EMPLOYMENT LAW: AN INTRODUCTION

UPDATE

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Stephen Taylor

Astra Emir

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Introduction

The past year has been a very unusual in the world of employment law as in so many other areas of our national life. In January 2020 it appeared that for the first time in a while a government with a good majority would be able to get on the front foot, move on from debates about Brexit and proceed with its domestic agenda. However, the period of normality proved short-lived with the onset of the coronavirus crisis in March. This again diverted government attention away from proceeding with its planned 'bread and butter' legislative programme.

The Conservative Party manifesto published prior to the 2019 General Election contained a general commitment to enhance employment rights alongside specific proposals to raise the level of the National Living Wage to a figure equivalent to two-thirds of national average earnings, to introduce a new points-based immigration system, to take forward the recommendations made in the by Matthew Taylor's 'Good Work' Review and to extend family-friendly employment rights in areas such as time off for neo-natal care.

While the government's stated ambition is to make Britain 'the best place in the world to work', only very limited details of its proposals were included in the manifesto. It was made clear, however, that some new employment regulation will be brought forward over the next three or four years alongside some reform and repeal of existing law:

> *Good regulation is essential to successful businesses: we will strive to achieve the right regulatory balance between supporting excellent business practice and protecting workers, consumers and the environment. Through our Red Tape Challenge, we will ensure that regulation is sensible and proportionate, and that we always consider the needs of small businesses when devising new rules, using our new freedom after Brexit to ensure that British rules work for British companies.*

Despite ministerial preoccupation with other more urgent issues, we saw the first of the changes recommended in the Taylor Review introduced in April, and more recently the passing into law of new immigration arrangements which have applied from 1st January 2021. Consultations on other proposals for new employment regulation have also been proceeding, so we are still on target for a significant, new Employment Act of some kind being brought forward over the next year or two.

Despite the relative paucity of new legislation, there has been plenty of action in the courts. While the schedule for courtroom-based Employment Tribunal hearings was severely disrupted by Covid-19 lockdown

arrangements, many scheduled hearings have continued online, and the higher courts have been able to continue ruling on points of law in cases appealed to them.

A further point to note by way of introduction is the continued rise in the number of claims coming to the employment tribunals in the wake of the abolition of tribunal fees in 2017. The number still remains well below its previous levels, but this has probably been as much due to the persistence of historically low levels of unemployment and tight labour market conditions as any reluctance to litigate or upsurge in a willingness of the parties to settle cases before claims before they come to court. There are thus good grounds for anticipating a substantial increase in the wake of the severe economic disruption that we are expecting over the next year or two.

The following table demonstrates how the annual number of claims has fluctuated in recent years. It is important to appreciate that this table summarises the number of claims, not the number of claimants. Some claims have multiple claimants, but these are only included once here:

2011 / 2012	186,300
2012 / 2013	191,541
2013 / 2014	99,704
2014 / 2015	18,784
2015 / 2016	18,396
2016 / 2017	18,121
2017 / 2018	30,440
2018 / 2019	41,829
2019 / 2020	46,030

The Brexit deal

After all the briefing and counter-briefing, friendly rhetoric and no-deal threats that characterised the final months of negotiation between the UK and the European Union, the section of the final Trade and Cooperation Agreement dealing with employment regulation was remarkably short and sweet.

The key paragraph in Article 6.2 reads as follows:

"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."

We have thus ended up with a 'non-regression' arrangement which means that existing employment standards will broadly be retained in the future, but that 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 will 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. However, any attempts 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 over time result in the application of punitive tariffs.

We can thus expect to see some relatively minor amendments being made to some statutes 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.

At one stage during the negotiation of the agreement the EU made it clear that they were seeking a position of 'dynamic alignment' in respect of employment rights whereby the UK government would be obliged as part of the trade agreement to give effect to all future EU employment regulations. Moreover it was proposed that failure to do so could result in the erection of punitive tariffs by the EU ahead of any formal arbitration process. No such clauses appear in the final agreement.

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 any amendments via a new ruling.

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.

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 judgements 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.

