SELWYN'S LAW OF EMPLOYMENT
Update October 2020

Consequences of coronavirus

[Note that there is also an update on Coronavirus and Brexit at the beginning of the 21st edition of the textbook – these updates are in addition to those.]

For much of the past few months government has advised people who can work from home to do so. For those who can't the requirement has either been to work in the usual locations while observing social distancing protocols or to stop working and take advantage of the financial assistance packages that were developed and implemented very rapidly at the start of the coronavirus crisis in late March. For some 9.3 million people (employees and workers already on payrolls at 1st March) this resulted in a long period of furlough via the government's Coronavirus Job Retention Scheme, which is coming to an end on 31 October 2020 and is expected to be replaced by the new Jobs Retention Scheme.

It is highly likely that large numbers of people who have been furloughed will either be laid off or made redundant as the scheme is withdrawn, particularly those working in sectors which are unable to re-open normally at this time. Workers in the transport, arts, hospitality and tourism industries are most vulnerable, but any general recession would result in job-losses across a much wider range of industries. We can anticipate a good number of insolvencies too. Such circumstances always lead to substantial numbers of employment tribunal claims, which in current circumstances may take a long time to be scheduled for hearings.

Moreover, because the furlough and other support schemes had to be set up hastily, it is inevitable that there will be a knock-on effect as far as interpretation of their full legal consequences are concerned. Many of these matters will have to be determined by judges as cases come before them, and it is thus reasonable to speculate that this will further increase the number of claims coming forward. There may well be disputes, for example, about how the level of an individual's furlough wage was calculated when variable patterns of hours were typically worked prior to March 23rd. Other areas where matters may ultimately have to be determined in court will be where employers have sought to require workers to take annual leave while furloughed, or where workers have performed paid work for other employers during furlough – something that is permitted under the regulations - but will often not be permitted by the terms of individual contracts of employment. There has been confusion over the precise circumstances in which employees should be paid Statutory Sick Pay rather than a full furloughed wage and we are still unclear about the precise basis on which contractual severance payments will have to be calculated when someone who has been furloughed is subsequently laid off. A great deal of government guidance on these kinds of issues has been issued, but this is not law, and there will be plenty of opportunity for legal arguments to be deployed in court on behalf of clients until definitive rulings are made.

We can also expect disputes to arise between employers and employees as workplaces are re-opened and people are asked to return to work. Normal, established health and safety regulation

will then kick in, and this may present employers with challenges. First, it must be remembered that it is for an employer to ensure that workplaces are safe to work in. This will require new risk assessments to be carried out which take specific account of coronavirus, for reasonable health and safety plans to be developed in reference to them and for these to be put in writing. Front and centre will be arrangements for ensuring social distancing, the wearing of masks and other protective clothing, hand-sanitizing, catering and the use of lifts and toilets. Things will inevitably vary from workplace to workplace depending on size and lay-out. It will also be safer, sooner, for younger staff who are fit to return safely than those who are older or have underlying health conditions that put them at greater risk. Pregnancy is a risk factor to take account of, while some argue that because coronavirus appears to have a substantially more severe impact on BAME employees, ethnicity will also have to be reflected in risk assessments and hence in plans for return to normal working. In short, it may well be the case that employers will have to bring different individual team members back into workplaces at different times in order to minimise safety risks. Moreover, where workplaces are physically small, fewer people will be able to be present at the same time, so some shift-working arrangements will be necessary to keep everyone safe.

These are matters over which an employer has control. In others things are less certain. What consideration, for example, should be given to commuting arrangements as the furlough scheme is withdrawn? Would a court ultimately determine that an employer acted reasonably in assuming that public transport is safe to use at all times, or should this also be given consideration when deciding who to bring back to a physical workplace? What about child care arrangements in a period in which schools are yet to open fully? What is the position of employees who live with elderly relatives who are highly vulnerable to Covid-19? Might we get to a situation in which an employer would use factors such as these in determining who to make redundant later in 2020 in circumstances where home working is not an available option? In truth it is not at all clear how a court would determine all such cases as this type of situation is unprecedented.

