Essential Employment Law - Key employment law changes in April 2021 and beyond

Coronavirus Job Retention Scheme

The Coronavirus Job Retention Scheme (CJRS) opened in March 2020. In broad terms it has provided for employees to be "furloughed" with the employment costs being funded by the UK Government via a grant covering 80% of furloughed employees' usual pay subject to a cap of £2,500 per month. Initially no work could be undertaken by furloughed employees but from 1 July "flexible furlough" was introduced allowing employees to return to work part-time. Employers were required to pay for any hours worked in the usual way. From 1 August employers had to make an increasing contribution to the costs of any furloughed hours until the planned closure of the scheme at the end of October 2020.

However, the scheme was extended in early November 2020, initially until December, then 31 March and then again until 30 April. It was announced during the Spring Budget on 3 March 2021 that the scheme would be extended again until 30 September 2021. The UK Government will contribute 80% to wages (subject to the cap of £2,500 per month) for unworked hours until the end of June 2021, but employers remain responsible for NICs and employer pension contributions. In July employers will have to contribute 10% to unworked hours, and in August and September they will contribute 20% to wages for unworked hours. Employers remain responsible for the costs of all worked hours.

For employees whose employment is terminated during furlough, the Employment Rights Act 1996 (Coronavirus, Calculation of a Week's Pay) Regulations 2020 ("the Regulations") came into force on 31 July. The Regulations provide that where an employee is entitled to minimum statutory notice they must be paid their pre-furlough rate of pay during their statutory notice period. This also applies to contractual notice unless the contractual notice period exceeds the statutory notice period by more than one week.

The Regulations also apply to the calculation of statutory redundancy payment, so any statutory redundancy pay entitlement must be calculated using an employee's normal pre-furlough pay and not the reduced furlough rate. The Regulations do not apply to any contractually enhanced scheme - that will depend on the terms of the scheme.

The extended scheme has largely mirrored the initial scheme, however, for claims relating to the period 1 December onwards, employers cannot claim the grant for any days on or after 1 December 2020 during which the employee was serving a contractual or statutory notice period for the employer (this includes people serving notice of retirement or resignation). HMRC is now also publishing details of employers who make claims under the extended scheme, starting from December 2020.

The Self Employment Income Support Scheme ("SEISS") grant has also been extended until 30 September 2021.

No Jab, No Job

An employer cannot physically force an employee to be vaccinated without their consent - that would be assault - but there is always the threat of dismissal if an employee does not comply, or employers may not hire applicants who have not been vaccinated. Employers who do attempt to enforce a policy of mandatory vaccination in this way will run the risk of both unfair dismissal and discrimination claims.

Both employees and workers are protected from discrimination in the workplace if the discrimination is on the grounds of any of the nine protected characteristics set out in the Equality Act 2010 ("the Act"). No qualifying period of service is required - so job applicants have this protection - and in certain

circumstances employers can be held liable not only for the acts of the business as the employer, but also vicariously liable for the discriminatory acts of other employees. That means not only will employers have to be careful not to discriminate, they will also need to ensure their employees do not engage in any behaviours which could amount to harassment of colleagues who have refused to be vaccinated.

In practice these discriminatory risks are most likely to arise where an employee cannot be vaccinated because of a medical condition which also renders them disabled under the Act. A decision to dismiss, or take detrimental action short of dismissal, could result in claims for discrimination arising from disability, a failure to make reasonable adjustments or indirect disability discrimination.

Employers may also face scenarios where the refusal is based on the protected characteristic of religion or belief. While very few religions expressly prohibit vaccination, an employee may refuse the vaccine as a result of the beliefs of their religion e.g. not eating or using animal products. As some vaccines include pork derived gelatine this could lead to employers having to deal with a refusal to vaccinate on the grounds of religion. The COVID-19 vaccines from Pfizer, Moderna and AstraZeneca do not use pork gelatine in their formulas, but there is some concern over vaccines from other companies, which have not yet released a list of their ingredients.

Following an employment tribunal decision in January 2020 which confirmed "ethical veganism" was a belief worthy of protection, vegans who refuse vaccination because of animal based ingredients may also be protected under the Act. It is less likely that simply holding anti-vaccination beliefs would be so protected but such an argument is still be tested before the tribunal. To date claims based on vegetarianism have been unsuccessful, but these are all potential risks of which employers need to be cognisant.

Having a protected characteristic does not prevent an employer from lawfully dismissing an employee for refusing a vaccine - indirect discrimination or discrimination arising from disability can be justified if the discriminatory act is a proportionate means of achieving a legitimate aim. However, while identifying legitimate aim may be relatively straight forward - for example protecting the health and safety of the workforce - dismissing an employee who refuses vaccination may not be a proportionate way of achieving that aim. What is proportionate may also change over time if the risk attached to the virus recedes.

For employees with 2 or more years' service, the dismissal would also have to be fair. In a scenario where an employer cannot utilise an employee because customers refuse to deal with an employee who is unvaccinated, or where the safety of vulnerable clients would be put at risk such as in a care home setting, a dismissal may be fair for "some other substantial reason", although the employer would have had to have followed a fair procedure. This would likely include giving warnings about the consequences of the refusal to be vaccinated. However, without this type of context, a dismissal simply for a refusal to get vaccinated is unlikely to be fair.

Rather than threatening dismissal, employers can take steps to encourage vaccination, perhaps by providing information on the benefits and safety of getting a vaccination - something akin to the guidance the UK Government has already provided for social care staff. Although COVID-19 vaccinations cannot currently be supplied privately, should they become available in the future, employers could offer them at no cost to employees, as many already do with the seasonal flu jab. In the meantime, paid time off could be given to facilitate employees being vaccinated.