Consequences of coronavirus

For much of the past year 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 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 long periods of furlough funded via the governments 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. The furlough scheme was intended to be phased out in the autumn, but it has instead been extended on two occasions. It is now intended to run until the end of April 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 most vulnerable, but any lengthy general recession caused by the pandemic 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 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. 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 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 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.

STATUTORY DEVELOPMENTS

Increases to redundancy and unfair dismissal compensation limits

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

Increases to the rates of SSP, SMP and other benefits

The weekly rate of Statutory Sick Pay (SSP) rose to £95.85 on 6th April 2020. The rates for Statutory Maternity Pay, Statutory Paternity Pay, Statutory Adoption Pay and pay for shared parental leave increased to £151.20 per week.

National Living Wage and National Minimum Wage

As of 1st April 2020 hourly rates increased as follows:

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

Vento compensation guidance

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

As of 6 April 2020, the bands and ranges of compensation are as follows:

Band 1: £900-£9,000 – for one-off occurrences

Band 2: £9,000-£27,000 – for more serious cases and discrimination occurring on more than one occasion

Band 3: £27,000-£45,000 – for 'severe' cases involving a lengthy campaign of seriously discriminatory actions.

As of April this guidance has stated that in 'the most exceptional cases' compensation is 'capable of exceeding the upper band'.

Parental bereavement leave

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

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

Section 1 Statements

From a practical HRM perspective the most significant new regulations that came into effect on April 6th 2020 relate to the requirement to provide written statements of terms and conditions (often known as written statements of 'employment particulars' or 'further particulars'). Moves in this direction were recommended in the Taylor Review and the government has gone rather further in practice to extend existing rights.

There are three main changes here:

i) All workers as well as employees, even if they are only going to be working for the employer for a short time, now need to be provided with a statement of their main terms and conditions in writing.

ii) This must now be provided on or before the first day of employment, and not simply within the first eight weeks as was the case before.

iii) There are some new, additional classes of information that now need to be included in Section 1 statements too. These are as follows;

- how variable pay is calculated
- details of all benefits provided in addition to pay (eg: contractual maternity pay, pensions etc)
- periods of probation that need to be formally 'passed'
- mandatory training that has to be completed and who pays for this
- any paid leave that is available in addition to annual leave (eg: contractual maternity leave)

There is no statutory requirement in the new regulations to update Section 1 statements that were issued to employees prior to April 6th 2020. But if an existing staff member asks for an updated version this is to be provided within a month.

It is the extension of the right to receive a Section One Statement to workers that may in practice be the most significant development. This is because it will require employers to let people know unambiguously what their employment status is from the first day they start working. In the case of people labelled 'workers' this may trigger a request / demand for full employment rights.

In the case of self-employed people, who will not receive a Statement by right, it may trigger a demand for one and hence classification as a worker or employee. The change thus makes it harder for employers to fudge the issue of employment status and, potentially, classify people wrongly with a view to denying them rights or reducing tax liabilities.

Calculating holiday pay

From 6th April 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.

The abolition of the 'Swedish Derogation'

This is another quite technical change that was recommended in the Taylor Review that has now been implemented. It only effects relatively small numbers of people, but the abolition in the UK of the so-called 'Swedish Derogation' has significant consequences for them.

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.

Not only is this no longer lawful in the UK, many agency workers are also now entitled to receive a Section 1 Statement (see above) detailing their contractual entitlements.

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.

Extension of IR35 to private sector

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

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

Public sector exit payments

These regulations were apparently shelved for a period, but were finally introduced after four years of consultation and delay on November 4th 2020.

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. The regulations require repayment of exit payments on re-engagement.

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

In addition, exit payments are subject to a cap of £95,000

Immigration law reform

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

This is a substantial and very complex piece of legislation that we only have space to summarise briefly here. 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.

MAJOR DEVELOPMENTS IN THE CASE LAW

Agency Workers

Angard Staffing Solutions Ltd v Kocur (2020)

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 this case 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 employees who have been directly-recruited by an employer. 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 Agency Workers 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.

In the same ruling 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.