It is important to remember that employees certainly, and potentially some other groups of workers too, have a right under the Employment Rights Act 1996 not to be subjected to any detriment if they refuse to work in conditions which they reasonably believe may cause a health and safety risk to themselves, their families or others (such as customers). Dismissing an employee in such circumstances is considered be automatically unfair in law.

Not only are we highly likely to see many cases revolving around these situations being brought to employment tribunals over the coming months, but others too that derive from the coronavirus experience. It is entirely reasonable to anticipate, for example, that a great many people will have enjoyed the experience of working from home over an extended period, will have found it to suit their need to juggle work and home responsibilities and, most importantly, will have established that they are able to perform their jobs entirely satisfactorily without the need to commute to an office each day. The inevitable result will surely be large numbers of requests being made to employers for flexible working.

Employers are also likely to look to reduce financial liabilities on a short-term basis during what may be a slow and hesitant period of recovery. Rather than make people redundant they are, in such circumstances, often going to prefer to explore short-time working, temporary pay-cuts, unpaid sabbaticals and formal lay-offs for a few weeks. All such initiatives have potential legal

consequences, particularly where they involve amending contracts of employment. Some breaches will inevitably occur and this will provide more work for the courts to do.

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 some 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 actually 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 'level 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.

CHAPTER 1

1.12 An Egyptian national working at the British Embassy in Cairo was not entitled to pursue a case in the UK employment tribunal, as she did not have a sufficiently strong connection to the UK **(***Hamam v Foreign and Commonwealth Office* UKEAT/0123/19).

1.92 An HR manager of a bank was dismissed because of his involvement in a personal knowledge-sharing website. The European Court of Human Rights held that this was unfair and that it violated his right to freedom of expression under Article 10 of the European Convention on Human Rights (*Herbai v Hungary* [2019] ECHR 793)

CHAPTER 2

2.4 The extension of IR35 to the private sector was postponed from April 2020 to 6 April 2021. From that date, therefore, when someone is an 'employee', they will no longer been 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.

2.56 The case of *Stuart Delivery Ltd v Augustine* UKEAT/0219/18 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. He could turn down work, but he had no choice as to who from the pool of designated drivers it would be passed on to in practice. Employers cannot deny people basic employment rights by inserting tightly-drawn and restrictive clauses into contracts which limit a person's right to send a substitute to cover a shift.

2.56 In a direct referral from an employment tribunal to the ECJ, *B v Yodel Delivery Network Ltd* C-692/19 also concerned substitution arrangements, but here the focus was very specifically on the EU law requirements in respect of working time. The claimant, Mr B, was a courier driver who was classed by his employer as a self-employed person. In this case the contractual arrangement specifically stated that the contractor was not always required to carry out jobs personally and could subcontract to others provided they had the required skills and qualifications to do the work.

Moreover he used his own van and mobile phone, was able to accept or reject offers of work as he pleased and was entitled to work for others if he wanted to. The European Court ruled that Mr B was not a 'worker' under EU law because he enjoyed very considerable independence and could not be described as being in a subordinate relationship in his dealings with Yodel. The ECJ said that the UK tribunal could define him as a 'worker' if it wished to, but that there was no requirement to do so under EU law. In this case the right to substitution was to all intents and purposes genuinely 'unfettered' – a very different situation than that in place in Mr Augustine's case above.

2.65 A judicial review brought by The Independent Workers Union of Great Britain (IWGB) will seek to extend health and safety rights to 'gig economy' workers. The case has not yet been heard.

2.119 Immigration law reform:

The Immigration and Social Security Co-ordination (EU Withdrawal) Bill 2019-21 has passed all legislative stages in the House of Commons and has been considered by the House of Lords which has returned to the Commons with amendments being made on points of detail before the new law comes into effect on 1st January 2021.

This is a substantial and very complex piece of legislation. The key changes made by the Bill are as follows:

From 1st January 2021 new immigration rules will apply that cover citizens of EU countries on the same basis as those from the rest of the world. The situation in respect of the Republic of Ireland is different, but free movement elsewhere across the EU will come to an end.

- The new system will be 'points based'. This means that people wishing to apply for work in the UK will need to demonstrate a variety of attributes each of which is scored. A total of 70 points will be needed to gain the right to work.