April 2021

Tribunal Compensation

The annual Employment Tribunal award limit changes will take effect on 6 April 2020. The limit on compensatory award for unfair dismissal will rise from £88,519 to £89,493.

The cap on the compensatory award is the lower of the maximum award (i.e. £89,493) or 52 weeks' pay (based on the claimant's gross salary prior to dismissal including employer pension contribution but excluding benefits in kind and discretionary bonus). As always there are a limited number of

exceptions where the cap does not apply. These are dismissals for whistleblowing or for raising certain health and safety issues. In addition, there is no limit to the award that can be made where a dismissal is related to unlawful discrimination.

The limit on a week's pay (used for calculating statutory redundancy payments and the basic award for unfair dismissal) will increase from £538 to £544 meaning the maximum basic award increases to £16,320.

Statutory Benefits

As of April statutory maternity pay and allowance, and statutory paternity, adoption and shared parental pay will increase from the current £151.20 per week to £151.97. Statutory sick pay will increase from £95.85 to £96.35 per week. The increase usually occurs on the first Sunday of April.

Injury to Feelings Awards

An award for injury to feelings is made to compensate for injury to feelings caused by discrimination. The award is separate from an award to compensate for financial loss and can be made even where no financial loss has been suffered. To assist Employment Tribunals, the Court of Appeal previously set out guidance for quantifying awards for injury to feelings, known as the Vento bands. The latest Vento bands (from 6 April 2020) are as follows:-

Lower band (less serious)	£900 - £9,000
Middle band	£9,000 - £27,000
Upper band (more serious cases)	£27,000 - £45,000

Awards over £45,000 will be made only in exceptional cases.

The Vento bands will increase (still to be announced) for any cases presented on or after 6 April 2021.

National Living Wage and National Minimum Wage

The National Living Wage ("NLW"), which is the highest band of the national minimum wage, is to increase to £8.91 per hour from April 2021. In addition, the age at which workers become entitled to the NLW will drop from 25 to 23 years old.

The National Minimum Wage rates will also increase:-

- The rate for workers (aged 21 to 22) will increase to £8.36 per hour;
- The development rate (workers aged 18 to 20) will increase to £6.56 per hour;
- The young workers rate (non-apprentices aged under 18 but above compulsory school age) will increase to £4.62 per hour; and
- The apprenticeship rate will increase to £4.30 per hour.

Gender Pay Gap Reporting

After a complete suspension of gender pay gap reporting in 2020, the Equality and Human Rights Commission announced enforcement of reporting in 2021 will be suspended for a six month period until 5 October. Employers are however still encouraged to meet the 30 March (public sector) and 4 April (larger private and voluntary organisations) deadlines if possible. The suspension is once again due to the impact of COVID-19.

Despite the suspension in 2020, approximately 50% of the organisations covered by reporting requirements did report voluntarily. Analysis of those figures showed an increase in the pay gap of just under 1%.

In terms of what we will see this year, the overall situation will be impacted by COVID-19 given the timing of the snap shot date (5 April 2020) and the fact that the furlough scheme ran from 1 March 2020.

It has been widely reported that the pandemic has had an inequitable impact on women in the workplace, with more women than men being furloughed. However, the Gender Pay Gap Information Regulations require employers to omit from their pay-gap calculations any employees who were on a reduced rate of pay on the snapshot date. This would include furlough pay and could constitute a significant proportion of an employer's workforce which may well skew the figures somewhat.

The Equality and Human Rights Commission has published guidance on gender pay gap reporting in the context of COVID-19.

Other Changes

IR35

HMRC introduced the off-payroll working rules - also known as IR35 - in 2000 to tackle what it referred to as "disguised employment". What it meant by that was circumstances where some contractors provided their services via an intermediary - often a Personal Service Company ("PSC") - in order to avoid being classed as an employee for tax purposes. This provided greater tax efficiency to the contractor and meant the organisation hiring the contractor (the "Client") did not have to pay employers' national insurance contributions (NICs) or give contractors employee benefits.

When IR35 was first implemented it fell to the contractor to assess their own status for tax purposes. This was changed in the public sector in 2017. The changes meant that when IR35 applied, the Client was responsible for working out the employment status of the person providing their services. This meant assessing whether a contractor is genuinely self-employed or whether, in reality, they would be deemed to be employed. The third category of employment status that is relevant when assessing employment rights - that of a worker - is not relevant for tax purposes. HMRC says the rules apply if a contractor "would be an employee if there was no intermediary".

The 2018 Autumn Budget confirmed the change made to the rules in the public sector would be extended to private sector companies with effect from April 2020. The coronavirus pandemic caused implementation to be delayed until 6 April 2021.

Small private sector companies are exempt from these changes, and where the client is overseas and has no UK connection the new rules will also not apply. To qualify as a "small company" the client must meet two of the following criteria:-

- Have an annual turnover of no more than £10.2million;
- Have a balance sheet total of no more than £5.2 million;
- Have no more than 50 employees.

The new rules introduce the concept of a 'fee-payer', who will be required to operate PAYE in the event that the client determines IR35 applies. In circumstances where the client contracts directly with the PSC, the Client and the fee-payer will be one and the same. However, in practice it is quite common for PSCs to be contracted through an agency. In that case, the obligation to determine status will remain with the Client, but the agency will be the fee-payer.

