Employment Law: An Introduction

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Update August 2021

OXFORD UNIVERSITY PRESS

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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 as the covid-19 pandemic has necessarily had to dominate government activity to the exclusion of other matters. There has thus been limited further progress made with the employment regulation agenda set out in the Conservative Party manifesto put forward at the 2019 general election. Significant relevant developments have, however, occurred – not least the agreement with the European Union about the post-Brexit relationship and the subsequent change in immigration regulations that came into effect in January. 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, most 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 an apparent stabilisation in the number of claims coming to the employment tribunals. There was a sharp increase in caseload in the wake of the abolition of tribunal fees in 2017, but only a very slight increase in the past year.

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
2020 / 2021	46,110

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 law in Northern Ireland) will not be obliged in the future to mirror any new EU regulations.

The agreement will not require the UK to retain every 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 (or the High Court of Justiciary in Scotalnd) decides to make 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 March 2020. 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 government's Coronavirus Job Retention Scheme. This has involved employers paying them up to 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 of 2020, but it was instead extended on three occasions. It is now intended to run until the end of September 2021.

It is highly likely that large numbers of people who have been furloughed will either be laid off or made redundant as the scheme is withdrawn during the second half of 2021, particularly those working in sectors which are unable to re-open normally. Workers in the transport, arts, hospitality and tourism industries are most vulnerable, but any general period of recession following the pandemic would result in job-losses across a much wider range of industries. We can also anticipate a large number of insolvencies. Such circumstances always lead to substantial numbers of employment tribunal claims.

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. Examples of 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.

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. It must be remembered that it is for an employer to ensure that workplaces are safe to work in. This may require new risk assessments to be carried out which take specific account of coronavirus and vaccination records, for reasonable health and safety plans to be developed in reference to them and for these to be put in writing. 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? 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.

We already have some employment tribunal case decisions on covid-related matters, though none yet as a result of appeals to higher courts:

* In Rodgers v Leeds Laser Cutting Ltd (2021) a man whose child suffered from sickle cell disease and was thus particularly vulnerable to covid refused to work during the pandemic in the factory where he was employed. He did so for fear that he might contract the virus and affect his child. The employer dismissed him on the grounds that they had in place a variety of covid protocols that meant that the workplace was safe. Mr Rodgers lost his unfair dismissal claim. He had not been automatically unfairly dismissed for refusing to work in unsafe conditions because he would not have been 'in serious and imminent danger' had he gone to work and observed safety precautions.

* Accattatis v Fortuna Group (London) Limited (2021) has some similarities to the Rodgers case. Here a man who caught covid refused to return to work after recovering. He asked instead if he could either work at home or be furloughed. He worked at a warehouse distributing PPE and working from home was not an option. He could not be furloughed as his job was continuing through the pandemc. He was dismissed a few weeks before the completing two years' service and failed to persuade the tribunal that his dismissal was automatically unfair. He would not have been 'in serious and imminent danger' and hence had no lawful grounds for refusing to come to work.

* In Kubilius v Kent Foods (2021) an HGV driver failed to comply with his employer's instructions during an early stage of the covid pandemic to wear a face mask when on customer sites. He was in his cab at the time with the window open. A complaint was made and he was dismissed for gross misconduct. This was found to be a lawful dismissal.

* In Prosser v Community Gateway Association Ltd (2021) a tribunal found against a woman who had been pregnant when the covid outbreak started and had been prevented from working by her employer until perspex screens had been erected between work stations. She claimed to have been unlawfully discriminated against on grounds of pregnancy. The tribunal found that she had been sent home because she was clinically vulnerable and had not been 'unfavourably treated'.

STATUTORY DEVELOPMENTS

Increases to redundancy and unfair dismissal compensation limits

For terminations occurring on or after 6th April 2021 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 £544. The maximum compensatory award for unfair dismissal is £89,493. The maximum basic award now stands at £16,320.

Increases to the rates of SSP, SMP and other benefits

The weekly rate of Statutory Sick Pay (SSP) rose to £96.35 on 5th April 2021. The rates for Statutory Maternity Pay, Statutory Paternity Pay, Statutory Adoption Pay and pay for shared parental leave increased to £151.97 per week.

National Living Wage and National Minimum Wage

As of 1st April 2021 hourly rates increased as follows:

- National Living Wage (for over 25s) £8.91
- National Minimum Wage (21-24 years) £8.36
- Development rate (18-20 years) £6.56
- Young workers rate(16-17 years) £4.62
- Apprentice rate £4.30

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 2021, the bands and ranges of compensation are as follows:

Band 1: £900-£9,100 – for one-off occurrences

Band 2: £9,101-£27,400 – for more serious cases and discrimination occurring on more than one occasion

Band 3: £27,401-£45,600 – for 'severe' cases involving a lengthy campaign of seriously discriminatory actions.

The guidance states that in 'the most exceptional cases' compensation is 'capable of exceeding the upper band'.

Public sector exit payments

These regulations having been shelved for a period, were finally introduced after four years of consultation and delay on November 4th 2020. Three months later, in February 2021 they were then suspended.