- In practice the new scheme will make it easier for employers in the UK to hire higher and medium skilled workers from overseas. Hiring less highly skilled workers from EU countries will become much harder.

- Employers wishing to hire from the EU now need to apply for and obtain a sponsor license as already happens in respect of hires from non-EU countries.

Under the new scheme applicants will be awarded 20 points towards the required 70 for the following:

i) having a job offer from an approved sponsor employer;

ii) having a job offer requiring an appropriate level of skill (now Level 3 or A level equivalent);

iii) an annual salary over £25,600

iv) a job in a designated shortage occupation

v) A PhD in a STEM subject that is relevant to the job

In addition 10 points towards the required 70 will be awarded for the following:

i) speaking English at the 'required level'

ii) an annual salary of between £23,040 and £25,599

iii) a PhD in any subject that is relevant to the job

No points are awarded if the salary is between £20,480 and £23,039, but people in this category will have the right to work in the UK if they have the required 70 points in respect of other attributes.

In practice therefore, under the new system, it will not be at all difficult for someone from overseas who has good English and a job offer in the UK at a salary in excess of £25,600 to gain the right to work here. Moreover, if someone does not meet all these requirements but either will be working in a designated shortage occupation or has a PhD, they will not have much difficulty in reaching the required 70 points. Moreover, there will be no requirement to be resident in the UK in order to apply. It will be much harder for others and for employers looking to hire them.

A variety of supplementary measures relating to groups such as agricultural workers and students from overseas who have graduated in the UK are also being introduced to ease anticipated labour market pressures resulting from the ending of EU free movement after 2020.

There are also separate arrangements planned for highly-skilled workers (a global talent visa), sports professionals and artists.

2.123, 2.153 The Posted Workers (Agency Workers) Regulations 2020 came into force on 30 July 2020, bringing the revised Posted Workers Directive. It amends the Agency Workers Regulations 2010 and imposes an obligation on the hirer to inform the temporary work agency of a posting to a different member State. They will expire at the end of the Brexit transition period.

2.153 The abolition of the 'Swedish was recommended in the Taylor Review and has now been implemented. The derogation is, in practice, a mechanism used to deny agency workers their rights under the terms of the EU's Agency Workers Directive, and by extension in the UK, the Agency Workers Regulations 2011. It means that agency workers do not have the basic right to equal treatment with directly-employed colleagues after twelve weeks' work if their agency pays them a retainer in between assignments. In most cases it has been used to keep agency workers' pay at a lower rate. This is now no longer lawful.

CHAPTER 3

3.10 In *Okedina v Chikale* [2019] EWCA Civ 1393 A migrant worker 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 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.

CHAPTER 4

4.24, 4.76 *Charles Ishola v Transport for London* [2020] EWCA Civ 112 – Mr Ishola contended that in requiring him to return to work after a period of sickness without first hearing his grievances his employer was operating a PCP which disadvantaged disabled people. The Court of Appeal disagreed. This was a one-off act on the part of Transport of London. A PCP requires an element of repetition. Had it been their general practice not to hear grievances he might have had a case. But this decision only related to him, so the employer could not be shown to have acted unlawfully.

4.24 *Delve and Glynn v Secretary of State for Work and Pensions* [2020] EWCA Civ 1199 related to 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 Court of Appeal upheld the High Court's refusal, stating taht 'this is not a case where the court can interfere with the decisions taken through the parliamentary process'.

4.88 In *Tesco Stores Ltd v Tennant* UKEAT/0167/19/OO an employee suffered from depressive episodes and was off sick regularly from her job as a check-out manager between September 2016 and September 2017. She claimed to have suffered various detriments during this time and brought a claim alleging unlawful disability discrimination. The case came before the employment tribunal in December 2018, by which stage it was clear that her condition was sufficiently 'long-term' in nature to qualify as a disability for the purposes of protection under the Equality Act. She therefore won her case. This decision was subsequently overturned on appeal to the Employment Appeals Tribunal on the grounds that the long-term nature of her condition had not been apparent to her employer at the time she suffered the detriments, so she did not qualify for protection under the Act. The existence of a disability must therefore be established at the date of each discriminatory act upon which a claimant relies.

