pay men and women taking shared parental leave equally but need not pay the same as they do when a mother takes a period of maternity leave.

Disability discrimination

Lamb v Garrard Academy (2019)

Owen v AMEC Foster Wheeler Energy (2019)

A Ltd v Z (2019)

Meier v BT (2019)

Parnaby v Leicester City Council (2019)

The Owen case concerned the withdrawal of a job offer. This occurred after a medical assessment designed to establish whether the claimant was fit enough to take up a posting in the United Arab Emirates. It was thus a doctor who raised concerns about the would-be employee’s health. Here the EAT, and subsequently the Court of Appeal, found that the employer had acted lawfully. The organisation had indirectly discriminated against Owen on grounds of disability, but could justify the medical assessment and the need to act on it as a proportionate means of achieving a legitimate aim.

The Lamb case is most interesting as it appears to reopen the issue of when employers are told about a disability which appeared to have been settled in the Equality Act. Here a woman suffering depression, due to post-traumatic stress relating to childhood experiences, raised a grievance concerning alleged bullying in March. This was rejected. She then informed her employer about her condition in July. A referral to an occupational health doctor followed, confirming the diagnosis in November.

The question the EAT had to determine was at what stage the employer could be said to have had knowledge of her condition, and at what date the duty to consider reasonable adjustments commenced. The EAT made a distinction in its ruling between ‘constructive knowledge’ and ‘actual knowledge’. The employer had ‘constructive knowledge’ in July when the employee informed the employer of her condition. ‘Actual knowledge’ was gained when the condition was confirmed by the OH doctor. The duty to consider reasonable adjustments – in this case to the grievance procedure – kicks in from the point that ‘constructive knowledge’ is gained.

The A Ltd v Z case is similar in many respects. Here the claimant was dismissed from her role as a part-time finance officer after 14 months’ service due to many short-term absences. She suffered from a range of psychiatric impairments including schizophrenia which she had not disclosed to her employer. The employer defended itself on the grounds that it neither did know, nor could reasonably be expected to know that Ms Z’s suffered from a long-term condition that amounted to a disability. The ET disagreed, ruling that medical certificates sent to the employer prior to the dismissal meant that they had ‘constructive knowledge’ of the condition and should have made further enquiries before taking the decision to dismiss her. The EAT disagreed on the grounds that Ms Z had taken considerable steps to conceal her condition – she had not just failed to disclose it and would have continued to deny it had she been questioned about it by her employer. However, the EAT accepted the more general point made by the ET on the question of the need for employers to undertake further enquiries when they have ‘constructive knowledge’ if not ‘actual knowledge’ of a disability.

The Meier case also concerns the extent to which an employer had knowledge of a disability. Mr Meier suffers from Asperger’s syndrome, dyslexia and dyspraxia. He applied fora graduate traineeship with BT and informed them of his disability via the ‘diversity section’ on the online the application form. This was then detached and sent for processing to a consultancy, so BT managers were unaware of Mr Meier’s disability when they rejected him due to poor performance in a ‘situational strengths test’ that was administered online. In defending their actions when Mr Meier brought a disability discrimination claim against the company, BT managers stated that as they had not known of the disability they could not have considered whether any reasonable adjustments should have been made to their recruitment procedures to make them more suitable. They argued that it was Mr Meier’s responsibility to raise with them any requests for reasonable adjustment. An employment tribunal considered that BT should have known of the disability as it had been disclosed and should have substituted this test for a competency-based interview with Mr Meier. The EAT and the Court of Appeal agreed.

The Parnaby case concerned an employee who was dismissed on ill health grounds. He alleged that this amounted to unlawful disability discrimination because he had a long-term depressive condition that accounted for his absence. This was not disputed, but he lost his case at the ET because his final period of absence had only lasted six months and did not therefore meet the 12 month requirement for an illness to count as sufficiently long term to be defined as a disability under disability discrimination law. This ruling was then overturned by the EAT. They said that the ET should have considered whether it was likely that the illness might recur in the future. If that ‘could well happen’ as was the case here given Mr Parnaby’s past absence record, the tribunal should find that an act of disability discrimination has potentially occurred.

WASPI women’s pensions

Deive et al v Secretary of State for Work and Pensions (2019)

This case is an application for judicial review of the decision made some years ago to equalise state pension ages between men and women by raising the female state pension age in stages between 2010 and 2018. According to the claimants in this case the decision and the ‘limited notice’ given to the millions of women concerned constituted unlawful direct discrimination on grounds of age and indirect discrimination on grounds of sex.

The details of the claim are quite complex, concerning social expectations that women of the WASPI generation would not undertake paid work when they were younger. This meant that less pension was often accrued, so women retiring at 65 ended up with less pension than equivalent men.

The High Court rejected the claim. There was no unlawful discrimination, but in any event had there been the equalisation of state pension ages it was in any event justifiable as ‘a proportionate means of achieving a legitimate aim’. There had also been very considerable consultation carried out before the changes were introduced, so the claim that insufficient information / notice was provided also failed..

This case will now be appealed to the Court of Appeal and, in all likelihood, onwards to the Supreme Court.

Vicarious liability

Shelbourne v Cancer Research UK (2019)

Forbes v LHR Airport (2019)

Bessong v Pennine Care NHS Foundation Trust (2019)

Zulu and Gue v Ministry of Defence (2019)

We have had some more significant judgments recently relating to situations in which vicarious liability applies.