Age Discrimination

Heskett v Secretary of State for Justice (2020)

This is a potentially significant ruling by the Court of Appeal in a case about justifying indirect discrimination on grounds of age with reference to the need to reduce costs. It will also presumably 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 a 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 live within its means by reducing costs.

Health and safety

The Independent Workers' Union of Great Britain v The Secretary of State for Work & Pensions and others (2020)

This ruling in the High Court stated that workers are entitled in law to the same protection as employees in respect of detriments on health and safety grounds. This case related in particular to the right to be provided with the same personal protective equipment (PPE).

This will probably be the last case in which the UK government is found not to have fully implemented an EU directive in a UK court – in this case two health and safety directives. The issue was a common and simple one. The directives refer to 'workers' while the UK legislation refers to 'employees'.

Redundancy

UQ v Marclean Technologies SLU (2020)

This 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.

The position here is that 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.

In this case 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.

Constructive dismissal

Williams v The Governing Body of Alderman Davies Church in Wales Primary School (2020)

It has long been the case in the law of constructive dismissal that an employee can claim successfully when there is no single, major repudiatory breach of the contract of employment. The resignation may instead be a response to a series of more minor breaches that take place over a period of time. This is known as 'the last straw doctrine' because it is the final minor breach which actually triggers the resignation. It is 'the straw that broke the camel's back'.

This case is interesting because here 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 tribunal therefore found against Mr Williams and for his employer.

On appeal this ruling was overturned by the EAT and Mr Williams declared to have been constructively dismissed. Provided earlier cumulative acts do add up to a repudiatory breach and have not been affirmed by the claimant (ie: allowed to pass without protest etc), the last straw that actually triggers the resignation needn't therefore be a breach of contract. It can be 'entirely innocuous'.

Whistleblowing

Jesudason v Alder Hey Children's NHS Foundation Trust (2020)

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

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

The Alder Hey case concerned a surgeon who 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, but the latter was not on grounds of the former.

Continuity of Employment

Mr R O'Sullivan v DSM Demolition Ltd (2020)

This is a case which brings some clarity to the question of how to establish the precise date that a period of employment started. This can be very important in cases of unfair dismissal – like this one – where claimants only have the right to bring claims once if they have completed two years' service as employees at the effective date of termination.

It is common for dismissals to occur just before two years' have been completed in order to avoid liability. But this can be problematic if there is a dispute over the actual date that the employment first started. In the past, for example, employers have been required to defend cases when employees attended meetings, training events or induction courses for which they were paid before their contractual start dates. In this case, the claimant, had indeed carried out some work – a week in fact – prior to his official start date, and he sought to rely on this fact as the basis for asking the tribunal to hear his unfair dismissal claim.

There was no dispute that he had done the earlier week's work. But the employer contended that it was as a result of 'an unofficial arrangement'. It was before he began his employment and was put on the payroll. A payment of £100 had been made informally in cash by way of compensation. The Tribunal and subsequently the EAT agree with the employer. Mr O'Sullivan failed to satisfy the court that he had completed two years continuous service as an employee at the time of his dismissal.

Disability discrimination

Tesco Stores Ltd v Tennant (2020)
Itulu v London Fire Commissioner (2020)
Charles Ishola v Transport for London (2020)

The past few months have, as usual, seen decisions made in the higher courts on diverse issues relating to disability discrimination law.

The Tesco case concerned an employee who 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 (EAT) 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 (ie the alleged acts of unlawful discrimination). So she did not qualify for protection under the Act.

The Itulu case concerned a claimant who was not prepared to co-operate when asked her to undergo a medical examination. She brought her claim, but it was unclear to the employer what exactly her disability was. So a request was made for the tribunal to make an order requiring Ms Itulu to undergo a medical examination with one of two doctors. When she refused to co-operate the Employment Judge struck out her claim. The EAT rejected her appeal on the grounds that she had refused to co-operate, making a fair trial impossible.

The Ishola case concerns indirect discrimination on grounds of disability, but the ruling has wider implications for the law of indirect discrimination more generally. It concerns the term 'provision, criteria or practice' (PCP) which is central to this area of law. In order to prove unlawful indirect discrimination a claimant must show that the employer operates a PCP which has an adverse effect on a substantial number of people who sahre a protected characteristic (sex, race, disability etc). 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. 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.