4.157 It is clear from the EAT ruling in *Gan Menachem Hendon v De Groen* UKEAT/0059/18/OO 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.

4.158 Although only an ET case, and so not binding, Casamitjana Costa v League Against Cruel Sports ET/3331129/18 interestingly found that tthical veganism can be a protected philosophical belief.

4.226 In *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 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.

4 *NH v Associazione Avvocatura per i diritti LGBTI* C-507/18 is an Italian ECJ case concerning remarks made by the owner of a law firm in a radio interview in which he voiced reservations about working with LGBTI people. No recruitment process was in train and no individual complained, but a case was brought against him by an association representing the rights of LGBTI people. The ECJ ruled that the Italian Court had been within its rights to find against him. He was a potential employer and his remarks might have the result of hindering access to employment, or discourage people belonging to the protected group from applying.

CHAPTER 5

5.38 A job evaluation survey is not retrospective when deciding whether work is of equal value. The legislation looks to the present and to the future, not to the past (*Co-Operative Group Ltd & Anor v Walker (Rev 1)* [2019] UKEAT 0087/19).

5.57 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 2021.

CHAPTER 6

6.107 *Ali v Capital Customer Management*; *Chief Constable of Leicestershire v Hextall* [2019] EWCA Civ 900 - 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 Court of Appeal said 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.

The Supreme Court refused the request for an appeal in the Hextall case, so this issue has now, in effect, been decided and will not be re-opened.

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.

CHAPTER 7

7.73 Calculating holiday pay – From 6th April 2020 the reference period to be used when calculating holiday pay when workers are employed to work variable hours or have, in practice, worked variable patterns of hours increased from 12 weeks to 52 weeks.

The purpose of this change is to ensure that people whose patterns of working time vary across a year are properly and fairly remunerated when they take their statutory holiday entitlement. Overtime and most commission payments are included.

There is no immediate requirement to update written policies or contracts where the established twelve week reference period is mentioned. But it would make sense to do so over time so as to ensure clarity.

7.84 In *The Harpur Trust v Brazel* [2019] EWCA Civ 1402 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.

CHAPTER 8

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

CHAPTER 9

9.30 A group of directors who were also employees of a company altered their own contracts very much to their advantage just before they were transferred to another company that had taken over the contract they worked on – a service provision change under the TUPE regulations. The EAT found that the change was not binding on the new employer. Regulation 4(4) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) provides that a variation of contract will be void if the sole or principal reason is 'the transfer', so as these variations were made to improve their contractual benefits in view of the pending TUPE transfer then these variations were void (*Ferguson and other v Astrea Asset Management Ltd* UKEAT/0139/19).

CHAPTER 10

10.74, 19.25 *Duchy Farm Kennels Limited v Graham William Steels* [2020] EWHC 1208 concerned a settlement agreement made with an employee prior to a full tribunal hearing. Under its terms, which included a confidentiality clause, monies would be paid to the claimant over a period

of time. He then spoke about the agreement to a former colleague. The employer found out about this and ceased the payments. The High Court ruled that the former employee had not fundamentally breached the agreement in such a way as could simply bring the payment agreement to an end. The agreement had not specified that a breach of the confidentiality clause would have this effect. The confidentiality obligation was not a condition of the contract, and so the breach did not entitle the employer to terminate the agreement.

10.75 *Okwu v Rise Community Acton* UKEAT/0082/19/OO 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.

10.75 In *Ibrahim v HCA International Ltd* [2019] EWCA Civ 2007, an interpreter working in a private hospital believed that rumours were circulating that he had breached patient confidentiality and 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.

