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Employment Law Update

22 April 2021

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Brexit and Employment Law

- Significant areas of UK employment law implemented EU law
- At the end of transition they all – stay the same
- All Regulations still valid
- Where appropriate, law continues to be interpreted in compliance with EU law
- Some provision for Supreme Court and CofA to depart from ECJ decisions – but largely a red herring
- But if Parliament amends law after end of transition – courts give effect to new wording, regardless of EU law

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The UK-EU trade agreement

- Level playing field provisions – Art 6.2
  - *3. 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.*
- So any change is valid in UK law – but may cause a trade dispute with EU
- Dispute resolution mechanism – consultations between the parties, appointment of committee of experts. No arbitration
- Ultimate penalty – trade sanctions

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Employment law post Brexit

- There is no specific government policy aimed at reforming any area of employment law previously covered by EU law
- Dramatic repeals (no more TUPE!) are highly unlikely
- But specific areas could reformed without provoking a backlash from EU:
  - Holiday pay
  - Working time record keeping (esp given Deutsche Bank case, May 2019)
  - Changing terms post-TUPE
  - TUPE information and consultation rules – small transfer exception?
  - Cap on discrimination compensation?
  - Positive action? (S.158/159 are awful!)

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Employment Bill 2021

- We are overdue!
- Commitments from Conservative manifesto 2019:
  - Redundancy protection for new parents
  - Carer's leave
  - Neo-natal leave
- Policies left over from the May premiership
  - Taylor review – gig economy, employment status, minimum wage
  - Ethnic pay gap monitoring
- Nothing deregulatory? Government will at least want a balanced impact assessment
- Current timing – maybe a Bill by the end of the year?

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Uber and others v Aslam and others
Supreme Court, 19 Feb 2021

- Uber Drivers are workers
- Tribunal right to ignore the provisions of the contract – start with the purpose of the statute
- Should these people be protected?
- Anything in the contract designed to avoid liability should be ignored
- Key issue was the control the employer exercised over the drivers
- That was what put them in a position of subjugation and dependence
- Would the same approach apply to “employee” status or is it confined to “workers”?

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Royal Mencap Society v Tomlinson Blake
Shannon v Rampersad
Supreme Court 19 March 2021

- Time spent sleeping (by arrangement with the employer) does not count as working time for the purposes of the National Minimum Wage
- Worker only entitled to be paid for time they are woken up to deal with a particular emergency
- Supreme Court used ‘purposive approach’ relying on 1998 report from the Low Pay Commission
- Will Government step in?

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Royal Mail Group v Efobi

- To be heard, 27 April 2021
- Employee claimed race discrimination after being turned down for numerous internal appointments
- Did not call the managers who made the decision – and neither did the employer
- Issue is around the burden of proof and when (if) it switches from the employee to the employer
- Would be good to have a clear explanation of this!

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Kostal UK Ltd v Dunkley

- To be heard 18 / 19 May 2021
- Was it an unlawful inducement to offer pay rises direct to workforce when union negotiations broke down?
- Did it matter that the employer was not derecognising the union and negotiations resumed when the matter was settled?
- Unlawful inducements carries fixed penalty of almost £4K per employee, per offer. Employer facing damages of £450,000

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East of England Ambulance v Flowers

- To be heard 22 June 2021
- Must holiday pay calculation include hours worked as voluntary overtime?
- Depends on application of EU law
- Still relevant – until UK government amends the Regulations (if it does)
- By the way, the answer is ‘yes’

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PSNI v Agnew

- To be heard 23/24 June 2021
- Issue is backpay and the ‘three month gap’ rule set out by the EAT in the Bear Scotland case
- When will failure to pay correct holiday pay over extended period be a ‘series of unlawful deductions’
- Note that the two year limit on backpay does not apply in Northern Ireland (and may be unlawful in Great Britain!)