From 6 April onwards Clients in the private sector who are not exempt will have to:-

- Determine the contractors status for tax;

- Notify the contractor of the determination and the reasons for it - where an agency is involved the agency must also be notified;

- If IR35 applies then the fee-payer must make the appropriate income tax and NIC deductions and account for them (and employer NIC) to HMRC.

Clients must also put in place a process under which contractors and/or fee-payer agencies can challenge the status determinations. Any challenges must be responded to within 45 days. The Finance Act 2020 also introduced a right to request confirmation of the Client's size so a contractor or fee-payer agency can assess whether the Client might be exempt. Again the Client must respond to any such request within 45 days.

Even in cases where an agency is the fee-payer, Clients should be aware that where HMRC cannot recover payments from the agency they (the Client) will have ultimate liability for accounting for tax and NIC.

Post-Employment Notice Pay

The concept of Post-Employment Notice Pay ("PENP") was introduced with effect from April 2018 by the Finance Act (No 2) 2017 under the much heralded proposals to change the way termination payments were taxed. PENP is the part of a termination payment which is treated as being payment in respect of the employee's notice period and subject to income tax and NICs (both employee and employer). The aim of the changes made in April 2018 was to ensure that all contractual, customary and non-contractual Payments in Lieu of Notice ("PILON") were consistently subject to income tax and NICs. Prior to that date, the tax treatment of payments made in lieu of the employee working their notice period was dependent upon whether there was a contractual PILON in the contract of employment.

PENP is currently calculated on the basis of either the simplified formula or the general formula. The simplified formula applies to an employee who is paid monthly, whose contractual notice period is expressed in months and whose employment is terminated with immediate effect or whose unworked period of notice is a whole number of months. The general formula is more complex and applies where the pay period is not expressed in months or the notice period, or the unworked portion of it, is not expressed in months. To address such cases, the general formula uses the number of days in the pay period ("P") as one of the inputs, and this can vary between 28 and 31 days.

This variation in the number of days in a pay period has had an unintended consequence, as less favourable outcomes occur depending on when in the year employment is terminated. To address this the draft Finance Act 2021 will amend ITEPA 2003 to provide an alternative formula for calculating PENP where the pay period is defined in months but the notice period is not a whole number of months. Instead of using the number of days in the pay period as P, the average number of days in a month is used, being 30.42 days. HMRC has been able to permit use of this figure on a discretionary basis since October 2019 where this inconsistency has arisen and the alternative calculation is advantageous to the employee, but the amended legislation will mean it will apply in all such cases from 6 April 2021.

A further unintended consequence of the changes in 2018 was that tax treatment varied depending on residency. Currently PENP is not chargeable to UK tax if an employee is non-resident for the tax year in which their employment terminates. From April 2021, this will be rectified by way of a new measure aligning the tax treatment for those who are non-resident when their employment terminates with the treatment of all UK residents. This is though only effective to the extent that non-residents would have worked in the UK had they been working their notice period - it therefore only affects those who physically perform their employment duties in the UK.

The new provisions will apply where employment is terminated and the termination payment is received on or after 6 April 2021.

Restriction on Public Sector Exit Payment Regulations

The Restriction of Public Sector Exit Payments Regulations 2020 ("the UK Regulations") were introduced on 4 November 2020. The UK Regulations placed a £95,000 cap on exit payments that could be paid by certain listed public authorities. In Scotland, the UK Regulations applied only to listed Scottish public bodies where employment terms were subject to UK Government approval. Devolved Scottish public bodies have been subject to a similar cap, introduced by the Scottish Government via the Scottish Public Finance Manual ("SPFM") since September 2019.

After only 3 months in force the UK Government announced in February that the UK Regulations were to be revoked. According to the UK Government, the decision follows an extensive review of the cap which found its application may have had unintended consequences, although it did not specify what those were. The UK Regulations were the subject of a number of judicial review applications arising from concerns around the UK Regulations clashing with the requirements of the Local Government Pension Scheme ("LGPS").

HM Treasury has published a Direction which came into force on 12 February 2021 that dis-applies the cap until the UK Regulations are revoked. Guidance has also been issued for both individuals and public sector authorities who were affected by the cap while it was in place. Affected individuals should contact their employer directly and request from them the amount they would have received had the cap not been in place. The guidance for public sector authorities is that they are "encouraged" to pay affected individuals the additional sums that would have been paid but for the cap, and that it is "HM Treasury's expectation" that they will do so.

The cap for Scottish devolved bodies introduced under the SPFM remains in force. It expressly excludes both pension benefits to which the employee is already entitled and mandatory payments made by the employer to the pension scheme to either top up or underwrite the actuarial reduction to allow early access to pension benefits. This therefore appears to avoid the primary issue that led to the judicial review applications that plagued the UK Regulations brought in by the UK Government.

The Employment Bill

The Employment Bill was announced in the December 2019 Queen's Speech and is to be introduced during this Parliamentary session. The key features of the Bill are:-

- A single labour market enforcement body - this proposal is intended to make it easier for vulnerable workers to be aware of their rights, and to exercise them. It is also intended to support business compliance. A consultation closed on 6 October 2019 and the UK Government response is awaited.

- Tips to go to workers in full - employers will be required to pass on all tips and service charges to workers and, supported by a statutory Code of Practice, to ensure that tips would be distributed on a fair and transparent basis. Legislation to implement this - the Employment (Allocation of Tips) Bill - had been announced in the Queen's Speech in October 2019, but Parliament was dissolved for the general election before it was introduced.