The Forbes case is one of a line recently about offensive social media posts. Here an employee of the airport had posted an image of a golliwog, together with a note asking how long it would be before the image was taken down by Facebook. This posting was made at home, outside working hours, using the employee’s own equipment and Facebook account. It was only viewable by the employee’s friends (in other words, not a public post) and nothing identified the person as an employee of the airport. A colleague then showed the post to Forbes who raised a grievance. The employee who had posted the image was disciplined, but when Forbes said he was no longer prepared to work alongside him, Forbes was redeployed. This then provoked claims of race discrimination, harassment and victimisation.

The EAT agreed with the employment tribunal that because the image had not been posted ‘during the course of employment’ the employer could not be held to be vicariously liable. Forbes thus lost his case.

The Shelborne case concerned a Christmas party. Here a visiting scientist, who was not an employee of Cancer Research UK, physically dropped Shelbourne while dancing with her. She sustained some nasty injuries and sought compensation from her employer. She was unsuccessful as the High Court decided that the visiting scientist’s work was insufficiently closely connected to the activities of Cancer Research to make the employer vicariously liable for his actions at the Christmas party.

The Bessong case also concerns third party racial harassment – an area of law which arguably requires urgent reform. Here a mental health nurse was racially harassed verbally by a patient as well as being physically attacked. No formal record of the racial element of the attack was then made on an incident reporting form as should have been the case. Mr Bessong argued that this failure to record meant that his employer was not taking all steps a reasonable employer should to prevent unlawful harassment from occurring. Had the harassment been perpetrated by a fellow employee, he might well have had a good case. But the same rules do not apply in the case of third party harassment. The EAT said that unless the failure on the part of the employer was connected to race, there is no liability for third party harassment under the terms of the Equality Act.

The Zulu and Gue case concerns two soldiers who resigned from the army in response to various acts of racial harassment. The issue at stake was whether or not the Ministry of Defence was vicariously liable given that in its view it had done everything a reasonable employer could be expected to do in order to root out racism among its people - such as fining and demoting soldiers found guilty of making racist remarks, a great deal of training and the drawing up of policy statements. However, the claimants in this case argued that the annual training carried out by the army was really a tick box exercise that had a cursory nature. Moreover, the army had admitted publicly that there was more it needed to do to combat racism, while some incidents were not in practice logged formally. In other words, there were further reasonable steps that could have been taken and had not been. The Ministry of Defence was therefore vicariously liable.

Holiday pay

Chief Constable of Northern Ireland Police v Agnew (2019)

Flowers v East of England Ambulance Trust (2019)

Brazel v the Harper Trust (2019)

The Agnew case concerns whether a claimant can claim for back pay in respect of unpaid holiday when there has been a break of more than three months between incidents of underpayment. This can often happen when holiday is taken intermittently in blocks. The Northern Ireland Court of Appeal decided that there was no reason why a period of three months in which holiday was not taken should ‘break a series’ of incidents in which full holiday pay was not paid.

The Flowers case relates to whether voluntary overtime payments should be included when calculating holiday pay. Compulsory overtime payments have long been included. The Court of Appeal confirmed that, provided it is undertaken regularly, voluntary overtime payments should be considered part of an employee’s normal remuneration and included when holiday pay rates are being calculated.

In the Brazel case the Court of Appeal ruled that permanent employees who work for part of the year (in this case on a term-time contract) are entitled to a full years’ paid holiday entitlement. It should not be calculated on a pro-rata basis as is usually the case for part-time workers. This was simply because of the way the Working Time Regulations are worded. Pro-rata principles are not included. Holiday pay in these situations should therefore be calculated on the basis of the 12 weeks full-time work undertaken prior to the holiday, and not on the basis of the number of weeks work performed across the whole holiday year.

Directors’ liability

Timis and Sage v Osipov (2018)

Antuzis v DJ Houghton (2019)

These are fascinating cases which could potentially have really significant long-term implications.

Osipov worked as CEO of a company called International Petroleum. Sage was the chairman of the company while Timis was a non-executive director as well as being the majority shareholder. In 2014 Osipov was dismissed. The email dismissing him was sent by Sage on the instruction of Timis.

It was subsequently established in court that the dismissal had been due to Osipov making a protected disclosure under the Public Interest Disclosure Act. He was awarded nearly £2 million by way of compensation. This case concerns whether or not this money should all be paid by the company or whether the two men who decided to dismiss Osipov should also – personally - be held to be jointly and severally liable. The ET, EAT and Court of Appeal all found in favour of Osipov on this point of principle. There is nothing in law to prevent an employee from bringing a case naming decision-makers as well as the employer as respondents when a detriment has been suffered.

Where senior directors with a good deal of personal wealth take decisions that are unlawful, particularly dismissals, we can now expect more to be named as joint respondents when claims subsequently come before the tribunals.

The Antuzis case concerned company directors’ liability in a situation where the claimants were required to work for excessive hours and had not been paid the national Living Wage. The High Court determined that the directors were personally liable in this case as they had failed to comply with their statutory duties.

Equal pay

Asda Stores v Brierley (2019)

This case really only focuses on the correct interpretation of a small piece of employment legislation, but its wider consequences are huge. The number of claimants is around 7000, but there are many thousands more working for other leading retailers who will be able to bring equal pay claims with a good prospect of success if this case goes against the company. Some estimates put the likely total cost to large UK retailers at around £8 billion.

At present the courts are determining a preliminary issue which will ultimately determine whether or not the substantive matter can be brought to an employment tribunal.

Aside from its scale, the case is in most other respects a fairly standard equal value claim. Mainly female employees working in Asda stores in customer-facing roles are paid substantially less that the mainly male employees who work in the company’s distribution centres. The women believe that they should be paid the same as their work is of equal value.