Employment status

Stuart Delivery Ltd v Augustine (2019)
B v Yodel Delivery Network Ltd (2020)

Two cases were determined recently relating to employment status. Are people employees, workers or self-employed? The distinction is important because 'employees' have many more rights in law than 'workers' who have more rights than 'self-employed persons'. Only employees have the right to bring claims of unfair dismissal. The distinction, however, is not always at all clear and there are no clear definitions provided in the statutes.

One of the many tests that have commonly been applied in the past is whether or not claimants can send a substitute to perform their duties

when they are absent. If a substitute can be sent, it is a strong indication that the person concerned is working under a 'contract for services' (in other words, is a worker or a self-employed person) rather than a 'contract of service' (an employee). This is because it suggests that there is no requirement on the individual to perform the work personally.

Stuart Delivery Ltd v Augustine (2019) focused on whether a substitution clause in a contract was sufficiently 'unfettered' to render the relationship one of self-employment. Both the ET and subsequently the EAT said that it was too limited in practice and that the claimant should thus be considered a worker. 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.

B v Yodel Delivery Network Ltd was a UK case that was referred to the European Court of Justice direct from an employment Tribunal. It also concerns 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.

Religion and belief

Connisbee v Crossly Farms Ltd (2019)
Jordi Casamitjana v League Against Cruel Sports (2020)

The Connisbee and Casamitjana cases were both heard in the employment tribunal and are thus not binding precedents. They concern

disputes about whether or not passionately held beliefs qualify for protection under the religion and belief provisions of the Equality Act.

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

* it must be a belief and not merely an opinion or viewpoint based on current information
* the belief must be genuinely held
* the belief must concern a weighty and substantial aspect of human behaviour
* the belief must have a 'certain level of cogency, seriousness, cohesion and importance'
* the belief must be 'worthy of respect in a democratic society, not incompatible with human dignity and not in conflict with the fundamental rights of others.'

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

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

Unfair dismissal

Royal Mail Group Ltd v Jhuti (2019)
Gallacher v Abellio Scotrail (2020)

In the Jhuti case the Supreme Court overturned an earlier Court of Appeal ruling on the question of whether or not a dismissal was due to the claimant blowing the whistle about a breach of regulations when the individual carrying out the dismissal was unaware of the disclosure and

dismissed her for poor performance. The Court found that even though the protected disclosure had been hidden from the dismissing manager, it was still the principle reason for the dismissal and hence was automatically unfair in law.

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

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

The Gallacher case is the latest in what has become a long line of judgements in unfair dismissal cases which are very employer-friendly and appear to alter established precedents.

This one 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 ruling 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 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 judgement 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."*

Only time will tell whether this case, in effect, will herald a further erosion of established employee rights under unfair dismissal law.

Vicarious liability

WM Morrison Supermarkets plc v Various Claimants (2020)
Barclays Bank plc v Various Claimants (2020)
Chell v Tarmac Cement and Lime Ltd (2020)

The Supreme Court rulings in the Morrison's and Barclays Bank cases are highly significant. These overturned earlier rulings by the Court of Appeal and in the process have apparently returned the law to where it was before a run of recent judgements which were extending in different ways the situations in which vicarious liability applies.

The Morrison's case concerns disgruntled internal auditor who decided to post vast amounts of confidential information about thousands of Morrison's employees, including pay data, on the internet. This was a criminal offence for which he was charged and sent to prison. According to long-established legal principles of the law an employer is only vicarious liable for acts carried out by employees during the course of their duties. The employer is not responsible when the employee 'goes off on a frolic of his own', stepping outside work duties. The auditor in the Morrison's case, like others in some of the more recent case law, was very clearly 'off on a frolic of his own' when he committed his offence. Yet despite this Morrison's were found by the Court of Appeal to have been vicariously liable. In doing so the Court was adjusting the established legal principles. The Supreme Court has now rejected this. While the auditor only had the opportunity he did to commit his illegal act thanks to his work at Morrison'. He had in no way at all been authorised to do so by the company. It was a personal act of malice. By finding in favour of the company the Supreme Court appears to have returned things to the earlier position.