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Harpur v Brazel Trust

- To be heard 9 November 2021
- Should normal rule on 12 week average apply to term time only casual music teacher?
- Employer argues amount should be pro-rated since employee does not work for whole of year
- Argument seems to be that because EU law *allows* pro-rating, the Working Time Regulations *must* provide for it

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Smith v Pimlico Plumbers Ltd (EAT 17 March 2021)

- Smith established he was a ‘worker’ in the Supreme Court back in 2018
- This is his claim for unpaid holiday pay
- Unlawful deductions from wages claim was out of time – last deduction was some months before his dismissal
- So he had to rely on claim for holiday accrued but not taken at the point of dismissal
- But that only allows payment for the current year – not the years of backpay he was claiming for
- King v Sash Windows – ECJ held that employer could not benefit from total denial of annual leave entitlement and allowed carry over
- But here, he had taken his leave but not been paid, in King no leave had been taken
- EAT say that makes it different and dismisses the claim

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Phoenix Academy Trust v Kilroy
(EAT 30 July 2020)

- Acting principal accused of gross misconduct by new academy owner
- He considers he is being ‘forced out’ and is summarily dismissed before his written resignation is delivered
- He appeals against decision to clear his name but makes it clear he does not intend to return
- Appeal is successful – and he claims constructive dismissal
- Held: his appeal affirmed the contract – it was a request to continue in his employment
- But breaches of trust and confidence in the conduct and result of the appeal could give a further right to claim constructive dismissal either on their own or alongside earlier breaches

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Berkeley Catering Ltd v Jackson (EAT 27 November 2020)

- Owner of a business falls out with Managing Director – starts to interfere more
- Eventually decides to take over as CEO and make MD post redundant
- Tribunal held that there was no redundancy situation because her work had not diminished
- EAT holds it is open to an employer to organise its work so that fewer employees are needed – and that creates a redundancy situation
- There was a separate question as to whether redundancy was the reason for the dismissal and whether the dismissal was fair
- Case sent back to Tribunal to consider those points

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K v L
(EAT 1 September 2020)

- Teacher charged with possession of indecent images of children
- Decision not to prosecute – not clear who downloaded images to one of the computers in his home
- Employer dismisses because can't exclude the possibility that he was responsible
- EAT says that isn't good enough – employer needed to make a finding on balance of probabilities
- Not enough evidence to give grounds for dismissal based on reputational risk – and that wasn't put to him in disciplinary

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Hammersmith and Fulham v Keable

- Heard by EAT on 12 January 2021
- Was employee unfairly dismissed when he made potentially offensive comments about ‘Zionists’ in a demonstration not related to work?
- Comment was reported on social media – then played on the news
- Local MP picked up the story, identified him as a Council employee and demanded the Council ‘take action’
- Employer dismissed on basis that his conduct brought Council into disrepute

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Gallacher v Abellio Scotrail
(EAT 11 August 2020)

- Employee told she is being dismissed at her annual appraisal
- Deteriorating relationship led to employer thinking she had lost confidence in her manager
- Not given any warning or chance to improve
- Dismissal held to be fair – employee did not dispute relationship had broken down and was ‘truculent’ in talks with her manager
- Following a normal procedure would have been ‘futile’
- Not a case for employers to rely on!

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ISS Facility Services NV v Govaerts & Atalian NV (European Court of Justice, 26 March 2020)

- Maintenance manager responsible for three ‘lots’ under contract with the council
- After a tendering exercise, the contract for two lots was won by one contractor and the third went elsewhere
- ECJ holds that the division of the undertaking into several parts, going to several transferees does not prevent the Directive applying
- National court must determine how the contract is toe be split (eg by time / value)
- Employee who is worse off a result is entitled to claim constructive dismissal
- Can this really apply in the UK?

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McTear Contracts Ltd v Bennett (EAT 25 February 2021)

- Local authority had contract with single contractor – split into two on re-tendering
- There were two separate teams – but not clear how their work was divided
- Tribunal finds there was a TUPE transfer – one team went to one contractor and one to another
- EAT rules that it is now necessary to consider whether individual contracts could be split into two, with employees working for both new contractors
- Applied Govaerts – even though this was a service provision change, not based on EU law

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Lewis v Dow Silicones UK Ltd
(EAT, 4 March 2021)

- TUPE transfer – employer introduces new call-out / standby arrangements
- Employee resigns and claims constructive dismissal
- Tribunal rejects claim – changes were within the contract, so no breach
- But TUPE is wider – 'substantial changes to working conditions' to the employee's 'material detriment'
- EAT say Tribunal should have found that the changes met this test – case sent back to determine unfair dismissal claim

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Heskett v Secretary of State for Justice (Court of Appeal, 11 November 2020)

- Probation service limited progression up the pay spine as a result of Government cutbacks
- As a result, younger employees were left clustered near the bottom – no realistic prospect of 'catching up' with longer serving (mostly older) colleagues
- Claim is indirect age discrimination – was the policy a 'proportionate means of achieving a legitimate aim'?
- To what extent can financial constraints provide justification – is it just 'cost'?