The company is resisting the claim by arguing that these male comparators cannot be used as they are located in different establishments and work under different terms and conditions of employment. The legal argument rests on a slight change in the wording about ‘common terms’ used in the Equality Act 2010 to that which previously applied when the Equal Pay Act 1970 was in force. The company lost its case in the employment tribunal and at the EAT. The organisation has now lost again in the Court of Appeal. The decision is that the law did not change with the introduction of the Equality Act. ‘Common terms’ apply across the company in that a distribution worker is employed on the same terms, irrespective of the location of their work, the same being true of the store-based workers. There is also a single source – namely Asda. This case will now be appealed again to the Supreme Court, and it is also possible to envisage circumstances in which a further appeal to the European Court of Justice might occur depending on what happens with Brexit.

Positive action

Furlong v Chief Constable of Cheshire Police (2019)

This case gained a great deal of publicity earlier this year. It serves to remind employers that the law on positive action that was introduced in the Equality Act 2010 apples only to a specific type of quite narrowly defined situation. Furlong was white, male, not disabled and heterosexual. He applied for a job as a police constable, passing and performing well in the necessary assessments. He was, however, turned down on the grounds that he was not part of an under-represented group.

The police force had adopted a new policy that required it to offer all available posts to women, BAME, LGBT and disabled applicants first, provided they passed the required tests. After these offers had been made, there were no opportunities left for people like Furlong, irrespective of the fact that he had performed very well in these tests.

The Employment Tribunal found in favour of Furlong. He had been discriminated against on grounds of his sex, race and sexual orientation. The approach taken by the police went much further than is permitted under the positive action rules set out in the Equality Act. These state that in a recruitment situation when two candidates are equally well-qualified for a job, an employer is permitted in law to select the one who comes from an underrepresented group. There is also a requirement that any action taken to minimise disadvantage must be proportionate.

In this case the candidates were not equal. Furlong had performed considerably better in the assessments than a good number of those who were recruited. Over 100 people had been classed as ‘equally appointable’ because they met the pass grade, but no further distinction had been made between, for example, high passes and bare passes. Moreover, the police force failed to satisfy the tribunal that its actions were ‘proportionate’ in relation to its impact on applicants like Furlong who were not members of the specified under-represented groups.

Religion and belief

*Gan Menachem Hendon v De Groen (2019)*

*Connisbee v Crossly Farms Ltd (2019)*

*Forstater v CGD Global (2019)*

*Jordi Casamitjana v League Against Cruel Sports (2020)*

It is clear from the EAT ruling in the *De Groen* case that an employer can defend itself against discrimination on grounds of religion if it has a religious ethos which an employee is unable fully to comply with in their private lives. Here a teacher working in an ultra-orthodox Jewish nursery was discovered to be living with her boyfriend in contravention of orthodox Jewish practice. The manager of the nursery raised the issue with her, subsequently asking her to state that she was no longer living with her boyfriend so that the children’s parents could be reassured. As De Groen was still living with him and was not prepared to lie about her situation, she refused to give the manager the reassurances asked for. She was then dismissed. The EAT held that the dismissal was not due to her religious beliefs, but to those of the nursery and its clients. She could not, therefore, be said to have been discriminated against on grounds of her religion or belief.

The Connisbee, Casamitjana and Forstater cases were both heard in the employment tribunal and are thus not binding precedents. All concern disputes about whether or not passionately held beliefs qualify for protection under the religion and belief provisions of the Equality Act. In Forstater’s case an appeal to the EAT and beyond is highly likely.

Both claims concern ETs applying the tests set out by the EAT in Grainger PLC v Niccholson (2010), currently the leading case on the question of what beliefs are and are not covered as protected characteristics. These areas follows:

\* it must be a belief and not merely an opinion or viewpoint based on current information

\* the belief must be genuinely held

\* the belief must concern a weighty and substantial aspect of human behaviour

\* the belief must have a 'certain level of cogency, seriousness, cohesion and importance'

\* the belief must be 'worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.'

Connisbee is a vegetarian who alleged that his resignation was triggered by harassment on the part of fellow employees who had fed him snacks which they later told him contained meat. In his case the tribunal decided that he had not been unlawfully harassed on grounds of religion or belief because his vegetarianism amounted to ‘a lifestyle choice’ and thus did not ‘concern a weighty and substantial aspect of human behaviour’.

This ruling is controversial as both the Casamitjana case and an earlier judgement reached a different decision in the case of ‘ethical vegans’, making an apparent distinction in our law between vegan and vegetarian beliefs. Vegetarians apparently have less of a cogent and cohesive belief system than vegans.

The Forstater case was very widely reported in December 2019. This concerns a researcher whose contract was not renewed by a charity she was carrying out work for after she posted tweets setting out her views on sex and transgender issues. The particular concern was Ms Forstater’s expressed view that sex is biologically immutable and that no trans woman should therefore be considered to be a woman. The judge in this case decided against her on the grounds that her belief, while genuinely held and cogent, was not 'worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.'

Working time

Federación de Servicios de Comisiones Obreras v Deutsche Bank (2019)

In this case the European Court of Justice decided that EU member states should require employers to maintain records of the hours their workers work each day so as to be able to ascertain whether or not working time rights are being adhered to.

UK law at present places no such duty on employers. This ruling requires that national governments in member states change their regulations to require that such records are kept for all workers. The administrative costs would be very considerable was this to happen. Whether or not it will happen depends on what happens with Brexit. If the UK leaves the EU fully, it would not apply. If we end up remaining or sign a deal which aligns employment regulations, UK law will need to change and employers placed under this new obligation.