The same occurred in the Barclays case - a disturbing one which concerned 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. On appeal this judgement was also overturned by the Supreme Court. Dr Bates was an independent contractor, not an employee. There was therefore no vicarious liability pertaining to Barclays Bank.

In the Chell case the High Court had the opportunity to apply the newly re-established law on vicarious liability in an extraordinary case about a practical joke being played by an employee on a subcontractor who he had taken a dislike to. The Tarmac employee damaged Mr Chell's hearing when he hit pellet gun targets with a hammer close to him.

Tarmac was found not to be vicariously liable as the individual employee was not carrying out his work duties when he played the practical joke. He had been, as was stated in the old case law that now applies again 'off on a frolic of his own'.

OTHER SIGNIFICANT CASES

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

In ***Hamam v (1) British Embassy in Cairo & (2) Foreign and Commonwealth Office (2020)*** it was decided that an Egyptian national working in a senior role at the British Embassy in Cairo was not entitled to pursue any cases in UK employment tribunals. She worked in a 'British enclave' but this work did not have a sufficiently strong connection to the UK to permit her to pursue her case in an English employment tribunal.

Gould v St John's Downshire Hill (2020) concerned the dismissal of a vicar by his church after his marriage broke down. He claimed that this amounted to unlawful discrimination on grounds of marital status. The tribunal and later the EAT found that the reason for his dismissal was a break down in trust which was only in part related to his having spoken publicly about his marital problems. The fact of the breakdown was not the main reason. So the Church trustees won.

Duchy Farm Kennels Limited v Graham William Steels (2020) 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 caluse would have this effect.

In ***Ferguson and other v Astrea Asset Management Ltd (2020)*** 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 TUPE-related and hence not binding on the new employer.

NH v Associazione Avvocatura per i diritti LGBTI (2020) is an interesting Italian case which was decided in the ECJ. It concerned 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 under EU law.

Lafferty v Nuffield Health (2020) 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'.

East Coast Main Line Company Limited v Cameron (2020) 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.

In ***Sullivan v Bury Street Capital Limited (2020)*** the EAT decided that a man who believed that he was being spied on and followed by a Russian gang did not have a condition which amounted to a disability under the Equality Act 2010. He had a mental health condition which affected his

timekeeping and attendance record, but not one that would reasonably be expected to last for twelve months or more.

Chemcem Scotland Ltd v Ure (2020) 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.

Nair v Lagardere Sports and Entertainment (UK) (2020) also 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.

In ***Commissioners for HMRC v Ant Marketing (2020)*** the employer had made deductions from employees' wages to take account of training costs and this took their hourly rate for a period below the level of the National Minimum Wage. The EAT ruled this to be unlawful. Deductions can generally only be made when the expense is either unrelated to employment or for the purposes of providing live-in accommodation.

In ***UCL v Brown (2020)*** a union representative set up an e-mail account that allowed him to send messages directly to IT staff without any management moderation. This was done when a similar official departmental e-mail account was closed down by managers after fourteen years. The employer claimed that its decision to discipline Mr Brown was for reasons of insubordination and not his trade union activities. The EAT disagreed. Mr Brown had been caused an unlawful detriment for trade union reasons.

In ***Tan v Copthorne Hotels (2020)*** costs of £432,000 were awarded against a claimant who had covertly recorded hundreds of hours of private conversations with colleagues and tried to use these duplicitously as evidence in a wide-ranging and ill-founded employment tribunal claim.

K v L (2020) 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 EAT found the dismissal to be unfair

in that it was based on the possibility that he might have committed a criminal act and hence might damage the school's reputation. Such supposition fell outside the band of reasonable responses.

FUTURE DEVELOPMENTS

National Minimum Wage / National Living Wage

Significant increases will be made to the levels of the National Living Wage and National Minimum Wage from 1st April 2021. In addition, the age at which workers will qualify for the higher National Living Wage rate will decrease from 25 to 23.