- Right to request a more predictable contract - the UK Government had announced in the Good Work Plan that it intended to legislate to introduce a right for all workers to request a more predictable and stable contract after 26 weeks service. The employer would be required to respond to the request within 3 months.

- Extending redundancy protection from the point of notification of pregnancy to 6 months after the end of maternity leave - BEIS published a consultation on extending the current protection in January 2019. The extended protection will apply from the date the employee notifies her employer (orally or in writing) of her pregnancy until six months after her return from maternity leave.

- Leave for neonatal care - the Government has published its response to a consultation on the introduction of this leave. It is intended to introduce leave and pay of up to 12 weeks for the parents of babies in neonatal care. It is anticipated that this will be implemented in 2023.

- One week's unpaid leave for carers - a consultation has taken place on the introduction of one week's unpaid leave for employees who are also unpaid carers. The term carer is fairly broadly defined and includes "a person providing unpaid care to family members, friends, neighbours, or others because of long-term physical or mental health, disability or problems related to old age".

- Making flexible working the default - this proposal was included in the Conservative party manifesto before being included in the Employment Bill. The proposal is subject to consultation.

No draft of the bill is available as yet so there is no detail of its provisions or fixed timescales for implementation. Consultation on flexible working as the default is awaited but likely boosted by the increase in homeworking in 2020.

The Queen's speech also indicated that legislation is to be introduced to reduce disruption caused by rail strikes. The UK Government's intention is to require a minimum level of service during strike action to ensure that the public are not disproportionately affected by rail strikes. Any strike which does not meet the minimum service requirement will be unlawful. Injunctions/interdicts or damages will be able to be sought against unions.

Employment Tribunal Statistics

The 2019/20 employment tribunal statistics - which looks at April 2019 to March 2020 (so was largely, but not completely, unaffected by the COVID-19 pandemic and lockdown) - showed a reduction in the number of claims made year on year for the first time since the abolition of tribunal fees. What is more the reduction was fairly significant.

In the year 1 April 2019 to 31 March 2020 a total of 103,984 employment tribunal applications were made. This compares to 121,111 the previous year and 109,685 in 2017/18. This reduction comes as something of a surprise as it had seemed likely that numbers would keep increasing following the abolition of fees and we are still some way off the 2012/13 (the last year prior to the temporary introduction of fees) figure of 191,541 claims. It is very likely though that fewer claims than usual were raised in March as the coronavirus pandemic took hold.

The number of awards of compensation has also fallen from 774 in 2018/19 to 740 in 2019/20. As usual this is a very small proportion of the overall number of claims raised but is should be remembered that a very significant number of cases will resolve themselves, usually on a confidential basis, by way of a financial settlement before a Tribunal hearing takes place.

The detail of the statistics makes for interesting reading. The highest sum awarded in the period 1 April 2019 to 31 March 2020 was £265,719 and was awarded in a disability discrimination claim. This was closely followed by an award of £243,636 for an age discrimination claim. These awards are though considerably lower than some of the awards that have been reported in recent years. For example, the highest award made in 2018/19 was £947,585 (awarded in an unfair dismissal case).

The highest award in an unfair dismissal claim this year was £118,842. While this is considerably lower than last year's highest award (see above), the mean unfair dismissal award has not changed significantly, rising slightly from £6,243 to £6,646. The picture is much the same for most of the other claim jurisdictions with the level of median awards remaining fairly steady. The exception to that is sexual orientation discrimination, religion and belief discrimination and sex discrimination awards. No awards were made in sexual orientation claims in 2018/19 whereas 5 were made this year with a median of £9,245. Religious discrimination experienced the opposite - last year 3 awards were made with a median award of £1,500 whereas this year no awards have been made.

Awards in sex discrimination cases stand out as having the most significant change in terms of both median and average awards. Sex discrimination also saw a significant increase in the highest award made. The median award has more than doubled from £6,498 in 2018/19 to £14,073 in 2019/20 and the average award has increased from £8,774 to £17,420. In 2018/19 the highest award for a sex discrimination claim was £24,103, in 2019/20 it was £73,619. The relative increase in the number of claims where awards were made compared to other claim jurisdictions is also significantly higher in sex discrimination cases - 19 awards of compensation were made in 2018/19 compared to 46 awards of compensation in 2019/20. This could be coincidence but it could also be related to the changing views of society brought about by the #MeToo movement. It may be that this has encouraged more female employees to bring claims with certain behaviours no longer being deemed acceptable.

The number of costs awards made by employment tribunals in 2019/20 has fallen to 177. This follows the trend from 2018/19 where the number of awards dropped to 209, having previously remained static at 479 for the preceding two years. Once again more cost awards were made to employers rather than claimants with the figures being 130 and 47 respectively.

The maximum costs award decreased significantly this year, decreasing from £329,386 in 2018/19 to £103,486 this year. The median costs award however stayed fairly static, increasingly slightly to £2,500 compared to £2,400 in 2018/19.

Other Future Changes

Ethnicity Pay Gap

In 2016 a draft Ethnicity Pay Gap Bill was introduced as a private members bill into the House of Lords, but did not get any further than a first reading. It called for regulations requiring employers with 250 or more employees to report on remuneration for employees from different ethnic groups. In 2017 Race in the Workplace - The McGregor-Smith Review was published calling for companies with more than 50 employees to publish a breakdown of their workforce by race and pay band. It also found that the UK economy could benefit from a £24bn per year boost if BAME people had the same work opportunities as their white counterparts in the workplace. The Government response was to encourage all employers to take on board the compelling case made for action and accept the recommendations made in the review.