TUPE / Employment status

Dewhurst v Revisecatch & City Sprint (2019)

This is an employment tribunal judgement and hence is not a binding precedent. But its potential significance is huge and would, if confirmed on appeal, amount to a very significant development in Transfer of Undertakings Law.

The TUPE regulations are part of EU law, which would usually mean that they applied to all workers and not just to employees working under a contract of service. However, the wording of the UK regulations leaves room for ambiguity and interpretation on this issue:

Regulation 2(1):

“Employee means any individual who works for another person whether under a contract of service or apprenticeship or otherwise but does not include anyone who provides services under a contract of service.”

This can be interpreted in two ways as far as workers are concerned. On the one hand the ‘or otherwise’ clause could be taken to mean that they are included in TUPE. On the other, the final clause excluding people working under contracts for services’ could be taken to mean that they are not. On this occasion the ET opted for the first interpretation and said that two bike couriers should have transferred with the contract they worked on when it was lost by Citysprint and won by Revisecatch.

**Unfair dismissal**

***Royal Mail Group Ltd v Jhuti (2019)***

In this case the Supreme Court overturned an earlier Court of Appeal ruling on the question of whether or not a dismissal was due to the claimant blowing the whistle about a breach of regulations when the individual carrying out the dismissal was unaware of the disclosure and dismissed her for poor performance. The Court found that even though the protected disclosure had been hidden from the dismissing manager, it was still the principle reason for the dismissal and hence was automatically unfair in law.

The ruling states that when searching for the main reason for a dismissal, tribunals should be mindful of the fact that decision-makers (often HR managers with authority to dismiss) may not always be fully appraised of all the circumstances and may be ‘blind to the real reasons’ because these have been hidden by other managers ‘behind a fictitious reason’. It is therefore ‘the Court’s duty to penetrate through the invention rather than to allow it to infect its own determination’.

This ruling opens up the strong possibility that lawyers and others representing claimants in unfair dismissal cases will from now on devote time and energy in their cross-examinations to probing the extent to which managers making the decision to dismiss were in fact fully informed of all relevant issues. Employers will thus need to be prepared to answer such questions if they are to defend claims successfully. The fact that on the question of the reason for dismissing the burden of proof falls on the respondent will make this task even more important.

OTHER SIGNIFICANT CASES

The following are brief summaries of cases that are notable or interesting, confirming points or developing less significant new precedents. Some have significance for specific types of employment situation, others are simply curiosities.

In Network Rail Infrastructure v Crawford (2019) the Court of Appeal overturned an earlier EAT ruling on rest breaks. Here the claimant had been refused a period of 20 minutes continuous rest on the grounds that he had been given (and encouraged to take) a number of shorter rest breaks during his shifts that together amounted to more than 20 minutes. The Court of Appeal ruled that his working time rights had not been infringed.

Jolly v Royal Berkshire NHS Foundation Trust (2019) concerns the dismissal of an employee who was 88 years old. She was dismissed from her job as a medical secretary on performance grounds without being offered training in the IT system that she was not using properly. This, according to managers, “would not have been appropriate”. The tribunal found that the significance of the errors she had apparently made had been exaggerated, that insufficient investigation had been carried out into who was responsible and that the disciplinary hearing had been held when she was attending a medical appointment. She had, therefore, not only been unfairly dismissed, but had also suffered disability and age discrimination too.

In ICTS (UK) v Visram (2019) an employer (effectively an insurance company) was held to have breached disability discrimination law when it failed to pay a disabled worker long-term benefits due under a health insurance scheme. He had returned to work, but not to the same job and the pay was less. The ruling states that this difference must be made up via the insurance scheme until Visram retires or dies.

In ***Nissa v Waverly Education Foundation (2019)***, the EAT looked at how the words ‘long term’ should be interpreted in the statutory definition of disability. Nissa suffered from a variety of ailments derived from a medical condition known as fibromyalgia. She lost her case at the employment tribunal where it was decided that because it was not probable that her condition would last for 12 months, she was not disabled under the meaning of the Equality Act. This was then overturned by the EAT which said that the correct approach was to ask whether the condition ‘could well last for 12 months or more’.

***Hare Wines v Kaur (2019)*** concerned an employee who was dismissed on the day the business she worked for transferred to Hare Wines. The company argued that the reason for the dismissal was a personality clash with one of her colleagues, and not the transfer itself. The Court of Appeal found against the employer. A TUPE transfer need not be the only reason for a dismissal for it to be automatically unfair, but if it probably would not have happened were it not for the transfer – as was the case here – a tribunal is entitled to conclude that it was TUPE-related and hence unlawful.

In ***London Borough of Lambeth v Agoreyo (2019****)* the Court of Appeal overturned a ruling of the High Court concerning a decision to suspend a teacher pending a further investigation into an incident that the teacher had earlier been cleared of by her line manager. The High Court said that a ‘knee jerk suspension’ that was not necessary had breached the implied term of trust and confidence. The Court of Appeal disagreed. Necessity shouldn’t come into it. The head teacher had had ‘reasonable and proper cause’ to suspend. There had thus been no breach of contract.

***City of Oxford Bus Service v Harvey (2019)*** concerned a Seventh Day Adventist who asked not to be scheduled for work on religious grounds between sunset on Fridays and sunset on Saturdays. The employer refused to do this on a permanent basis for fear that other drivers might make similar requests, making rostering unmanageable at certain times of the week or year. Harvey won his case for indirect religious discrimination in the employment tribunal but lost in the EAT. Here it was said that the circumstances of the business had not been given sufficient weight when determining if the requirement for drivers to be available to work on all days of the week constituted a proportionate means of achieving a legitimate aim.

