# Selwyn's Law of Employment

## Update April 2021

**BREXIT**

The Trade and Cooperation Agreement was agreed at the end of 2020. The key paragraph affecting employment regulation is in Article 6.2, and states:

"A Party shall not weaken or reduce, in a manner affecting trade or investment between the Parties, its labour and social levels of protection below the levels in place at the end of the transition period, including by failing to effectively enforce its law and standards."

This 'non-regression' arrangement means that existing employment standards will broadly be retained in the future, but the UK (with the exception in some areas of Northern Ireland) will not be obliged in the future to mirror any new EU regulations.

The agreement does not require the UK to retain every single EU regulation or to adhere to all past judgements of the European Court of Justice. Governments will be free to amend and adjust the way that the law operates, but any attempt to de-regulate in such a way as to distort fair trade would in all likelihood be contested by the EU, and potentially result in the application of punitive tariffs. There is therefore unlikely to be any wholesale repeal of existing employment rights that have an EU origin or which became areas of EU competence during the UK's decades of membership.

The same is true of existing enforcement mechanisms. The agreement commits both parties not to reduce their effectiveness as a means of gaining a competitive advantage over the other. It does not, however, preclude some future reform.

The agreement makes it clear that from January 1st 2021, with the exception of some discrimination laws in Northern Ireland, the European Court of Justice no longer has any constitutional role in the UK. However, its existing rulings remain good law and will do so unless and until the Supreme Court decides to make any amendments via a new ruling. (Note that The European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 provide which courts are not bound by any principles laid down by, and any decisions of, the Court of Justice of the European Union, as those principles and decisions are modified by or under the European Union (Withdrawal) Act 2018 or other domestic law).

If there is a dispute between the EU and the UK over the application of the Trade and Cooperation Agreement, a system of arbitration can be used to settle the matter. The arrangements here are complex but they involve, first, a consultation phase lasting 30 days during which diplomats will try to settle the matter in dispute. If this fails, there is the possibility of an appeal to a body known as 'the Partnership Council' which will adjudicate. This will contain equal numbers of expert representatives from the UK and the EU, with a neutral chair appointed from another country. The Council will then rule on whether a distortion in the terms of trade exists and whether or not tariffs can be imposed in order to rectify the balance.

In practice therefore, for the foreseeable future, existing employment law which has a European origin or has been an area of European competence will remain good law, and so nothing will change in the short term.

In the longer term it is possible that amendments may be made to employment rights and, potentially, some existing ECJ judgments overturned or altered. But the agreement precludes any radical change of a nature that would potentially give the UK a competitive advantage when trading with the EU. Existing, core employment rights should not therefore be significantly diluted.

Over time EU and UK employment rights may start to diverge as new regulations are introduced by one side or the other.

**CORONAVIRUS**

For much of the past year the government has advised people who can work from home to do so. For some 9.3 million this resulted in long periods of furlough funded via the government's Coronavirus Job Retention Scheme. This has involved employers paying them 80% of their original salaries up to a maximum of £2500 a month and reclaiming the sums from the public purse. Employees can be fully or partly furloughed. The furlough scheme has been extended until 30 September 2021.

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 during 2021, particularly those working in sectors which are unable to re-open normally for a period. Workers in the transport, arts, hospitality and tourism industries are the most vulnerable, but any lengthy general recession caused by the pandemic would result in job losses and insolvencies across a much wider range of industries. 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 2020.

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 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 (note that there is also specific ACAS guidance on this). Normal, established health and safety regulation will 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. 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. There is also the question of whether employers can require staff to be vaccinated, or provide a vaccination certificate.

Those 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 places where schools are unable 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 2021 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 workers 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. This was only available to employees, but has recently been extended to workers (see Chapter 11).

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. The government has announced a consultation on whether to extend the legislation in this area.

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.

## CHAPTER UPDATES

### Chapter 1

**1.88** There is an independent review taking place on whether there is a need to reform the Human Rights Act, which will report in the summer of 2021.

