Selwyn's Law of Employment

Update October 2021

For this update, we will first look at the general situation relating to Brexit and Covid, and then move on to listing the specific updates for each chapter.

BREXIT

The section of the final Trade and Cooperation Agreement dealing with employment regulation is Article 6.2, which reads:

> *"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 means that existing employment standards will broadly be retained in the future, but that the UK (with the exception in some areas of law in Northern Ireland) will not be obliged in the future to mirror any new EU regulations.

The agreement will not require the UK to retain every EU regulation or to adhere to all past ECJ decisions. The Government will be free to make any changes, but any attempt to de-regulate in a significant way 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.

We can therefore expect to see some relatively minor amendments being made in areas such as Working Time or Agency Workers' Rights, but no 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 (ECJ) 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 amendments via a new ruling or new UK legislation is passed.

What all this means in practice is that for the foreseeable future existing employment law that has a European origin or has been an area of European competence will remain on the UK statute book. In other words, nothing will change in the short term at all.

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 will start to diverge as new regulations are introduced by one side or the other. UK law will, however, no longer change as EU law changes and new EU employment rights will no more change in the UK than new UK rights will be followed in the EU.

CORONAVIRUS

For much of the past 18 months the 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 made available the start of the coronavirus crisis and are now being wound down.

After Furlough

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.

Health and safety

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. Matters to consider 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. ACAS has a 'Working safely during coronavirus' guide on the matters to take into account, and there is guidance on the gov.uk website.

It is important to remember that there is 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.

Another issue is whether it is acceptable to require employees to be vaccinated. The Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021, which amend the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 will make COVID-19 vaccinations a condition of employment for workers deployed in care homes, and come into force on 11 November 2021. (One interesting case appears in the update to chapter 1, dealing with compulsory vaccination and human rights in the Czech Republic (*Vavřička and others v Czech Republic*).

Working from home

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.

The government is currently considering changes to the flexible working regulations, in particular whether to make working from home the default option unless the employer has a good reason to refuse.

Covid Case Law

There have been some employment tribunal decisions on Covid-related matters, though none have yet been heard by the higher courts. Note also that the TUC have called for 'Long Covid' to be specifically recognised as a disability. This has not yet been done and for some people it may well come within the definition of disability in any event.

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.

In *Rodgers v Leeds Laser Cutting Ltd* ET/803829/2020 a man whose child suffered from sickle cell disease and was thus particularly vulnerable to Covid refused to work during the pandemic in the factory where he was employed in case he contracted the virus and affected his child. The employer dismissed him on the grounds that they had in place a variety of Covid protocols that meant that the workplace was safe. Mr Rodgers lost his unfair dismissal claim. He had not been automatically unfairly dismissed for refusing to work in unsafe conditions because he would not have been 'in serious and imminent danger' had he gone to work and observed safety precautions. This can be contrasted with *Montanaro v Lansafe Ltd* ET/2203148/2020, where an employee who stayed in Italy at the outbreak of the pandemic and wanted to work from home was found to have been atomatically unfairly dismissed.

Accattatis v Fortuna Group (London) Limited ET/ 3307587/2020 has some similarities to *Rodgers*. A man who caught Covid refused to return to work after recovering. He asked instead if he could either work at home or be furloughed. He worked at a warehouse distributing PPE and working from home was not an option. He could not be furloughed as his job was continuing through the pandemic. He was dismissed a few weeks before completing two years' service and failed to persuade the tribunal that his dismissal was automatically unfair. He would not have been 'in serious and imminent danger' and hence had no lawful grounds for refusing to come to work.

Dismissal for raising concerns about a lack of PPE and other Covid-related health and safety matters was an automatically unfair dismissal (*Gibson v Lothian Leisure* 4105009/2020).

In *Prosser v Community Gateway Association Ltd* ET 2413672/2020 a tribunal found against a woman who had been pregnant when the covid outbreak started and had been prevented from working by her employer until perspex screens had been erected between work stations. She claimed to have been unlawfully discriminated against on grounds of pregnancy. The tribunal found that she had been sent home because she was clinically vulnerable and had not been 'unfavourably treated'.

In *Independent Workers Union of Great Britain v Secretary of State for Business, Energy and Industrial Strategy and others* [2020] EWHC 'workers' and not just employees should have protection from being subject to detriments on health and safety grounds and the right to be provided with PPE.