10.75 A surgeon made various allegations, including some to media organisations, about alleged malpractices at the hospital he formerly worked at. The hospital responded by hitting back, in the process making some comments about Mr Jesudason's allegations that contained inaccuracies. He contended that these comments harmed his professional reputation and hence constituted a detriment caused by his whistleblowing activities. The Court of Appeal agreed with the earlier Employment Tribunal ruling that the hospital had not acted unlawfully. Its motivation in making the statements it did was to defend its reputation and not to impune that of Mr Jesudason. A detriment had been caused and Mr Jesudason had made a protected disclosure and a detriment had been caused, but the latter was not on grounds of the former (*Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] EWCA Civ 73)

10.75 *Tiplady v. City of Bradford Metropolitan District Council* [2019] EWCA Civ 2180 concerned planning officer who believed that had she suffered a detriment due to making made protected disclosures in relation to a property she owned and about which she had dealings with the council who employed her. The Court of Appeal ruled that because the detriments were not suffered by the claimant in her capacity as an employee, she could not rely on them in an employment law claim.

10.86 In *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55, 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 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'.

10.110 *Bessong v Pennine Care NHS Foundation Trust* UKEAT/0247/18 concerned third party racial harassment. 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.

10.110 *Barclays Bank plc v Various Claimants* [2020] UKSC 13 related to a deceased doctor who had sexually assaulted over a hundred women at pre-employment medical examinations between 1968 and 1984. This Dr Bates was never an employee of Barclays Bank and therefore according to established principles of the law was not someone whose actions the Bank could ever be vicariously liable for. Here too though, the Court of Appeal had pushed the law in a new direction by finding that he was in a relationship to Barclays that was 'akin to one of employment'. They found in favour of the victims. Like the WM Morrison case, this was overturned by the Supreme Court. Dr Bates was an independent contractor, not an employee. There was therefore no vicarious liability pertaining to Barclays Bank.

CHAPTER 11

A judicial review brought by The Independent Workers Union of Great Britain (IWGB) will seek to extend health and safety rights to 'gig economy' workers. The case has not yet been heard.

Coronavirus updates appear separately as a note in the front of the 21st edition, and also above.

CHAPTER 12

12.71 In *Harrison v Barking, Havering And Redbridge University Hospitals NHS Trust* [2019] EWHC 3507, a solicitor was suspended, and then only permitted to return to work on restricted duties. She refused, as she said it was a demotion, and was suspended again for failing to follow a management instruction. She sought an interim injunction to allow her to perform most of her normal duties, arguing that the decision to suspend her caused her ill health, and being deprived of the opportunity to practice her profession was likely to damage her professionally. The court allowed the interim injunction, stating that it was strongly arguable that the manner in which she was treated amounted to a breach of the implied duty of trust and confidence.

CHAPTER 13

13.4 *R O'Sullivan v DSM Demolition Ltd* UKEAT/0257/19/VP

Unofficial work done before a formal start date did not count towards a period of continuous employment.

CHAPTER 14

No important updates

CHAPTER 15

No important updates

CHAPTER 16

16.6 *East Coast Main Line Company Limited v Cameron* UKEAT/0212/19/BA was a wrongful dismissal claim resulting from the summary dismissal on grounds of gross misconduct of a long-serving employee. The incident that led to his dismissal was a breach of health and safety rules that resulted in a fellow employee being 'brushed' by a train that was being shunted. The tribunal considered dismissal to be too harsh a sanction given Mr Cameron's many years of unblemished service. The EAT overturned this ruling. The employer acted lawfully and length of service need not have been taken into account.

16.11 *Jagex Ltd v McCambridge* UKEAT/0041/19 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.

CHAPTER 17

17.23 Where there is no single, major repudiatory breach of the contract of employment, but the resignation is instead a response to a series of more minor breaches that take place over a period of time, 'the last straw doctrine' because it is the final minor breach which actually triggers the resignation there can still be a constructive dismissal. In *Williams v The Governing Body of Alderman Davies Church in Wales Primary School* UKEAT/0108/19, the last straw that triggered the resignation was held by the Employment Tribunal to have been 'entirely innocuous'. There had been a series of earlier breaches relating to a disciplinary process, but the event which finally pushed the claimant into resigning could not be described as a breach of his contract. The EAT declared Mr Williams to

have been constructively dismissed. Provided earlier cumulative acts do add up to a repudiatory breach and have not been affirmed by the claimant, the last straw that actually triggers the resignation needn't therefore be a breach of contract. It can be 'entirely innocuous'.