### Chapter 2

**2.2, 2.56** The Supreme Court has upheld the decision that Uber drivers are workers, not self-employed (Uber BV and others v Aslam and others [2021] UKSC 5).

**2.4** From 6 April 2021, IR35 changes to the off-payroll rules take place, and all organisations that meet two or more of the following criteria:

- an annual turnover of more than £10.2 million
- a balance sheet total of more than £5.1 million
- more than 50 employees

will be responsible for deciding the employment status of workers. This was due to take place in April 2020 but was postponed because of the pandemic. In practice this means that, when someone is an 'employee', they will no longer be able to be paid as if they were an independent contractor via invoices, but will now have to be paid through a payroll along with all other employees, with tax and national insurance being deducted at source.

**2.119** The Immigration and Social Security Co-ordination (EU Withdrawal) Act came into effect on 1st January 2021.

The key changes are as follows:

The new immigration rules apply to 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 has come to an end.

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

- In practice the new scheme makes it easier for employers in the UK to hire higher and medium skilled workers from overseas. However, hiring less highly skilled workers from EU countries becomes 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 is no requirement to be resident in the UK in order to apply.

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.

**Chapter 3**

**3.8** In 2016, the Supreme Court in Patel v Mirza [2016] UKSC 42 set out a new policy-based approach to the illegality defence at common law, holding that when a claim is tainted by illegality, the court should ask itself whether enforcing the claim would lead to inconsistency that is damaging to the integrity of the legal system. In assessing this, it should consider:

(a) the underlying purpose of the illegality in question, and whether that purpose would be enhanced by denying the claim;

(b) any other relevant public policy on which denying the claim may have an impact;

(c) whether denying the claim would be a proportionate response to the illegality.

This was further clarified by the Supreme Court in Stoffel & Co v Grondona [2020] UKSC 42, where a firm of solicitors had failed to register a property transfer in a case that involved a fraudulent mortgage. They argued that because the mortgage application had been illegal, they should not be liable for their failure.

The court found that the three considerations above should not be a mechanistic process. The court should look at them a relatively general level, and decide whether enforcing a claim that is tainted with illegality would be inconsistent with the policies to which the law gives effect.

**Chapter 4**

**4.65** A pay freeze which caused indirect age discrimination could not be justified on cost alone, but if it was coupled with something else, for example the need to reduce expenditure and balance the books, then it could be justified. This was known as the 'costs plus' principle, but the Court of Appeal said that a better question is to ask whether the aim is solely to avoid increasing costs. The court said that 'an employer's need to reduce its expenditure, and specifically its staff costs, in order to balance its books can constitute a legitimate aim for the purpose of a justification defence' (Heskett v Secretary of State for Justice [2020] EWCA Civ 1487).

**4.122** In Taylor v Jaguar Land Rover Ltd [Case No. 1304471/2018], the employment tribunal found that a person did not need to undergo or even intend to undergo, medical treatment in order to fall within the protected characteristic of gender reassignment. Note that, as an employment tribunal case, this is not a binding decision.

**4.160** In another clash between the competing rights of sexual orientation equality and the right to freedom of religion and belief, in Page v Lord Chancellor [2021] EWCA Civ 254 a Christian magistrate who made public comments condemning same-sex adoption and was removed from the magistracy was held not to have been victimised. His removal was not because of his religious beliefs or his

complaint of discrimination, but rather because he had publicly said that in such adoptions he would make a decision based upon his own views, and not in accordance with the law.

**4.203** An employer was unable to rely on the 'reasonable steps' defence in s109 of the Equality Act in a race discrimination case, as the training that it had provided had become stale. A reasonable step here would have been to refresh the training (Allay (UK) Ltd v Gehlen [2021] UKEAT 0031/20).