In ***iForce v Wood (2019)*** an employee asked to work continually at a specific work bench rather than to work at several different ones as she believed the atmosphere to be damper in some areas of the premises than others and hence detrimental to her osteoarthritis. The employer was able to satisfy the EAT that there was no difference in the humidity at different work stations. So, the EAT found against Wood and overturned the original tribunal decision.

The case of ***Mackenzie v University of Cambridge (2019)*** reminds us that under unfair dismissal law, when an employer loses a case, it cannot be forced to reinstate or re-engage an employee, even when a tribunal makes a re-engagement order. The employer can refuse and pay additional compensation instead. In this case Mackenzie, having won her unfair dismissal claim in the tribunal and having secured a re-engagement order, sought an injunction to force the university to re-engage her. The Court of Appeal refused her request. Additional compensation could be paid instead.

***Phoenix House v Stockman (2019)*** concerned an employee making a covert recording of a meeting with an HR manager about a forthcoming restructure. This only came to light during a dismissal hearing at a tribunal, after which the employer sought a reduction in compensation to take account of the fact that it would have dismissed the employee on grounds of gross misconduct had it been aware that the covert recording had been made. The EAT ruled that covert recording does not always amount to a breach of trust and confidence. It could simply be to retain a record and not have any dishonest intent.

In Kostal v Dunkley (2019) a trade union member sought to argue that in approaching him individually with a pay offer outside collective bargaining procedures, his employer was inducing him unlawfully to bypass the collective agreement. The Court of Appeal decided that this was a one-off incident aimed at breaking a stalled negotiation and was not an unlawful inducement.

Page v NHS Trust Development Authority (2019) concerned the dismissal of a non-executive director after he made remarks to the national media in his capacity as a lay magistrate criticising the adoption of children by same sex couples. His views were informed by his Christian beliefs. The EAT agreed with the tribunal that he had been dismissed for the manner in which he had expressed his views and not the views themselves. So there had been no unlawful discrimination on religious grounds.

Kuteh v Dartford and Gravesham NHS Trust (2019) is another religious discrimination case in which a claimant lost her case. Here the dismissal was for proselytising (saying prayers, singing psalms etc) with patients before they underwent surgery. As with previous cases of a similar kind, the courts found against the claimant. She had acted inappropriately and had continued to do so after having been warned not to by her manager.

***South West Yorkshire NHS Trust v Jackson (2019)***concerned a woman who was on maternity leave being sent information, via an email account which she was not accessing frequently while on leave, about redeployment opportunities at a time when redundancies were being made. There was thus a delay before she read them. A tribunal found that this amounted to unfavourable treatment. The EAT found that the issue should be decided with reference to the reason why theemails had beensent to this account and why the claimant was not picking them up. It could have been administrative error rather than unfavourable treatment on maternity grounds. A rehearing was thus ordered.

***Jagex Ltd v McCambridge (2019)*** concerned the dismissal for gross misconduct of an employee who had stumbled across a document left on a photocopier in error which contained details of a senior manager’s pay. He mentioned the figure to a colleague and the information became a subject of gossip in the company. The EAT upheld the ET’s finding of unfair dismissal. The misconduct was not sufficiently serious to justify summary dismissal without notice.

***Chikale v Okedina (2019)*** concerned a migrant worker who was dismissed when she asked for a pay rise. At this time she was working in the UK illegally, but was unaware of this as she had been told by her employer that a visa extension for her was being arranged. The employer (Ms Okedina) argued that the fact she was working in the UK illegally meant that she could not bring a claim of unfair dismissal. The courts disagreed as she had had no knowledge of the fact that she was working in the UK illegally.

In ***Lopez Ribalda et al v Spain (2019)*** a group of Spanish supermarket workers argued that the Spanish courts had breached the European Convention on Human Rights in finding for their employer in a case concerning covert surveillance. They were caught stealing by CCTV and argued that their employer had breached their human rights by snooping on their activities without prior warning. The European Court of Human Rights (ECHR) found that the employer had been justified in using covert surveillance as they had reasonable suspicion of dishonest activity.

The case of ***Harrison v Aryman Ltd (2019)*** reminds us that protected conversations that seek to reach settlements with employees before a procedure that may lead to their dismissals commences are only subsequently inadmissible as evidence in court when they relate to potentially fair dismissals and where the employer has not engaged in any ‘improper behaviour’ when carrying out the protected conversation. In this case Ms Harrison succeeded in showing that an employment tribunal should take account of a letter sent to her concerning a protected conversation when she was alleging automatically unfair dismissal on grounds of pregnancy.

In***Base Childrenswear Ltd v Otshudi (2019)*** the Court of Appeal found that an employer had failed to show that race had not played a part in a decision to dismiss an employee who was suspected of preparing to steal some items. They had lied to her about the reason they were dismissing her, which shifted the burden of proof to them, and were then found to have based their suspicions on stereotypical prejudices concerning black people.

In***Raj v Capita Business Services Ltd (2019)*** an employment tribunal dismissed a claim from a male employee that his female manager’s tendency to massage his shoulders for several minutes while praising his work constituted unlawful sexual harassment. He had apparently given her misguided encouragement’, while the shoulder massages had been jokey in nature.

**FUTURE DEVELOPMENTS**

***Good work / Taylor recommendations***

In 2016, Matthew Taylor, a former government advisor and Chief Executive of the Royal Society for the encouragement of Arts, Manufactures and Commerce (RSA), was commissioned by the government to lead a formal review of policy and law across the field of employment. The catalyst for the review was recent growth in atypical working of various kinds and the so-called ‘gig economy’.