CHAPTER 1

1.92 The ECHR's first judgment on compulsory childhood vaccination was *Vavřička and others v Czech Republic* [2021] ECHR 116. The applicants alleged that the consequences for them of non-compliance with the statutory duty to have children vaccinated, or otherwise be fined or refused admission to pre-school, were incompatible with their right to respect for their private life under Article 8 of the Convention.

The court found that while there was an interference with their right to respect for private life, it was justified, as the State had taken measures to guard against major disruptions to society caused by serious disease, namely the interests of public safety, the economic well-being of the country, or the prevention of disorder. This was necessary in a democratic society and within the margin of appreciation. There is an obligation on States to place the best interests of the child, and also those of children as a group, at the centre of all decisions affecting their health and development. When it comes to immunisation, the objective should be that every child is protected against serious diseases.

The applicants perceived it as a form of sanction or penalty on them. However, the Court said it was intended to safeguard in particular the health of young children and was essentially protective rather than punitive in nature, and within the wide margin of appreciation.

The applicants also claimed a breach of Article 9, freedom to manifest one's religion or beliefs, on the basis that they did not believe in having the vaccinations, but in this particular case the court found that the beliefs were not of sufficient cogency, seriousness, cohesion and importance to attract the guarantees of Article 9.

CHAPTER 2

2.2, 2.56 The *Deliveroo* case, otherwise known as *The Independent Workers Union of Great Britain v The Central Arbitration Committee* [2021] EWCA Civ 952 followed on from the *Uber* line of cases, considering whether those in the gig economy qualify as 'workers'. Here, the drivers wanted compulsory union recognition as if they were workers. The union argued that as the Deliveroo riders did not qualify as workers for the purposes of union recognition, this was a breach of their rights under article 11 of the ECHR. This was a very narrow issue for the Court of Appeal to decide, and under the particular facts of this case the Court decided that this fell within the margin of appreciation and compulsory recognition did not need to be extended to independent contractors. The drivers had a genuine right of substitution, and so were independent rather than workers.

In a similar argument, however, in *National Union of Professional Foster Carers v Certification Officer* [2021] EWCA Civ 548 the Court of Appeal found that article 11 was breached when the Certification Officer refused to put the Union under the official list of unions. This was a case about the right of foster carers to form a trade union. Only workers can do so, as Section 1 of TULRCA 1992 defines a trade union as an organisation which consists wholly or mainly of 'workers', so the certification

officer rejected the NUPFC's application. The Court of Appeal issued a declaration that for the purposes of TULRCA, 'worker' would be extended to include foster carers.

In another employment status case, though, *Addison Lee v Lange and others* [2021] EWCA Civ 594 the Court of Appeal refused permission to appeal as every time a driver logged on there was a contract in place and they were clearly workers.

Lord Justice Bean quoted the EAT, which had said:

'The Respondent is correct to say that they are free not to do so and that they can choose when to do it. The commercial reality, however, is that they are undertaking to do work when and as soon as they log on. There is, in our view, a strong implication of an underlying agreement. They remain under Addison Lee's rules between driving jobs. Their use of the vehicle, for example, is restricted and regulated; and they cannot remove the Addison Lee insignia. The Driver Contract remains in force. It is when it is terminated that the vehicle can be repossessed, in effect, forthwith. Underlying all of this is the ongoing vehicle hire charge that endures from week to week (subject to the free weeks being earned), a significant factor, and the recoupment of the 'service charge' referred to in paragraph 26 above.

From an economic standpoint, all this obliges the drivers to log on and drive, so as to cover fixed hire costs. It is perhaps, the central point, because it is the mechanism by which the Respondent can be close to certain that its drivers will log on. Addison Lee needs them to log on; and they need to do so in order to pay the overheads and then start earning money. They know that once they log on, they have to accept the jobs that the Respondent's system offers them. It is a symbiotic relationship, to borrow a word from the scientific world. We conclude that there was an overarching contract.'

Further, in *Nursing & Midwifery Council v Somerville* UKEAT/0258/20, it was found that there is 'no irreducible minimum of obligation' for someone to be found to be a worker.

2.4 The government has set out its intention in the Good Work Plan to create a single enforcement body. This will bring together the HMRC National Minimum Wage Enforcement, the Gangmasters and Labour Abuse Authority and the Employment Agency Standards Inspectorate, which will also have the remit to enforce Statutory Sick Pay.