**4.234** The Vento bands will increase from 6 April 2021 as follows:

- lower band of £900 to £9,100

- middle band of £9,100 to £27,400

- upper band of £27,400 to £45,600

with the most exceptional cases capable of exceeding £45,600

**4.250** As a result of the Lorraine Gallagher case, new guidance has been issued so that the Disclosure and Barring Service (DBS) will no longer disclose youth reprimands, youth warnings, or youth cautions. It will also no longer automatically disclose all convictions where an individual has more than one conviction, but assess each individual conviction.

**Chapter 5**

**5.9** The Supreme Court confirmed the Court of Appeal decision in Asda Stores Ltd v Brierley and others[2021] UKSC 10.

This followed from the case of Dumfries and Galloway Council v North (para 5.8), where the Court had confirmed that the question should be whether, assuming that the comparator was employed to do his present job in the claimants' establishment, the existing terms and conditions would apply (although the tribunal may be satisfied that there are common terms without needing to ask this).

The Supreme Court said that the question in the North case served the important purpose of allowing cases even where an employer allocates groups of employees to separate sites so that they have different terms.

The correct exercise for the employment tribunal is to make a broad comparison by asking whether the terms enjoyed by the distribution employees were substantially the same at the distribution depots and at claimants' establishments. The tribunal was not required to perform a line-by-line comparison of different sets of terms and conditions. It should not be a prolonged enquiry, and the answer may more readily be found by inference from the relevant facts and circumstances. Here,

the employment tribunal found that the distribution employees would have been employed on substantially the same terms if they had been employed at the claimants' site.

**5.57** Enforcement of gender pay gap reporting, which was suspended in March 2020 because of the pandemic, will re-start on 5 October 2021.

**Chapter 6**

The rates statutory maternity, paternity, adoption, parental bereavement and shared parental pay increase from 4 April 2021 to £151.97 per week. The lower earnings limit remains £120 per week.

**6.127** Given the change in working practices during the pandemic, the government has announced a consultation whether to give employees more rights in relation to flexible working.

**Chapter 7**

**7.43** The rate of statutory sick pay (SSP) will increase from 6 April 2021 to £96.35 per week.

**Chapter 8**

**8.38** From April 2021, the National Living Wage applies to those aged 23 and 24.

(a) National living wage (workers aged 23 and over) £ £8.91

(b) 21-22 year-olds £8.36

(c) 18–20-year-olds £6.56

(d) 16–17-year-olds £4.62

(e) Apprentices £4.30

(f) Accommodation offset £8.36

**8.48** The Supreme Court upheld the decision of the Court of Appeal in Royal Mencap Society v Tomlinson-Blake [2021] UKSC 8, that live-in carers were not entitled to be paid the NMW for all the hours of their sleep-in shifts. It overruled the case of British Nursing Association v Inland Revenue [2002] EWCA Civ 494.

The Court said that the time when the Appellants were, by arrangement, permitted to sleep should only be taken into account for the purpose of calculating whether they were paid the NMW to the

extent that they were awake for the purposes of working, and so the entire shift did not fall to be taken into account for this purpose.

**Chapter 9**

No important updates

**Chapter 10**

**10.89** The Court of Appeal upheld the EAT decision in Simpson v Cantor Fitzgerald EWCA Civ [2020] 1601. The allegations made were not protected disclosures. He did not have genuine belief in the malpractice and they were therefore not in the public interest, although multiple allegations can cumulatively amount to a protected disclosure.

**10.110** In a vicarious liability case, Chell v Tarmac Cement and Lime Ltd [2020] EWHC 2613, it was found that an employer was not liable for an employee's horseplay which resulted in injury. The High Court approved the trial judge's comment that 'horseplay, ill-discipline and malice are not matters that I would expect to be included within a risk assessment'.

**Chapter 11**

**11.50-52** The Employment Rights Act 1996 (Protection from Detriment in Health and Safety Cases) (Amendment) Order 2021 extends the protection of s44 of the Employment Rights Act to workers as well as employees, and is expected to come into force on 31 May 2021. This is of great importance in the present circumstances, where workers as well as employees are concerned at their return to work.