Taylor’s report, ‘Good work: the Taylor review of modern working practices’ was published in July 2017. It made dozens of recommendations, aimed at encouraging higher quality jobs as a means of boosting productivity and fairness at work. The government responded to the report with a policy paper, the ‘Good work plan’, in December 2018.

The following is a summary of the major points in the Taylor report that relate to employment regulation.

**Employment status**

The report’s most important section from an employment law perspective relates to employment status. While no really fundamental changes are suggested here, the report makes a series of recommendations with the aim of clarifying the existing legal position and ensuring people are better able to enforce their rights.

The present situation is widely regarded as being unsatisfactory for the following reasons:

* It is not always at all clear either to workers, or the organisations they work for, which employment rights apply to particular individuals. The courts have devised a variety of tests over the years, but there is little statutory guidance.
* The tests used by HMRC for the purposes of collecting tax have sometimes differed from those used by the courts when establishing employment rights. This means, for example, that someone may be classed as ‘self-employed’ from a tax point of view, but ‘employed’ for the purposes of employment law – or vice versa.
* It is often asserted that there has been a growth of ‘bogus self-employment’ over recent years. This means labelling employment relationships as ‘self-employment’ as a means of avoiding tax and employment rights.
* The introduction of tribunal fees in 2013 (since abolished), and the limited legal penalties deterring bogus self-employment, has incentivised employers to casualise labour, remove job security and avoid tax.

The Taylor report concludes that the main features of the existing system of three major employment categories – employee, worker and self-employed – should be retained but that ministers should take steps to clarify the position and make it much easier to enforce in practice. The principles of the law do not need to change greatly, but they must actually be applied in practice in a way that too often they are not at present.

The key recommendations are as follows:

* The existing ‘worker’ category whose members are entitled to a range of important, basic employment rights, such as the National Minimum Wage and paid holiday, should be re-labelled as ‘dependent contractors’.
* Clearer statutory tests should be developed that distinguish genuine self-employment (when someone is ‘in business on their own account’) from ‘dependent contractor’ status. This should explicitly include ‘platform based workers’ operating in the gig economy and, potentially, all who are employed on a casual or flexible basis under the control of an employer.
* A ‘dependent contractor’ being entitled, under the terms of their contract, to send a substitute to work in their place when they are not available to work should not in itself preclude them having this legal status and the rights associated with it.
* There should be clearer statutory tests to distinguish between ‘employment’ and ‘dependent contractor’ status which should include a requirement to perform work personally.
* Tax law should be aligned with employment law so that one status determines both employment rights and the taxes that have to be paid by workers and employees.
* Dependent contractors, as well as employees, should have a ‘day one’ right to a set of written particulars which state what their status is and what employment rights they have. Compensation should be paid when employers fail to meet this statutory duty.
* Employment Tribunals should clarify claimants’ employment status at a preliminary hearing.
* The existing burden of proof at such hearings should be reversed so it is the employer that must prove a worker is not an employee or a dependent contractor, rather than the other way round.
* Employers’ national insurance contributions should be paid in respect of payments made to dependent contractors as well as employees. This would reduce the incentive not to employ someone under a ‘contract of service’ with the wider range of associated employment rights.
* Dependent contractors should receive statutory sick pay, but the length of time it can be claimed for should accrue with length of service.
* The government should create an online tool which will enable employers and workers to establish employment status easily.

Were all of these recommendations to be implemented, they would together amount to a major reform of the existing system. People would know where they stood and would be able to make better-informed choices about the work that they did. However, it is possible that some employers would take the opportunity to reclassify employees as ‘dependent contractors’, hence reducing employment rights for some. It is also possible that the increased taxation implied by the recommendations would serve to deter employers from hiring people, thereby increasing unemployment.

**Wider recommendations**

In addition to the central recommendations on clarifying employment status and enforcing rights more effectively, the Taylor report deals with a wide range of other issues. Some concern wider policy issues in the field of employment such as apprenticeships, taxation and improving the quality of work, but there are plenty that concern employment regulation too. These include the following:

* The National Minimum Wage/National Living Wage legislation should be amended to better take account of ‘platform work’ in the gig economy.
* Workers should retain continuity of employment when there are gaps of up to a month between assignments with an employer.
* Casual workers should have the right to rolled-up holiday pay (in effect a 12.07% supplement on top of their hourly pay). This will only be possible after Brexit as the European Court has ruled such arrangements to be unlawful under EU law.
* Agency staff should have the right to request a direct contract once they have been working for a single ‘end-user’ or hiring organisation for 12 months.
* Workers employed on zero hours contracts should have the right to request fixed hours after 12 months’ service and a higher hourly rate of National Minimum/National Living Wage should be paid to workers employed on zero hours contracts.
* Employers should be under an obligation to publish data about the number of agency workers and people on zero hours contracts they employ, together with information about the number of requests they receive for direct contracts and fixed hours.
* Formal consultation should be encouraged in organisations by reducing the threshold for the number of staff requesting it from 10% of the workforce to 2%.
* The regulations that provide a right to request flexible working should be amended so that people can request temporary alterations to their working arrangements and not just permanent contractual changes.
* Workers who are absent for lengthy periods due to ill health should have a right to return to the same job, as is the case for people taking maternity, paternity, adoption and shared parental leave.
* All regulation relating to pregnancy and maternity should be consolidated into a single piece of legislation, and greater clarity achieved in the guidance provided to employers and workers.

**Enforcement**

The Taylor report also makes a series of recommendations aimed at improving the effectiveness with which employment law is enforced in practice. These include the following:

* Enhancing the roles played by the Director of Labour Market Enforcement and the Low Pay Commission.
* Making the Department for Business, Innovation and Skills responsible for issuing civil penalties when employers fail to pay compensation to claimants who win Employment Tribunal cases.
* More use of aggravated damages and cost orders by tribunals when employers repeatedly lose cases.
* HMRC should take responsibility for enforcing rights to holiday pay as well as the National Living/Minimum Wage and statutory sick pay.