2.167 The Agency Workers Regulations 2010 require employers to inform agency workers they are employing about relevant, permanent vacancies that are available to apply for in their organisations. After twelve weeks' employment they also require equal treatment with directly-employed colleagues in respect of basic terms and conditions of employment such as pay, hours of work and holiday entitlement.

In *Angard Staffing Solutions Ltd v Kocur* [2020] UKEAT/0050/20/JOJ the EAT decided that the Regulations do not mean that agency workers had the right to apply for all internally-advertised vacancies on the same basis as directly-recruited employees. Here, the employer – the Royal Mail – advertised some internal vacancies and reserved the right to apply for them to employees it had recruited directly. Its position was that agency workers would be informed of vacancies that were being advertised externally, but not those it was only advertising internally.

The EAT decided that there had been no breach of the Regulations. The right is simply to be informed about relevant vacancies on the same basis as directly-recruited colleagues, not to be considered for them on equal terms.

The EAT also found that agency workers could lawfully be required to work longer shifts than directly-recruited staff and that directly-recruited colleagues could lawfully be given preferential treatment in respect of scheduled rest breaks and overtime requests. There was also no right for agency workers to be provided with the same training as directly-recruited staff.

2.178 There is now statutory guidance available on the government website on signs that may help determine if a person is the victim of modern slavery.

CHAPTER 3

3.7 The fact that there had been illegality in the past but then the contract was made legal did not prevent the claimant from claiming unfair and wrongful dismissal. The Court in *Robinson v Al-Qasimi* [2021] EWCA Civ 862 followed *Patel v Mirza* [2016] UKSC 42 in considering whether denying the claim would be a proportionate response to any illegality .

3.45 *Nair v Lagardère Sports and Entertainment* [2020] EWHC 2608 (QB) relates to a breach of trust and confidence on the part of an employer. Here the claimant argued that by failing to push for a substantial bonus payment to paid to him by another company in the same group, his employer had breached his contract by damaging trust and confidence. The EAT agreed. An act of omission can amount to a breach just as much as an act of commission can.

3.103 It occasionally occurs that an employer will fire an employee and rehire them on different terms and conditions. This has been disapproved of in a statement in parliament, and is the subject of an ACAS report, but it is not expected that there will be legislation expected.

The Parliamentary Under Secretary of State for BEIS, Paul Scully stated

'It is unacceptable and, frankly, immoral to use the threat of fire and rehire as a negotiating tactic to force through changes to people's employment contracts, or for employers to turn to dismissal and rehiring too hastily, rather than continue to engage in meaningful negotiations...However...the Government want to send a clear message to employers: even if your business is facing acute challenges, all other options to save jobs and a business should be exhausted before considering the dismissal and re-engagement of staff. I believe that we can achieve this working in partnership with businesses and workers, without heavy-handed legislation.'

CHAPTER 4

4.26 *Heskett v Secretary of State for Justice* [2020] EWCA Civ 1487 related to justifying indirect discrimination on grounds of age with reference to the need to reduce costs. It will also apply in cases related to other protected characteristics such as sex and race discrimination.

The case concerned a change made to the incremental salary scale for probation officers which had the effect of favouring people who were over the age of fifty. The reasons for the changes were financial, following government instructions to reduce costs sharply. The employer's case was that such action had to be taken so that it could run its operations within budget.

The Court of Appeal ruled that the necessity to run an organisation within a set budget did amount to 'a proportionate means of achieving a legitimate aim' and hence that the introduction of new salary arrangements was not unlawful despite it indirectly favouring older employees over younger colleagues.

It is important to note that this would not necessarily apply when the reason for a reduction in salary was simply a desire to reduce costs. The case specifically refers to a situation in which an organisation needed to make changes in order to stay within its means by reducing costs.

4.81 *Daley v Optiva* 1308074/2019 was a preliminary hearing in the Employment Tribunal, so is not a binding judgment, but it is potentially of considerable significance. Mrs Daley was 51 and had been experiencing significant menopausal symptoms for two years when she decided to bring a disability discrimination claim against her employer who she considered had caused her a detriment on these grounds. She claimed that her symptoms, which included an inability to sleep well and some anxiety attacks should be considered a disability under the terms of the Equality Act 2010. The statutory definition is well-established and reads as follows:

A disabled person is someone who suffers from 'a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities'.