17.144 *Lafferty v Nuffield Health* UKEATS/0006/19 concerned an employee who had worked as a hospital porter for many years. He was accused of committing a serious sexual offence and was dismissed by his employer who feared for its reputation should he be convicted. He vigorously denied the accusations, arguing that he should be considered innocent until proven guilty in a criminal court. The EAT upheld the tribunal decision that this should be considered a fair dismissal for 'some other substantial reason'.

CHAPTER 18

Extending redundancy protection for pregnancy and maternity

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 government's intention was 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, but no draft regulations or implementation dates have yet been published.

CHAPTER 19

19.25, 10.74 *Duchy Farm Kennels Limited v Graham William Steels* [2020] EWHC 1208 concerned a settlement agreement made with an employee prior to a full tribunal hearing. Under its terms, which included a confidentiality clause, monies would be paid to the claimant over a period of time. He then spoke about the agreement to a former colleague. The employer found out about this and ceased the payments. The High Court ruled that the former employee had not fundamentally breached the agreement in such a way as could simply bring the payment agreement to an end. The agreement had not specified that a breach of the confidentiality clause would have this effect. The confidentiality obligation was not a condition of the contract, and so the breach did not entitle the employer to terminate the agreement.

CHAPTER 20

20.6 In *Lowri Beck Services v Brophy* [2019] EWCA Civ 2490, a dyslexic employee who had genuinely misunderstood the date that he was dismissed was allowed an extension of time to bring a claim where the dismissal letter was ambiguous.

20.38 Protected conversations 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 (*Harrison v Aryma Ltd* UKEAT/0085/19/JOJ).

Future changes

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.

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. A request has now been made by ministers to the Law Commission asking it to make recommendations about how a new fees regime might be effectively introduced in the future.

The Law Commission has also now come forward with a range of specific recommendations on ways in which the Employment Tribunals rules might be reformed and their remit extended in the future. These include the following:

- Extending time limits for making claims to tribunals from three months to six months
- Permitting tribunals more grounds on which to extend time limits in individual cases where it would be just and equitable to do so.
- Inviting Employment judges to preside in County Court hearings in matters relating to discrimination law in the employment field.
- Widening the remit of tribunals to decide breach of contract claims where damages of up to £100,000 are being sought – up from £25,000 at present – and to include claims made by workers and not just employees.
- Strengthening sanctions and the enforcement regime when respondents who lose cases in the tribunal fail to pay compensation swiftly.

CHAPTER 21

21.22 In *Royal Mail Group Limited v Communication Workers Union* [2019] EWCA Civ 2150, the Court of Appeal upheld an interim injunction to prevent a Christmas postal strike. The CWU had advised its members, as Royal Mail employees, to pick up their own ballot papers from the Delivery Office of

the Royal Mail, fill them out there, and post them back, rather than waiting for them to be delivered to their own homes.

This was found to be an 'interference' by the union under section 230(1), a breach of the obligation in section 230(2) to ensure, so far as practicable, that voting papers were sent to the homes of those entitled to vote, and a breach of the obligation contained in section 230(4) to ensure so far as practicable that voting was in secret.

The High Court granted the injunction, and it was upheld by the CA. The CA said that 'interference' in a strike ballot by a union relates to conduct which has the effect of preventing or hindering the ordinary course of voting. It is not a test of impropriety' and is not limited to conduct which amounts to intimidation, coercion or fraud. In addition, by encouraging what were in effect workplace ballots, there was a risk that voters would feel themselves under the pressure to which Smith LJ referred in British Airways v Unite, as voters would not feel the voting was secret.

CHAPTER 22

No important updates

CHAPTER 23

23.144 Changes to the ICER (Information and Consultation of Employees Regulations 2004) – While not often used in practice, under the terms of the EU's ICE regulations groups of employees working in workplaces of over fifty have the right, in certain circumstances, to "be informed and consulted about the business you work for, including the prospects for employment and substantial changes in work organisation or contractual relations."

Until April 6th 2020 this right only applied formally when either 10% or fifteen people made a formal request. This has now gone down to 2%, making it far easier for employees to force their employers to consult formally when they are unhappy with the extent of information-sharing and consultation they receive.