The new hourly rates will be as follows:

National Living Wage:	£8.91
21 to 22 year olds:	£8.36
18 to 20 year olds:	£6.56
16 and 17 year olds:	£4.62
Apprentices:	£4.30

Good work / Taylor recommendations

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

Taylor's report, 'Good work: the Taylor review of modern working practices' was published in July 2017. It made dozens of recommendations, aimed at encouraging higher quality jobs as a means of boosting productivity and fairness at work. The government responded to the report with a policy paper, the 'Good work plan', in December 2018 and legislated to put some into effect in April 2020 (see above). Consultations are now ongoing about how to implement further Taylor recommendations.

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

Employment status

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

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

- It is not always at all clear either to workers, or the organisations they work for, which employment rights apply to particular individuals. The courts have devised a variety of tests over the years, but there is little statutory guidance.

- The tests used by HMRC for the purposes of collecting tax have sometimes differed from those used by the courts when establishing employment rights. This means, for example, that someone may be classed as 'self-employed' from a tax point of view, but 'employed' for the purposes of employment law – or vice versa.

- It is often asserted that there has been a growth of 'bogus self-employment' over recent years. This means labelling employment relationships as 'self-employment' as a means of avoiding tax and employment rights.

- The introduction of tribunal fees in 2013 (since abolished), and the limited legal penalties deterring bogus self-employment, has incentivised employers to casualise labour, remove job security and avoid tax.

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

The key recommendations are as follows:

- The existing 'worker' category whose members are entitled to a range of important, basic employment rights, such as the National Minimum Wage and paid holiday, should be re-labelled as 'dependent contractors'.

- Clearer statutory tests should be developed that distinguish genuine self-employment (when someone is 'in business on their own account') from 'dependent contractor' status. This should explicitly include 'platform based workers' operating in the gig economy and, potentially, all who are employed on a casual or flexible basis under the control of an employer.

- A 'dependent contractor' being entitled, under the terms of their contract, to send a substitute to work in their place when they are not available to work should not in itself preclude them having this legal status and the rights associated with it.

- There should be clearer statutory tests to distinguish between 'employment' and 'dependent contractor' status which should include a requirement to perform work personally.

- Tax law should be aligned with employment law so that one status determines both employment rights and the taxes that have to be paid by workers and employees.

- Employment Tribunals should clarify claimants' employment status at a preliminary hearing.

- The existing burden of proof at such hearings should be reversed so it is the employer that must prove a worker is not an employee or a dependent contractor, rather than the other way round.

- Employers' national insurance contributions should be paid in respect of payments made to dependent contractors as well as employees. This would reduce the incentive not to employ someone under a 'contract of service' with the wider range of associated employment rights.

- Dependent contractors should receive statutory sick pay, but the length of time it can be claimed for should accrue with length of service.

- The government should create an online tool which will enable employers and workers to establish employment status easily.

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

A further recommendation, namely that dependent contractors (ie workers), as well as employees, should have a 'day one' right to a set of written particulars which state what their status is and what employment rights they have was implemented in April 2020 (see above), although no change has been made to the rather limited remedies available in cases when employers fail to meet these obligations.

Wider recommendations

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

- The National Minimum Wage/National Living Wage legislation should be amended to better take account of 'platform work' in the gig economy.

- Workers should retain continuity of employment when there are gaps of up to a month between assignments with an employer.

- Casual workers should have the right to rolled-up holiday pay (in effect a 12.07% supplement on top of their hourly pay). This will only be possible after Brexit as the European Court has ruled such arrangements to be unlawful under EU law.

- Agency staff should have the right to request a direct contract once they have been working for a single 'end-user' or hiring organisation for 12 months.

- Workers employed on zero hours contracts should have the right to request fixed hours after 12 months' service and a higher hourly rate of National Minimum/National Living Wage should be paid to workers employed on zero hours contracts.

- Employers should be under an obligation to publish data about the number of agency workers and people on zero hours contracts they employ, together with information about the number of requests they receive for direct contracts and fixed hours.