A UK Government consultation on the introduction of mandatory ethnicity pay gap reporting took place between October 2018 and January 2019 but since then there has been no progress on the matter. However, a petition created by a member of the public calling for the introduction of mandatory reporting reached 100,000 signatures in June. This means it must be considered for parliamentary debate. Although the pandemic may delay the introduction of ethnicity pay gap reporting it does seem likely that this will become a mandatory requirement in the future.

Restriction on Use of Gagging Clauses

In March 2019 the UK Government launched a consultation on measures to prevent misuse of confidentiality clauses in situations of workplace harassment or discrimination. The consultation closed at the end of April 2019 and the UK Government's response was published in July 2019. The response identified a number of measures the UK Government intends to take to tackle misuse of NDAs including:-

- Legislating to ensure a confidentiality clause cannot prevent an individual disclosing to the police, regulated health and care professionals or legal professionals;
- Legislating to ensure the limitations of a confidentiality clause are clear to those signing them;
- Legislating to improve independent legal advice available to an individual when signing a settlement agreement;
- Production of guidance on drafting requirements for confidentiality clauses; and

- Introduction of new enforcement measures for confidentiality clauses that do not comply with legal requirements in written statements of employment particulars and settlement agreements.

It is not clear when the legislation will be brought forward.

Possible Reform of Post Termination Non-Compete Clauses in Employment Contracts

The UK Government launched a consultation on measures to reform post-termination non-compete clauses in contracts of employment in December 2020. According to the UK Government, the consultation, which closed in February 2021, has been triggered by the COVID-19 pandemic and the need to look at measures to "unleash innovation, create the conditions for new jobs and increase competition".

There are two reforms, in particular, that the UK Government is interested in views upon. The first is "mandatory compensation". This means post-termination non-compete clauses in contracts of employment would only be enforceable if the employer provided compensation during the restriction period. It is thought this would:-

- encourage employers to consider whether the use of a non-compete clause is necessary and reasonable for that particular role before inserting it into a contract;
- create a financial disincentive to the use of non-compete clauses ‘as standard’ in contracts of employment and reduce misuse of non-compete clauses; and
- disincentivise employers from applying a non-compete clause for an unreasonable length of time as this would incur additional cost.

The UK Government are also interested in views on the possibility of complementing this with measures to enhance transparency such as introducing a requirement for employers to disclose the exact terms of a non-compete agreement to the employee in writing before they enter into the employment relationship. A failure to do so would render the clause unenforceable. Views are also sought on the potential to place statutory limits on the length of non-compete clauses.

The second and more extreme proposal is to make post-termination, non-compete clauses in contracts of employment unenforceable - effectively banning them. It is suggested in the consultation document that this would have the benefit of providing greater certainty for all parties and could have a positive effect on innovation and competition by making it easier for individuals to start new businesses and enabling the diffusion of skills and ideas between companies and regions. However, views on options short of a ban which instead limit enforceability in the interests of spreading innovation are also sought.

If responses to this consultation are similar to those received following a 2016 Call for Evidence to better understand how non-compete clauses are used and why, and to look at their prevalence and the benefits and disadvantages associated with them, then an outright ban seems unlikely. At that time, the majority of responses were in favour of restrictive covenants as a valuable and necessary way of protecting business interests and the UK Government decided it was unnecessary to take any further action. However, a lot of water has passed under the bridge since then and the damage inflicted on the labour market by COVID-19 may encourage some reform in this area.

Possible Ban on Exclusivity Clauses in Contracts of Employment

Currently legislation prevents employers from including exclusivity clauses in zero hours' contracts. Exclusivity clauses restrict workers from taking on additional work with other employers. A consultation on extending this ban to low income workers opened on 4 December 2020. This proposal was consulted on in 2014 but rejected at the time. However the UK Government has indicated it is reconsidering the position in consequence of the impact COVID-19 has had on the labour market.

If taken forward the exclusivity clauses in employment contracts of workers' whose guaranteed weekly income is less than the Lower Earnings Limit (LEL), currently £120 a week, would be banned. This would allow low income workers to seek additional work elsewhere when they are not offered sufficient hours by their employer.

Tribunal Fees

In June the re-introduction of fees in the employment tribunal rumour mill sprang into action once again. The Times newspaper claimed to have had sight of correspondence between Whitehall officials and the head of the English Law Commission requesting that the Commission "provide recommendations for creating a coherent system for charging and updating fees in the future". However, the Scottish and UK Governments were not aligned in their approach to employment tribunal fees even prior to the Supreme Court finding them unlawful in 2017, so it remains to be seen what impact recommendations emanating from the English Law Commission would have in Scotland.

Case Law Update

Despite the pandemic and subsequent interruption to hearings in courts and tribunals there has still been a significant number of important judgements handed down in the last 12 months.

Uber BV and others v Aslam and others [2021] UKSC 5

The long awaited judgment of the Supreme Court in the case of Uber BV & Others v Aslam & Others was handed down on 19 February. The case primarily concerned the employment status of Uber drivers - specifically were they "workers" for the purposes of employment legislation? If they were then they would be entitled to be paid at least the national minimum wage, to receive paid annual leave and to benefit from certain other protections. The case also considered, if the drivers were workers, what periods constituted their "working time".