The change in legislation arises out of the significant case of R (on the application of the Independent Workers' Union of Great Britain) v Secretary of State for Work and Pensions [2020] EWHC 3050. Gig economy workers, such as taxi drivers and bus and coach drivers, who were members of the union, complained that they were required to work during the pandemic without being provided personal protective equipment. The union succeeded in obtaining a declaration from the High Court that the UK had failed to transpose two EU council directives that would protect workers as well as employees.

**Chapter 12**

No important updates

**Chapter 13**

No important updates

**Chapter 14**

No important updates

**Chapter 15**

No important updates

**Chapter 16**

No important updates

**Chapter 17**

**17.116** A senior employee and director, while suspended, set up a covert camera to investigate if anyone else had used his work computer to find evidence against him, and this was one of the reasons for which he was dismissed. The EAT said that it was possible his actions were to protect commercial and personal interests because of his senior position. It found that the employer had failed to conduct a balancing exercise between its right to privacy and his right to protect his confidential information, and he was held to be unfairly dismissed (Northbay Pelagic Limited v Colin Anderson UKEAT/0029/18).

**17.116** Although only an ET case, in Kubilius v Kent Foods Ltd ET/3201960/2020 it was found that dismissal of an employee for refusing to wear a face mask, which was company policy during the pandemic, was within the range of reasonable responses and therefore fair.

**Chapter 18**

**18.7** If there is a diminution in the employer's requirement for employees to carry out work of a particular kind, then there is a redundancy situation – the motive for dismissing someone is only relevant to identify the reason for dismissal but otherwise if a job is redundant then it is redundant. Berkeley Catering Limited v Jackson UKEAT/0074/20

**18.72** Where there is a collective redundancy situation, the employer should look at a rolling 90 day period, both backwards and forwards, to see if the threshold is reached for collective consultation (UQ v Marclean Technologies SLU [2020] EUECJ C-300/19).

**Chapter 19**

**19.25** A junior financial adviser was employed on a six-month probationary period, with either side able to give two weeks' notice to terminate. She left just before the end of six months. Her contract was subject to a nine-month non-compete clause and a twelve month non-solicitation one. The High Court held that these restrictions were not enforceable,

Restrictive covenants imposed on junior employee were unenforceable. She was a junior employee, had only been there a short amount of time and had not had time to build up a list of clients. The short notice period showed that she was not considered an important employee, and so the clauses were unreasonable and in restraint of trade. The court said 'the threat of a departing employee requires less protection if she has had less of an opportunity to build such a relationship with the clients. Having access to client-related documentation does not of itself build a strong client relationship' (Quilter Private Client Advisers Ltd v Falconer & Anor [2020] EWHC 3294).

**Chapter 20**

**20.5, 20.51** From 1 December 2020, ACAS Early Conciliation can take 6 weeks, rather than the previous limit of one month with a possible 14 day extension.

**Chapter 21**

**21.26** A trade union can owe a duty of care to its members by voluntarily assuming responsibility, and following the case of Friend v Civil Aviation Authority [1998] IRLR 253, the standard that of the ordinary skill and care to be expected of a trade union, as an organisation dedicated to protecting the rights of its members. It is not a quasi-legal duty and depends on what is set out in the membership handbook (Langley v GMB & Ors [2020] EWHC 3619)

**21.50** An employee who was a union representative refused to delete a duplicate email list of trade union members that he had created, and was disciplined. It was found that this was union activity, and that he was subjected to a detriment within s146 TULRCA 1992. The employer could not justify it on the basis that it was insubordination (University College London v Brown [2020] UKEAT 0084_19_1712)

**Chapter 22**

No important updates

**Chapter 23**

**23.145** Changes to the ICER (Information and Consultation of Employees Regulations 2004): While not often apparently 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.