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Heskett v Secretary of State for Justice (Court of Appeal, 11 November 2020)

- Court of Appeal accepts that a desire to save costs cannot in itself provide justification
- The phrase ‘costs plus’ is not helpful
- Question is whether the employer’s aim can fairly be described as no more than a desire to save costs
- If it can then justification fails. If not then Tribunal must ‘arrive at a fair characterisation of the employer aim taken as a whole’
- In this case, Tribunal was entitled to find the aim of working within external pay restraint was legitimate
- Also relevant to take into account employer’s plan to reform the pay system ‘soon’

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Gould v St John's Downshire Hill
(EAT 2 June 2020)

- Vicar of a proprietary chapel dismissed following breakdown in trust and confidence
- Part of background was breakdown of his marriage
- He claimed marriage discrimination – had he not been married many of the issues would not have arisen
- EAT agrees with Tribunal that there was no discrimination
- Direct discrimination involves a 'reason why' test rather than a 'but for' test
- Marriage might have been part of the background – but it was not part of the reason

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Forstater v CGD Europe
(ET, December 2019)

- Researcher alleges her contract was not renewed because of her ‘gender critical’ beliefs as expressed on social media
- Tribunal finds her beliefs were not protected
- Trans rights acknowledged by European Court of Human Rights
- Denying those rights was therefore a belief ‘not worthy of respect’ because it conflicted with the rights of others
- Appeal to be heard later this month

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Page v Lord Chancellor; Page v NHS Trust Development Authority (Court of Appeal, 26 February 2021)

- Magistrate removed from office after comments he made saying that he would be reluctant to approve an adoption by a same sex couple
- Removed from position as non-exec director of an NHS Trust because of the interviews he gave
- No religion and belief discrimination – not the beliefs, but the breach of judicial oath and refusal to limit media appearances
- Not victimisation – not the allegation of discrimination, but the public expression of his views that was the reason for the treatment

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Omooba v Michael Garret Associates Ltd
(ET 8 February 2021)

- Actor gets lead role in 'The Color Purple' – features her in a same sex relationship
- Historical Facebook post arises in which she condemns homosexual activity on religious grounds – she confirms that is still her view
- Public outcry threatens production – part is withdrawn. Was that discrimination?
- No says the Tribunal. It was not on the grounds of her belief, but a result of the public outcry.

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Sullivan v Bury Street Capital Ltd (EAT 9 September 2020)

- Employee suffered paranoid delusions about being followed by a Russian gang
- For two periods (in 2013 and 2017) they had a substantial adverse effect on his day-today activities affecting his work performance
- Claimed disability discrimination – but was he disabled?
- EAT says no: neither period lasted for a year or was likely to last for a year
- Neither were they likely to recur
- Likely means ‘could well happen’ – not the same as ‘probable’
- But question is what was likely at the time – the fact that in fact something did recur does not affect that
- Tribunal entitled to find that the adverse effect in 2017 was also not likely to recur

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Robinson v DWP
(Court of Appeal 7 July 2020)

- Employee developed blurred vision in one eye – made it difficult to work with the employer's IT system
- All sorts of problems in trying to find a solution led to additional stress and anxiety
- Tribunal found that delays in dealing with a grievance amounted to S.15 disability discrimination
- Court of Appeal say that was wrong. Failure to deal with the grievance properly was not because of something arising in consequence of the disability

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Walker v Cooperative Group
(Court of Appeal, 14 August 2020)

- Equal pay ‘material factor’ defence
- Senior executive paid less than male colleagues – less experience, less crucial role, market forces
- Tribunal accepts those factors applied initially but became less relevant over the following year – were no longer ‘material’
- Court of Appeal says ‘material’ does not mean justified – just means that the factors genuinely explain the difference in pay
- Factors applied when pay decision was made and continue to apply as long as they explain the pay difference

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Questions?