**Policy debate**

The report’s recommendations were received favourably by ministers. Not all will become law. However, as there would be cross-party support for many of them, it is very plausible to conclude that these will find their way on to the statute book over the next few years. Some require further work and some will be controversial, but in any event they are likely to form the basis of debate on the future development of UK employment rights for several years.

**Select committees’ Bill**

In the autumn of 2017, two parliamentary select committees (the Business Committee and the Work and Pensions Committee) held a series of joint hearings, the result of which was the publication of a draft Bill which they asked the government to consider supporting.

Key clauses aim to achieve the following:

* Clearer statutory definitions of the terms ‘employee’, ‘dependent contractor’ and ‘self-employed person’ based on existing case law.
* Making dependent contractor status the default position for those employed as part of substantial groups who are not employees, so that employers would have to show they were self-employed if they wished to avoid providing them with basic employment rights.
* Requiring employers who wished to employ people on zero hours contracts to pay them higher levels of the National Living/Minimum Wage by way of compensation for their income insecurity.
* Introducing a system of punitive fines where employers are found to be employing people on a bogus self-employed basis.
* Authorising a government inspectorate to undertake proactive investigations into employment practices in industries or regions where there is evidence of bogus self-employment.

***Good work plan***

Theresa May’s government formally responded to the Taylor report in the ‘Good work plan’. On some bigger issues relating to employment status, enforcement of rights, atypical working and labour market transparency, further consultation will be required. However, a series of regulatory changes have been announced that will come into effect – some in April 2020 - and will not be subject to any formal period of consultation. In some respects, these go further than Taylor’s recommendations envisaged:

* all workers (not just employees, as presently) to receive written particulars from day one of employment (in force from 6 April 2020)
* alignment of the law on employment status across the tax and employment law systems
* increasing the reference period for the calculation of holiday pay to 52 weeks (in force from 6 April 2020)
* increasing the length that a break in service can be while preserving continuity of employment to four weeks (in practice it is currently less than two weeks)
* improving transparency as regard payment arrangements for agency workers by requiring employment businesses to issue them with a ‘key information document’ (in force from 6 April 2020)
* introducing a new right for all workers ‘to request a more predictable contract’ after 26 weeks’ service (consultation on ‘one-sided flexibility’ launched 19 July 2019)
* simplifying the process for enforcing tribunal awards when they are not paid
* formal ‘naming and shaming’ of employers who fail to pay tribunal awards
* repealing the so-called ‘Swedish derogation’ which allows employers to pay agency workers less than permanently employed colleagues if their agency employs them on permanent contracts and pays them between assignments.

***Race and ethnicity pay gap reporting***

Proposals to extend the recently-established gender pay gap reporting requirements to cover race and ethnicity were included in the Conservative and Liberal Democrat manifestos at the 2017 election. As the Labour Party also proposed introducing a form of ethnicity pay auditing, there would apparently be cross-party support for new measures in this area. The government started consulting formally on the detail of proposed approaches in October 2018. This would suggest that legislation might come into effect in 2020 or 2021.

***Parental bereavement leave***

The Parental Bereavement (Leave and Pay) Act 2018, which will entitle most parents of children who die before their 18th birthdays to at least two weeks’ paid bereavement leave, will come into effect in April 2020.

Leave will be a universal right for all employees with any kind of parental responsibility for a child (that is, someone under the age of 18) who dies. The right will be to two weeks’ paid leave for employees who have completed 26 weeks’ service. The right will apply to parents of still born babies once 24 weeks of a pregnancy have elapsed. It will be possible either to take two weeks as a single block at the time of the death or two separate blocks of one week during the subsequent 56 days.

***Volunteering***

The government has confirmed its intention to bring forward proposals which will require all employers with over 250 employees to permit them to take three days of leave each year in order to carry out voluntary work. The details of this scheme have yet to be published, but it can be expected that such a scheme will be launched over the coming few years. The original commitment was to make this additional ‘paid leave’. There now appears to be some question over whether or not the right will in fact be to take ‘paid leave’ or just ‘leave’.

***Carers’ leave***

The Conservative party manifesto for the 2017 general election contained a proposal to give workers a statutory right to take a year’s leave for the purpose of caring for a relative. This would be unpaid, but would give the individual concerned a right to return along similar lines to the existing shared parental and maternity leave schemes. It is unclear whether or not this will continue to be government policy following the 2019 general election.

***Employment tribunal reform***

Ministers have signalled their intention to bring into effect some further changes to the Employment Tribunals system. Proposals include moving to a completely digital system for lodging claims and responses and the delegation of some activities from Employment Judges to caseworkers. These would require amendments to be made to the Employment Tribunals Act 1996 and would thus need Parliamentary approval.

The Law Commission is now consulting on further proposals for broadening the competence of Employment Tribunals to hear many more cases relating to breach of contract that can currently only be heard in the County and High Courts.

In July 2017 the tribunals fees system, introduced in 2013, was abolished following a ruling from the Supreme Court that it was unlawful. A scheme for refunding fees paid between 2013 and 2017 was launched in November 2017. The government has not ruled out introducing an alternative fees scheme at some point in the future. At a recent select committee hearing the Permanent Secretary of the Ministry of Justice confirmed that plans for the reintroduction of some kind of fee system were being considered.