The EAT in *Seccombe v Reed* UKEAT/0213/20/OO found that the long-term requirement for finding that someone has a disability relates to the effect of the impairment not the impairment itself, and in considering whether an impairment is "likely" to recur, "likely" means "could well happen" (*SCA Packaging Ltd v Boyle* [2009] ICR 1056)

All Answers Ltd v W and Another [2021] EWCA Civ 606 concerns how a court should go about assessing the term 'long term' in the statutory definition. This has long been understood to mean 12 months or more, which poses no problems when a condition has already lasted that long or is highly likely to in the future given the medical prognosis. However, it is not always so clear early on in an illness. In this case the Court of Appeal ruled that tribunals should consider only what the employer knew at the time it caused someone a detriment. It may well later become clear that the condition in question did last for 12 months, but if this was not apparent at the time there may well not have been any unlawful discrimination on grounds of disability.

4.115 In *Mallon v Aecom Ltd* UKEAT/0175/20/LA the EAT overturned an Employment Tribunal's decision to strike out a claim from a dyspraxic man who had argued that having to complete an online application and selection process was been unreasonable as it put him at a substantial disadvantage. The tribunal should have considered whether auxiliary aids were a reasonable adjustment.

4.158 A belief that there were only two biological sexes, and that a person could not change sex, was capable of being a philosophical belief, further to Grainger v Nicholson (*Forstater v CGD Europe and others* [2021] UKEAT 0105/20).

Ms Forstater worked as a consultant on a variety of projects for CGD (an organisation which conducts research into international development issues). In 2018 her contract was not renewed after she made comments on Twitter on the subject of transgender rights. Ms Forstater believes that gender is immutable and that trans women are thus men. Colleagues had complained about her opinions on this matter which some found to be offensive. She lost her claim for discrimination on grounds of religion or belief in the employment tribunal, but has won it on appeal to the EAT.

Several key tests were set out for tribunals to apply when determining whether or not a person's beliefs should be protected for the purposes of discrimination law:

* 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.'

It was on this final test that Ms Forstater lost her original tribunal case. The tribunal decided that her opinions on transgender people were not, on balance, 'worthy of respect in a democratic society' and did potentially conflict with the rights of others.

This interpretation was overturned in the appeal hearing, but , referring to Article 10 of the European Convention on Human Rights, the EAT found that:

In our judgment, it is important that in applying Grainger, Tribunals bear in mind that it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. However, the manifestation of such beliefs may, depending on circumstances, justifiably be restricted under Article 9(2) or Article D 10(2) as the case may be.

The EAT went on to stress that its ruling does not give carte blanche to harass transgender people. That is still very much unlawful, but respectfully expressing views about transgender issues, as Ms Forstater had done, is protected in law.

4.160 A policy which required neutral dress for all employees, which meant that they were prohibited from wearing anything manifesting a religious or political belief, such as a headscarf or a cross, was found by the ECJ not to be direct discrimination in IX v WABE & MH Muller v MJ. Any

indirect discrimination could also be justified if the policy met a genuine need of the employer (*IX v WABE & MH Muller v MJ* Case C-804/18 and Case C-341/19).

4.202 *Allay v Gehlen* UKEAT/0031/20/AT is another case in which the courts found anti-discrimination training to have become stale and in need of refreshment in order for an employer to rely on its existence when arguing that it took all reasonable steps to prevent racial harassment from occurring. Training must be repeated and refreshed regularly (hence demonstrated to be effective) if this defence is to be relied on and the employer found not to be vicariously liable.

This is the second recent case in this field. In Zulu and Gue v Ministry of Defence 2205687/2018 and 2205688/2018 training on harassment was found to be 'a tick box exercise' and thus not to have been sufficiently robust to pass the 'all reasonable steps' test.

4.226 S136(2) of The Equality Act 2010 did not change the burden of proof that was set out in the previous discrimination legislation Royal Mail Group v Efobi [2021] UKSC 33

CHAPTER 5

5.9 In *Asda Stores Ltd v Brierley & Ors* [2021] UKSC 10, Asda lost its appeal to the Supreme Court in a long-running case concerning equal pay claims made by some 35,000 female store-based staff using mainly male warehouse workers as their comparators. The company had sought to argue that they could not use these men as their comparators as they did not work under 'common terms and conditions'.