When the case first came before the employment tribunal in 2016 there were approximately 30,000 Uber drivers operating in London, with a further 10,000 operating throughout the rest of the UK. The claimants were taken as a test case to establish employment status. Individuals could become Uber drivers by signing up online and then attending and presenting certain documents to the offices of their local Uber company. They required to provide and cover the running costs for their own vehicles. They also took part in a brief interview and watched a presentation about the Uber app and certain Uber procedures. Once accepted as an Uber driver they were given free access to the Uber app. They made themselves available for work by logging on to the app. When they did so the fare was calculated by the app and debited from the credit or debit card that the passenger has registered with the app. Uber made a weekly payment to the driver of sums paid by the passengers less a "service fee" that they retained.

The drivers were not provided with any insignia or uniform and in London were discouraged from displaying Uber branding. They were though given instructions about how to conduct themselves and were expected to meet certain standards of performance with penalties ranging from being automatically logged out for periods of time for refusing or cancelling trips, through to being removed from the platform and accounts being deactivated if their passenger rating dropped too low. Uber would handle customer complaints and if a refund was required this would usually result in a correspondingly lower payment to the driver.

Uber's position was that it was solely a technology provider and the local Uber subsidiary companies acted as booking agents for the drivers - something akin to minicab firms. Uber argued that minicab firms had been recognised in judicial decisions as acting as booking agents for self-employed drivers who then provide transportation services directly to passengers. It also relied upon the wording in its standard written contracts, emphasising the drivers' freedom to work as much or as little as they liked and maintained that they were independent contractors.

When the case first came before the employment tribunal it held that the drivers were workers, and that they were working whenever they (i) had the Appellant's app switched on; (ii) were within the territory in which they were authorised to work; and (iii) were able and willing to accept assignments.

This judgment was upheld by the EAT and by the Court of Appeal, albeit with one dissenting judgment which may have given Uber a glimmer of hope for the appeal to the Supreme Court.

The Supreme Court upheld the employment tribunal's judgment that the drivers were "workers". It unanimously dismissed the appeal, finding that Uber contracts with passengers and then engages drivers to carry out the bookings for it. It was wrong to treat the written agreements as the starting point in deciding whether an individual is a worker. Rather, the correct approach is to consider the purpose of the relevant employment legislation which is to give protection to vulnerable individuals who have little or no say over their pay and working conditions. The Court emphasised five aspects of the findings made by the employment tribunal:-

1. Uber dictated how much the drivers were paid as they set the fare;

2. The contract terms on which drivers provide their services are imposed by Uber, the drivers have no say in them;

3. Once logged on to the app the drivers choice as to whether to accept fares is constrained by Uber's monitoring of the acceptance rate and imposition of penalties for refusals/cancellations;

4. Uber exercised considerable control over the way in which the drivers delivered their services including via the passenger rating system which, if it fell too low, could result in the driver being removed from the platform; and

5. Uber restricts communications between passenger and driver to the minimum necessary to perform the trip, taking active steps to prevent drivers establishing a relationship with the passenger beyond the individual fare.

To make a bad day in court for Uber even worse, the Supreme Court also held that the employment tribunal was correct to find that the time spent by the drivers working for Uber included any period when the driver was logged into the app within the territory in which the driver was licensed to operate and was ready and willing to accept trips. It was not limited to the time spent actually driving passengers. This finding will significantly increase Uber's liability for national minimum wage and holiday pay, the number of hours worked being of relevance to both calculations.

The case will now return to the employment tribunal which will decide the level of award the drivers are entitled to.

This judgment has been awaited with some trepidation by gig economy companies, in particular those who have a similar business model to Uber. For Uber the ramifications include potentially thousands of compensation claims and also higher running costs including not only minimum hourly rates and holiday pay but also the need to auto-enrol workers into a pension scheme. Not surprisingly, the company is currently maintaining the position that the judgment "focussed on a small number of drivers who used the Uber app in 2016" and that it does not therefore impact on the majority of their drivers. That view is now likely to be tested via further tribunal claims.

While the judgment will undoubtedly have significant ramifications for businesses operating in the gig economy, it should not be hailed as the final word on employment status as these cases do all turn on their own facts. For example, substitution was not an issue in the Uber case and where there is a genuine ability to substitute that has been used, that factor can have a significant impact on the outcome of such claims.

It would though be wise for gig economy businesses to review their working arrangements to ensure the individuals they are engaging are correctly classified. In addition to the claims made against Uber, worker status also brings with it the possibility of claims for discrimination under the Equality Act 2010, so any review should include practices relating to equality and diversity. In carrying out such a review businesses should be in no doubt that the focus of any court and tribunal will be on the day to day reality of the working arrangements and not the written contractual arrangements between the parties.

McTear Contracts Limited v Bennett & Others [2021] UKEAT 0023_19_2502

Last year the European Court of Justice handed down a judgment in ISS Facility Services NV v Govaerts ("Govaerts"). The case concerned the transfer of contracts of employment under the Acquired Rights Directive (which the TUPE Regulations implement in the UK) where there are multiple transferees. The ECJ held that the rights and obligations arising from a contract of employment are transferred to each transferee in proportion to the tasks performed by the worker concerned. That was subject to the proviso that division of the contract is possible and neither causes a worsening of working conditions nor adversely affects the rights of the worker. In other words, following a business transfer, employees could end up with more than one employer.

The ECJ in Govaerts did not consider whether the same principle would apply to a Service Provision Change ("SPC"), as an SPC is a purely UK construct and therefore was not relevant in the Belgian case. In McTear Contracts Limited v Bennett & Others ("McTear") the EAT has considered whether the same principle should be applied to an SPC.