***Fathers’ rights***

The Women and Equalities Committee of the House of Commons has made a series of recommendations putting the case for a fairly radical improvement of paternity rights in a number of areas of family-friendly employment law. In their view existing law does not reflect social changes that are occurring in this area of UK life. The proposals included the following:

* Paternity should be included in the Equality Act as a protected characteristic in the same way that maternity is
* Statutory Paternity Pay should be paid at a rate equivalent to the higher rate of SMP rather than the lower rate as is currently the case
* Fathers should have equivalent rights to mothers in respect of attending ante-natal care appointments. That would mean that this was paid time off rather than unpaid time off as at present
* Fathers should not be required to share leave with mothers under the shared parental leave scheme that was introduced in 2015. They should have a free-standing right to take 12 weeks’ paid leave during the first year of their child’s life.

While there has been no formal government response, recent history would suggest that these are very much the sorts of proposals that are likely to be included in the next tranche of new family friendly employment entitlements.

***Sexual harassment***

In the wake of the #MeToo campaign and revelations about sexual harassment in the film industry, the Equality and Human Rights Commission (EHRC) published a report entitled ‘Turning the tables: ending sexual harassment at work’.

A variety of proposals are put forward for tightening up employment law in this area. They include the following:

* employers should be required to publish their harassment policies on websites
* tribunal time limits for claimants alleging sexual harassment should be extended to six months
* confidentiality and non-disclosure provisions included in settlements reached with victims of sexual harassment should not be permitted and rendered void if agreed
* a new statutory code of practice should be issued providing clear guidance to employers about how they should respond to cases of sexual harassment.

In a further contribution, in July the EHRC published some good practice guidelines on the use of confidentiality agreements in discrimination claims more generally. These include the suggestion that employers should pay for employees to take independent legal advice before signing and that the wording should make it clear that the signatory is not prevented by the agreement from having discussions with enforcement authorities including the police, medical professionals, a trade union reps , close family members and potential alternative employers.

The government has now announced an intention to bring forward legislation on non-disclosure agreements, increased penalties and a new statutory code of practice. Ministers are also consulting formally on other proposals with a view to extending the law in the future.

***Public sector exit payments***

These regulations were apparently shelved for a period, but are now back on the government’s agenda. A formal consultation ended in July 2019, so we can expect further draft regulations to be issued soon.

The main purpose is to bring exit payments in the public sector more closely in line with practice in private sector organisations, saving around £250 million of public money each year.

A further aim is to bring an end to situations in which a well-paid public sector employee leaves with a sizeable settlement, only to return soon afterwards to work on a high salary in some other area of public sector employment. Once implemented, the regulations would require repayment of exit payments on re-engagement.

Pretty well the whole public sector, as defined by the Office for National Statistics, will be covered, including academy schools and NHS trusts. Only housing associations, the armed forces and one or two other bodies are excluded.

Exit payments will be subject to a cap of £95,000

***Extension of IR35 to private sector***

From 2020 major changes are being made to taxation arrangements for people who provide services to private sector organisations through personal service companies. The aim is to extend the changes made in the public sector in recent years to all employers.

In practice this will mean that as of 6 April 2020, when someone is an ‘employee’, they will no longer be able to be paid as if they were an independent contractor via invoices. They will have to be paid through a payroll along with all other employees, with tax and national insurance being deducted at source.

***Extending redundancy protection for pregnancy and maternity***

For a good time now women who are on maternity leave have had considerable protection from redundancy. Women whose jobs are being made redundant while they are on maternity leave must, wherever possible, be offered suitable alternative employment either with their existing employer or an associated employer when their employer is part of a group of companies.

The intention is now to extend this right to women who are pregnant but still working prior to their maternity leave, and to women who have returned to work following maternity leave for a further six months.

No draft regulations or implementation dates have yet been published.

***Immigration law reform***

The Conservative Party manifesto for the 2019 general election contained a proposal to introduce an “Australian-style points based system” for determining overseas immigration into the UK from 2021 once the Brexit process is complete. Full details of what is proposed are yet to be brought forward, let alone draft regulations, but statements by ministers and press releases indicate that the new system will not be hugely dissimilar in practice from the existing regime which has applied for migrants coming from outside the European Union for some years. People deemed to be either ‘exceptionally talented’ or able to make ‘an exceptional contribution’ (currently labelled Tier 1 migrants) will continue to be able to come to live in the UK whether or not they have a job to come to. People who have specific skills, including would-be NHS workers, will be entitled to enter the UK and work here if they have a job to come to (Tier 2 in the current scheme). There will be no caps set by government unless the Migration Advisory Committee (MAC) decides that there should be. The MAC will also be able to recommend that incentives are paid when there is a particular shortage of skills in a specific area of work. In addition, lower skilled workers will be permitted to work in the UK where the MAC identifies a serious skills shortage (eg: agricultural workers). Numbers here are likely to be capped. Some short-term, temporary work visas may also form a part of such sector-specific schemes.

During the Brexit transition period (currently expected to last until December 2020) freedom of movement between the UK and the EU will continue, EU citizens being permitted to make formal applications for ‘settled status’ (if they arrived prior to 31st January 2020) or ‘pre-settled status’ (if they arrive afterwards) which will permit them to live and work in the UK as at present after December 2020.

Another major planned change to immigration law is expected to apply from the summer of 2021. This will be the establishment of a new ‘Graduate Immigration Route’ which will permit students who are undertaking degree-level qualifications at eligible UK institutions to apply for a two-year visa extension after completing their studies. During this time they will be free to live and work in the UK in any job (ie: it needn’t be skilled or highly paid as at present). After two years they will have to leave the UK unless they have by then managed to secure a job that would enable entry into the UK from overseas.