- The regulations that provide a right to request flexible working should be amended so that people can request temporary alterations to their working arrangements and not just permanent contractual changes.

- Workers who are absent for lengthy periods due to ill health should have a right to return to the same job, as is the case for people taking maternity, paternity, adoption and shared parental leave.

- All regulation relating to pregnancy and maternity should be consolidated into a single piece of legislation, and greater clarity achieved in the guidance provided to employers and workers.

Taylor's recommendation that formal consultation should be required in organisations when 2% of the workforce request it rather than 10% was implemented in April 2020 (see above).

Enforcement

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

- Enhancing the roles played by the Director of Labour Market Enforcement and the Low Pay Commission.

- Making the Department for Business, Innovation and Skills responsible for issuing civil penalties when employers fail to pay compensation to claimants who win Employment Tribunal cases.

- More use of aggravated damages and cost orders by tribunals when employers repeatedly lose cases.

- HMRC should take responsibility for enforcing rights to holiday pay as well as the National Living/Minimum Wage and statutory sick pay.

Policy debate

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

Select Committees' Bill

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

Key clauses aim to achieve the following:

- Clearer statutory definitions of the terms 'employee', 'dependent contractor' and 'self-employed person' based on existing case law.

- Making dependent contractor status the default position for those employed as part of substantial groups who are not employees, so that employers would have to show they were self-employed if they wished to avoid providing them with basic employment rights.

- Requiring employers who wished to employ people on zero hours contracts to pay them higher levels of the National Living/Minimum Wage by way of compensation for their income insecurity.

- Introducing a system of punitive fines where employers are found to be employing people on a bogus self-employed basis.

- Authorising a government inspectorate to undertake proactive investigations into employment practices in industries or regions where there is evidence of bogus self-employment.

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 or 2022.

Employment tribunal reform

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

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.

Fathers' rights

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

- Paternity should be included in the Equality Act as a protected characteristic in the same way that maternity is
- Statutory Paternity Pay should be paid at a rate equivalent to the higher rate of SMP rather than the lower rate as is currently the case

- Fathers should have equivalent rights to mothers in respect of attending ante-natal care appointments. That would mean that this was paid time off rather than unpaid time off as at present

- Fathers should not be required to share leave with mothers under the shared parental leave scheme that was introduced in 2015. They should have a free-standing right to take 12 weeks' paid leave during the first year of their child's life.

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

Sexual harassment

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

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

- employers should be required to publish their harassment policies on websites

- tribunal time limits for claimants alleging sexual harassment should be extended to six months

- confidentiality and non-disclosure provisions included in settlements reached with victims of sexual harassment should not be permitted and rendered void if agreed

- a new statutory code of practice should be issued providing clear guidance to employers about how they should respond to cases of sexual harassment.

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

authorities including the police, medical professionals, a trade union reps , close family members and potential alternative employers.

In 2020 the Women and Equalities Commission produced a further set of recommendations on the reform of the law on sexual harassment. These included the following:

- placing a mandatory duty on all employers to protect staff from sexual harassment, and on public sector employers to carry out formal risk assessment in the manner of health and safety risk assessments
- bringing back employer liability in cases of third party harassment
- extending protection to interns and volunteers as well as workers

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

Extending redundancy protection for pregnancy and maternity

For a good time now women who are on maternity leave have had considerable protection from redundancy.

Women whose jobs are being made redundant while they are on maternity leave must, wherever possible, be offered suitable alternative employment either with their existing employer or an associated employer when their employer is part of a group of companies.

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

No draft regulations or implementation dates have yet been published.

Non-compete and exclusivity clauses

The government is now formally consulting on proposals to allow employees more freedom to contract with other employers. There are two major proposals:

i) Requiring employers to pay former employees compensation if they are unable to work for a period after leaving due to a non-compete clause or restrictive covenant in their contracts. Alternatively regulations could be brought forward banning such clauses altogether.

ii) Banning all exclusivity clauses from employment contracts when an employee earns less than the lower earnings limit for National Insurance Contributions (presently £120 a week). This would permit some part-timers to work more easily for multiple employers at the same time.