The main purpose was 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 was 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 required repayment of exit payments on re-engagement. Exit payments were also subject to a cap of £95,000.

Apparently, serious deficiencies were observed soon after the regulations were introduced. Hence the decision to suspend with a view to revoking the regulations altogether in due course.

Extension of IR35 to private sector

From April 2021 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 2021, 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.

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.

Gender pay gap reporting

In March it was announced that the duty on employers to report their gender pay gap statistics for 2020-21 would be delayed by six months until 5th October. This is due to covid disruption.

Extension of health and safety detriment rights to all workers

As of 31st May 2021 existing rights for employees relating to health and safety in the Employment Rights Act 1996 have been extended to all workers. This is in response to a High Court ruling of 2020 (R [on the application of the IGWU] v Secretary of State for Work and Pensions) which ruled that restricting the right to employees breached the European Union Health and Safety Framework directive. Thus means that workers and not just employees who suffer a detriment, such as a dismissal, for refusing to work in unsafe conditions are protected in law on the same basis.

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.

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.

Racial harassment

Allay v Gehlen (2021)

This is an important case from a practical HR point of view. It concerns a situation in which an employee was subjected to racial harassment (comments) on an ongoing basis, particularly from one individual. The employer sought to defend itself by arguing that it had, as is required under the terms of the Equality Act, taken 'all reasonable steps' both to prevent the harassment from occurring in the first place and subsequently when a complaint was made. They were not therefore vicariously liable.
In particular, the employer argued that it provided regular training for its managers on what comprises unlawful harassment and how to deal with it. Both the Employment Tribunal, and subsequently on appeal, the EAT found for the claimant. The training had taken place, but more than a year prior to the incidents. It had therefore become stale. Regular refreshers were needed if the employer was not to be found to be vicariously liable.

This is the second recent case in this field. In Zulu and Gue v Ministry of Defence (2019) training on harassment was found to be 'a tick box exercise' and thus not to have been sufficiently robust to pass the 'all reasonable steps' test.

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 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'.

On 31st May the law changed so that it now complies with this ruling (see above in the section entitled 'statutory developments)

National Living Wage

Royal Mencap Society v Tomlinson-Blake (2021)

In this case the Supreme Court clarified a number of points on the rights of workers who sleep over as part of their jobs. In the process some earlier precedents were overturned and amended, notably some established British Nursing v HMRC (2002).

The central point here relates to the National Living Wage (NLW) and whether or not employees who are away from home working on night shifts in care jobs should be paid the NLW for the hours that they are asleep. Mrs Tomlinson Blake argued that because while in bed and asleep she was obliged to 'keep a listening ear open' this should be counted as working time. The Supreme Court decided that this was not the case. Of course she should be paid the NLW for time working during the night when she had to get up, but not for time that she was asleep.

Disability discrimination

Daley v Optiva (2021)
All Answers Ltd v W and Another (2021)

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

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

She won at the preliminary hearing and can thus now proceed to take her claim to a full hearing.

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

Unfair dismissal

Gallacher v Abellio Scotrail (2020)
Sinclair v Trackwork Ltd (2021)

The Gallacher case is the latest in what has become a long line of judgments 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 judgment the EAT suggested that while unusual, tribunals might expect to be faced with similar cases in the future:

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

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

In the Sinclair case the EAT took a different approach and found in favour of the former employee. It is a most interesting and potentially significant judgement.

Mr Sinclair was given responsibility for implementing new health and safety policies in his company, a task which he carried out rather zealously, taking a risk-averse approach which caused a lot of upset among his colleagues. He was dismissed before completing two years' service, so he brought an unfair dismissal claim arguing that he had in fact been automatically unfairly dismissed on health and safety grounds.

Such claims commonly relate to situations in which someone is dismissed for refusing to work in unsafe conditions. Here the EAT widened the number of potentially relevant situations to include upset caused in respect of the implementation of health and safety rules.

Religion and belief

Forstater v CGD Europe and others (2021)

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

The claim concerns how one of the tests set out by the EAT in an earlier case - Grainger PLC v Nicholson (2010) – should be interpreted. Here several key tests were set out for tribunals to apply when determining whether or not someone's beliefs should be protected for the purposes of discrimination law:

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

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

This interpretation was overturned in the appeal hearing, but the EAT went further, adding a very significant additional layer of interpretation that may prove to be of considerable assistance to others who suffer a detriment at work on account of holding or expressing views that others find to be offensive. The ruling referenced Article 10 of the European Convention on Human Rights. The key passage reads as follows:

In our judgment, it is important that in applying Grainger, Tribunals bear in mind that it is only those beliefs that would be an affront to Convention principles in a manner akin to that of pursuing totalitarianism, or advocating Nazism, or espousing violence and hatred in the gravest

of forms, that should be capable of being not worthy of respect in a democratic society. Beliefs that are offensive, shocking or even disturbing to others, and which fall into the less grave forms of hate speech would not be excluded from the protection. However, the manifestation of such beliefs may, depending on circumstances, justifiably be restricted under Article 9(2) or Article D 10(2) as the case may be.

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

Employment status

Aslam and others v Uber (2021)
Addison Lee v Lange (2021)

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.