The employment tribunal heard the McTear case before the Govaerts judgment was handed down, so could not take it into account. Instead, at that time, they were bound by an EAT judgment - Kimberley Group Housing Ltd v Hambley and Others ("Kimberley") which established that when an SPC takes place an employee can only transfer to one transferee - whichever one that took on the greater part of the pre-transfer activities.

In McTear, a local authority had re-tendered work for replacement of kitchens within its social housing stock. Pre-transfer the work was carried out by a single contractor. Latterly the contractor had split the employees carrying out the work into two autonomous teams. When the work was re-tendered the local authority split it on geographical lines into two contracts which were awarded to two new contractors. The new transferee contractors did not take on all the transferor's employees and some brought tribunal claims. The employment tribunal found there had been an SPC and allocated the employees to the new contractors according to which team they were in while working for the transferor.

Both transferees appealed arguing that the tribunal had failed to consider the individual position of the employees and that some of them may not have transferred at all. When the Govaerts judgment was handed down a further ground of appeal was added arguing that the proposition in Kimberley regarding transfer to only one employer must now be in doubt.

As the Govaerts judgment did not consider SPCs, it did not set a precedent that had to be followed. However, the EAT "saw considerable force" in the argument that it would be undesirable for there to be a difference in approach taken in the application of TUPE dependent upon whether the relevant transfer in question was a business transfer or an SPC. The EAT held that there was no reason in principle why an employee may not, following an SPC, hold two or more contracts of employment with different employers at the same time, provided that the work attributable to each contract was clearly separate from the work on the other(s) and was identifiable as such. The case was therefore remitted back to the employment tribunal to consider the application of the principle in Govaerts to each of the claimants.

This case has the potential to take what is already a complicated area of the law and make it more so. In Govaerts, the ECJ caveated the judgment to the extent that if a division of the contract was impossible or would adversely affect the rights of the employee, then the transferees would be regarded as responsible for any consequent termination of employment. This proviso is likely to be significant as it seems likely that in many cases division of the contract of employment would cause a worsening of employees' working conditions or have an adverse effect on their rights. As terminations in these circumstances may well be considered automatically unfair in the absence of an Economic, Technical or Organisational (ETO) reason, transferees will need to ensure they have adequate indemnities in place to protect their position.

Ferguson & Others v Astrea Asset Management Limited UKEAT/0139/19/JOJ

TUPE is well known for protecting employees from dismissal and preventing variations to employees' contracts if the sole reason for the change is a transfer. The voiding of such variations was legislated

for in Regulation 4(4) of The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("the Regulations"). The earlier 1981 incarnation of the Regulations did not contain a directly comparable provision. Cases decided under the 1981 Regulations indicated that where beneficial changes were made, employees may be able to cherry pick either their pre-existing contractual term or the new term if they thought it more beneficial.

In Ferguson & Others v Astrea Asset Management Ltd, the employees in question were both employed by and owners of Lancer, a "single client" company that managed the Berkeley Square Estate. When Lancer was served notice that management of the estate was to transfer to Astrea the employees (using their status as owners of the company) updated their contracts to provide for significantly enhanced terms including guaranteed bonuses and new termination provisions, assuming these liabilities would be picked up by Astrea.

On the transfer taking place the employees were dismissed, ostensibly for gross misconduct relating to the changes made to the contracts. They made claims to the employment tribunal for (amongst other things) unfair dismissal and payment of their new contractual notice provisions. Astrea argued that Regulation 4(4) rendered the changes void. The Employment Judge found that although two of the claimants were successful in their unfair dismissal claims, the contractual variations were void under Regulation 4(4).

The Claimants appealed on various grounds. In relation to the Regulation 4(4) finding, they argued that it was only intended to invalidate variations that were adverse to an employee. They relied upon EU case law stating that where the Acquired Rights Directive was applicable workers could not, even voluntarily, diminish their rights. They also relied on the case of Power v Regent Security (which was decided under the 1981 Regulations) in which the employer was prevented from seeking to avoid a variation raising the employee's retirement age.

The EAT rejected the claimant's submissions. The Power case could be distinguished as it was decided under the different provisions of the 1981 Regulations and related to variations introduced by the transferee after the transfer, rather than the employee/owners prior to the transfer. The proposed solution in that case - letting the employee decide whether to rely on the old or new contractual term - would not always be satisfactory and opened the door to contractual rights being decided upon by the subjective (and possibly changing) view of employees. Further, the Court in Power did not go so far as to say that variations that are advantageous to an employee cannot be deemed void. Instead, it confirmed that transferees and employees are not prevented from agreeing beneficial terms by reason of the transfer. The EAT concluded that Regulation 4(4) applies to any variation whether adverse or beneficial.

BEIS guidance on the 2006 Regulations that was published in January 2014 states that an employer may vary terms and conditions when changes are entirely positive from an employee's perspective, and that such changes are not prevented by the Regulations. However, the EAT noted this guidance as being of only limited persuasive value. The EAT was also mindful of the EU case law confirming the Acquired Rights Directive seeks to ensure a fair balance between the interests of transferring employees and the interests of the transferee. It was clear in this case that the changes went beyond safeguarding the rights of transferring employees and were harmful to the transferee.

This case does not necessarily spell the end of beneficial changes being made to contracts. The facts in this case, where the employees who transferred were able to amend their own contracts in advance of the transfer, are unusual. Depending on the particular circumstances, where changes are made post transfer with the agreement of the transferee, beneficial changes may still be possible.