The court said that the threshold test is to ask whether the comparators would be employed on the same or substantially the same terms if they were employed at the Claimants' establishment. If there is no comparator working at the same establishment, and common terms do not apply, then it may be necessary to apply the 'North hypothetical'.

This involves asking if the terms under which comparators are employed would be substantially the same if they were working on the same site. In other words, would the warehouse / distribution workers be employed on common terms with the store-based staff if they worked together on the same premises? Here, the answer was 'yes'. A line-by-line comparison is not required and it should not be a prolonged factual enquiry or complex exercise, but rather a 'threshold test'.

The Supreme Court found that here the terms were sufficiently common to permit a claim for equal value to proceed.

This ruling means that the 35,000 claimants can now proceed with their equal value claim and, if they win it, will be in line for significant pay rises and a great deal of back-pay too. The potential costs to Asda and other large retailers who operate a similar pay policy may well run into £ billions.

(A similar case was heard by the ECJ in K and Others v Tesco Stores Ltd (C-624/19). While the latter was a decision made after the UK left the EU, the Withdrawal Agreement states that decisions of the

ECJ will be binding if they relate to cases referred to it before the end of the transition period, of which this was one.)

5.57 The reporting of gender pay gap statistics for 2020-21 was delayed because of Covid, and now has to be done by 5 October 2021. (Note that a number of organisations have called for ethnic pay gap reporting, but this is not currently a legal requirement).

CHAPTER 6

6.96 There is a new online tool to calculate shared parental leave and pay, and the amount of notice that is required https://www.gov.uk/plan-shared-parental-leave-pay

6.130 With so many people working from home, the government is considering whether to make working from home a 'default' option unless employers have good reason not to. It is expected that there will be a consultation. The right currently is simply to request flexible working, and the only obligation is for the employer to consider it in a reasonable manner, as set out in chapter 6.

CHAPTER 7

No important updates

CHAPTER 8

8.48 The Supreme Court in Royal Mencap Society v Tomlinson-Blake [2021] UKSC 8 confirmed the Court of Appeal decision that time spent sleeping whilst on call does not count towards calculation of the National Minimum Wage. 'Keeping a listening ear open' was not enough. Mrs Tomlinson Blake she should be paid the NMW for time working during the night when she had to get up, but not for time that she was asleep. BEISS has changed its guidance to comply with this case, and considers a number of difference scenarios.

CHAPTER 9

9.25 Interestingly, employees who are assigned to an undertaking which is fragmented upon transfer can be transferred to multiple transferees (*ISS Facility Services NV v Sonia Govaerts & Atalian NV, formerly Euroclean NV* Case C-344/18). The rights and obligations of the contract transfers to each different transferee in proportion to the task performed, and therefore could mean that a contract is split into a number of part time contracts. This also applies to a service provision change transfer under regulation 3(1)(b) of TUPE (*McTear Contracts Ltd v Bennett & ors* UKEATS/0023/19/SS; UKEATS/0030/19/SS).

CHAPTER 10

10.109 An employer was not liable for a practical joke that went wrong, as the employee was on a 'frolic of his own' (*Chell v Tarmac Cement And Lime Ltd* [2020] EWHC 2613).

CHAPTER 11

No important updates (but see section above re Coronavirus, for health and safety cases etc specifically related to the pandemic).

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

17.21 *Chemcem Scotland Ltd v Ure* UKEATS/0036/19/SS concerns a woman who failed to return to work after her maternity leave. The reason was the failure of her manager (who was also her father and in the process of divorcing her mother) to inform her about important changes to her payment arrangements while she was taking her leave. The EAT held that her refusal to return to work could be taken as an acceptance of a repudiatory breach of contract. She could therefore proceed with her constructive dismissal case even though she had never formally resigned.

17.23 Following *Bournemouth University v Buckland*, if a breach has become fundamental by a certain point, actions taken by the employer after that point cannot make any difference (*Flatman v Essex County Council* [2021] UKEAT 0097/20).