In February 2021 the Supreme Court delivered its long-anticipated ruling in the long-running case of Uber v Aslam which concerns whether or not Uber drivers working in the UK should be classed as workers or self-employed persons. The company had lost its case in all previous hearings and it was thus no surprise when the Supreme Court also found in favour of the drivers, declaring them to be workers in law and not self-employed. This was despite what their formal contracts stated and reflected the lived reality of their work which required them to work under considerable control and made them dependent on Uber. The ruling specifically states that Uber drivers (and presumably by extension many 'gig economy workers' need to be paid at least at the level of the National Living Wage / Minimum Wage from the moment at which they switch their apps on at the start of a shift until they switch them off. It is not the presence of a passenger that determines the start of their work.

The cost to Uber will be very significant as back pay now needs to be paid to all its drivers in respect of the last six years. All are also entitled to five weeks and three days holiday pay in respect of work carried out over the past six years and into the future.

The Addison Lee case was determined soon after the Uber case. Here too the Court of Appeal found that drivers should be considered workers and not self-employed persons from the point at which they switched on their apps. Leave to appeal to the Supreme Court was refused.

Equal Pay

Asda Stores Ltd -v- Brierley and others (2021)

In terms of its practical impact this is the most important employment law case of the past year. Asda lost its appeal to the Supreme Court in along running case concerning equal pay claims made by some 35,000 female store-based staff using mainly male warehouse workers as their comparators. The company had sought to argue that they could not use these men as their comparators as they did not work under 'common terms and conditions'. The Supreme Court rejected this argument. The terms were sufficiently common to permit a claim for equal value to proceed. Where establishments operated by the same company are located in geographically dispersed locations, the so-called North Convention should be applied. This involves asking if the terms under which comparators are employed would be substantially the same if they were working on the same site. In other words, would the warehouse / distribution workers be employed on common terms with the store-based staff if they worked together on the same premises. The answer was 'yes'.

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

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 ***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.

The extraordinary case of **Chell v Tarmac Cement and Lime Ltd (2020)** concerns a practical joke that went badly wrong. Here an employee of Tarmac damaged Mr Chell's hearing when he hit pellet gun targets with a hammer close to him. This provided the High Court with the opportunity to apply the newly re-established law on vicarious liability.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'.

In **Mallon v Aecom Ltd (2021)** the EAT overturned an Employment Tribunal's decision to strike out a claim from a dyspraxic man who had argued that it an employer's refusal to adjust its online recruitment and selection process in his case had been unreasonable. This case reminds us of the very considerable efforts employers are obliged to make when making 'reasonable adjustments' that meet the needs of disabled people.

Page v Lord Chancellor (2021) concerns a magistrate who due to his strong Christian beliefs had refused an application for adoption by a same sex couple and had later discussed his decision on social media. He was then dismissed and brought a claim of religious discrimination. He lost at the ET, EAT and now also at the Court of Appeal. The reason for the dismissal was his refusal to carry out his duties, not his religion.

Northbay Pelagic Limited v Anderson (2021) is an apparently rare example of the EAT finding that an employer's decision to dismiss an employee on grounds of gross misconduct fell outside the 'band of reasonable responses'. The claimant, a director, had been suspended pending investigation into his conduct and had installed a covert camera in his office so that he could observe what was going on during his suspension.

Allay v Gehlen (2021) is another case in which the courts found anti-discrimination training to have become stale and in need of refreshment in order for an employer to rely on its existence when arguing that it took all reasonable steps to prevent racial harassment from occurring. Training must be repeated and refreshed regularly (hence demonstrated to be effective) if this defence is to be relied on.

In **Cumming v British Airways (2021)** the EAT overturned an ET judgement in a case concerning indirect sex discrimination. A rule at British Airways that removed a day of paid contractual leave for every three days of unpaid parental leave taken by employees was thus found to discriminate

against women indirectly and unlawfully.

In **Independent Workers Union of Great Britain v Secretary of State for Business, Energy and Industrial Strategy and others (2021)** it was confirmed that a trade union cannot seek recognition using the compulsory recognition clauses of the Employment Relations Act 1999 if the employer concerns already has in place a recognition agreement with another trade union.

In **Price v Powys County Council (2021)** the EAT decided that a man taking shared parental leave could not use a woman taking adoption leave as his comparator when claiming direct sex discrimination. It was lawful for the Council to pay him less than her as the purpose of adoption leave 'go beyond providing childcare'.

In **Sargeant v London Fire Commissioner & Others (2021)** the EAT ruled that all pension schemes should be deemed to include non-discrimination rules whether or not formal reference is made to them. Importantly this includes discrimination on grounds of age.

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

In **NUPFC v Certification Officer (2021)** it was decided that paid foster carers were to be considered workers' for trade union listing purposes. The National Union of Professional Foster Carers overturned the Certification Officer's decision not to list them as a trade union – with all the legal privileges and protections listed status brings with it. This was another case (see Forstater above) in which the Human Rights Act played a part in determining the outcome.

FUTURE DEVELOPMENTS

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).

- 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. Implementation has been delayed by the Covid pandemic, but we may perhaps look forward to some legislation in 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.