17.77 In *Sinclair v Trackwork Ltd* UKEAT/0129/20/OO the EAT took a different approach and found in favour of the former employee. Mr Sinclair was given responsibility for implementing new health and safety policies in his company, a task which he carried out rather zealously, taking a risk-averse approach which caused a lot of upset among his colleagues. He was dismissed before completing two years' service, so he brought an unfair dismissal claim arguing that he had in fact been automatically unfairly dismissed on health and safety grounds.
Such claims commonly relate to situations in which someone is dismissed for refusing to work in unsafe conditions. Here the EAT widened the number of potentially relevant situations to include upset caused in respect of the implementation of health and safety rules.

17.116 *Gallacher v Abellio Scotrail* UKEATS/0027/19/SS concerned the dismissal of a senior employee at an appraisal meeting by her manager with no warning at all, no proper procedure and with no appeal. According to all established case law – notably the landmark *Polkey v Deyton Services* in 1988 – dismissing employees with more than two years' service without at least following the basic ACAS procedure renders the dismissal unfair. Account can then be taken when awarding compensation of contributory fault or the likelihood that a fair and full procedure would in any event have resulted in a dismissal. In *Gallacher* the ET and then the EAT both concluded that in this particular case the absence of any serious procedure did not mean that the dismissal was unfair in law. The employers' actions still fell within the 'band of reasonable responses', in this instance because the employer considered the working relationship to have broken down beyond repair and going through a procedure would thus have been futile and would possibly have made things worse for all concerned.
In its judgment the EAT suggested that while unusual, tribunals might expect to be faced with similar cases in the future:

> *"Dismissals without following any procedures will always be subject to extra caution on the part of the Tribunal before being considered to fall within the band of reasonable responses."*

17.136 *L v K* [2021] CSIH 35 concerned a teacher who was dismissed when he was accused of owning a computer on which indecent images of children were found. He was arrested, but not prosecuted, because several people had had access to his computer and there was no evidence that he had downloaded the images himself. The school dismissed him because, although it could not be concluded that the he downloaded the images, it could not be confirmed that he had not been involved. This gave rise to safeguarding concerns and to reputational risk, and he therefore posed an unacceptable risk to children. The Court of Session said the ET was entitled to find that that this was within the range of reasonable responses. It can be reasonable for an employer to someone who may be innocent if there is a substantial reason to justify that dismissal.

17.181 In *Kelly v PGA European Tour* [2021] EWCA Civ 559 the EAT confirmed that an employer could resist a re-engagement order for a senior employee following a finding of unfair dismissal if trust and confidence in the individual's capability had broken down. Normally these cases relate to trust and confidence in respect of conduct.

For unfair dismissal cases which relate to Covid, see the general section above.

CHAPTER 18

UQ v Marclean Technologies SLU Case C-300/19 will probably be the last significant European Court of Justice ruling in a case that will have the status of a binding precedent as far as UK employment law is concerned. It concerns collective redundancy consultation.

Employers are under an obligation to consult collectively (ie: with a recognised trade union or another elected committee of employees) and not just individually when they are proposing to make more than twenty people redundant at the same time. They are required to consult for at least thirty days when 20-99 are being made redundant and for forty-five days if the figure is a hundred or more.

Here the ECJ ruled that the duty to consult collectively applies when these threshold figures are met at any time during the consultation period. So if an employer decides to make 15 people redundant and hence does not consult collectively, and subsequently decides to make a further five redundant within 30 days, then the right to be consulted collectively applies.

CHAPTER 19

No important updates

CHAPTER 20

Employment tribunals road map
During the pandemic, hearings were conducted very differently, and generally by video. The tribunals' road map looks to the future, not just during the pandemic, and there will be much greater use of video hearings.

CHAPTER 21

21.50 Taking steps to prepare for, organise, and take part in industrial action counts as 'trade union activities' (*Mercer v Alternative Future Group Ltd & Anor* [2021] UKEAT 0196/20), and therefore s146 TURLCA should be read and interpreted as providing protection from detriment for participating in industrial action. Here, the Claimant had been suspended for planning and organising a series of strikes.

CHAPTER 22

In *Independent Workers Union of Great Britain v Secretary of State for Business, Energy and Industrial Strategy and others* [2020] EWHC 3050 it was confirmed that a trade union cannot seek recognition using the compulsory recognition clauses of the Employment Relations Act 1999 if the employer concerned already has in place a recognition agreement with another trade union.

CHAPTER 23

No important updates