Aylott v BPP University Limited Cases 2201378/2019 & 2201817/2019

According to the 2020 annual Simplyhealth/CIPD Health and Well-being at Work survey, mental ill-health remains the most common cause of long-term absence. The survey also highlighted that not enough line managers are being equipped with the necessary knowledge and skills to support good mental health in the workplace. The case of Aylott v BPP University Limited is one example of where better informed line managers could have been of real assistance.

Mrs Aylett suffered from Autistic Spectrum Disorder, anxiety and depression. She had a difficult home life combined with working long hours in a stressful job. Despite clear indications from Mrs Aylott that she was not coping with work pressure she was subjected to some ill-thought out actions by her employer. These ranged from her being described as "mad as a box of frogs" to being told she should not refuse work or indicate she was not managing, and that she should be able to prioritise her work at her age. Significantly after requesting a referral to Occupational Health (OH) and attending a sickness review meeting where she disclosed she had suicidal thoughts, she was informed that discretion to extend contractual sick pay would not be used (a decision taken on the basis she was off sick with "stress"), and that her feelings of stress were "her perception". She was, instead, offered a settlement agreement and re-engagement as a contractor. He request for OH support was not dealt with.

She subsequently resigned and claimed constructive dismissal and a number of disability discrimination claims. Although claims for harassment, failure to make reasonable adjustments and indirect disability discrimination failed, her constructive dismissal claim and two claims for discrimination arising from disability were successful. The constructive dismissal claim was one based on a fundamental breach of trust and confidence by the employer. The cumulative effect of nine separate incidents including failures to address her workload or heed indications she was not coping, not extending the sick pay and a superficial grievance investigation all contributed to the fundamental breach, as did the attempt to steer the claimant towards termination of employment under a settlement agreement rather than referring her to occupational health. It became clear in evidence that the decision to push Mrs Aylott towards a settlement agreement was taken by the HR business partner dealing with the matter, however, he did not give evidence to the tribunal.

Discrimination arising from disability occurs where a disabled person is treated unfavourably because of something arising in consequence of their disability, and the treatment is not justified. The Employment Judge found that the adjustments Mrs Aylott needed to accommodate her mental health (a referral to OH) and the stigma of mental health arose from her disability, and that the failure to make that referral in a timely manner was unfavourable treatment. The tribunal found that the failure to obtain OH advice was because the HR business partner did not want to make adjustments to Mrs Aylott's role, choosing instead to focus on termination of her employment.

The Employment Judge also concluded that Mrs Aylott's absence was something arising from her disability. They found that the HR business partner's focus on termination of employment under the settlement agreement was because of Mrs Aylott's sickness absence, and the failure to offer alternatives (in this case an OH referral) was unfavourable treatment.

This case has been appealed to the EAT. It is also of note that the HR business partner was not available to give evidence and that the employer failed to make any attempt to argue that the treatment of Mrs Aylott was justified. However, even taking that into account what is clear is that had those involved on the part of the respondent been better able to properly deal with Mrs Aylott's situation then the matter could have had a completely different outcome.

Properly managing mental health and well-being in the workplace has not only been shown to improve morale, retention of staff and productivity, it is also now something that employers are being judged upon by customers, clients and potential employees. Line managers and, as in this case, HR professionals need to ensure that they are able to identify employees who may be struggling and understand and be able to fulfil their legal obligations towards those employees. Appropriate training is an essential part of making that happen.

Argos Limited v Kuldo UKEAT/0225/19/BA

Failure to follow proper process when carrying out redundancies can result in successful unfair dismissal claims. Unusually, for a redundancy situation, in Argos Ltd v Kuldo the employee's claim was for constructive dismissal as a result of the failures in the procedure.

Ms Kuldo was employed by Argos as a Costs Manager when the company was acquired by Sainsbury's plc. Ms Kuldo's role was identified as being at risk of redundancy when the finance function was restructured. She and a colleague were pooled together and told they would both be considered for a newly created role of Central Costs Manager. She was also given information about

proposed collective and individual consultation processes, and given a job description for the new role.

The colleague subsequently resigned leaving only Ms Kuldo in the running for the new role and she was advised that she would therefore be "mapped" into it. Mapping was the process adopted by Argos to decide if an existing employee's role was redundant or whether there was a role in the new structure into which they could transfer. For mapping to take place Argos applied a 70:30 metric - there must be no more than 30% difference between the old and new roles.

Argos were of the view that in this case the two roles were sufficiently similar to map Ms Kuldo into it, and that she was no longer at risk of redundancy. However, Ms Kuldo disagreed believing the new role to be of lower status, less responsibility and including a change of job content. She believed it to be more than 30% different to her original role. She set this out in writing, including some counter proposals and this was treated as a grievance by Argos. After both the grievance and an appeal were unsuccessful she resigned.

An Employment Judge ("EJ") upheld a constructive dismissal claim finding that the new role was significantly different to the old role, and that the Respondent had breached the implied term of trust and confidence when it failed to consult, failed properly to assess the roles, and failed properly to address the Claimant's grievance and appeal. However, the EJ failed to deal with the two other claims made by Ms Kuldo - wrongful dismissal and redundancy pay. Argos appealed.

The EAT found that the EJ had made a number of errors in dealing with the case. Having found there was a constructive dismissal the EJ should have assessed separately whether the dismissal was fair or not and whether the alternative employment was suitable for Ms Kuldo. The reason for the dismissal should have been determined, as should whether that reason was a potentially fair one and whether the dismissal was reasonable in all of the circumstances. There was no evidence that the tribunal had done this and there had been an error in law to that extent. That error did not though undermine the finding of constructive dismissal. The case was referred back to the employment tribunal to determine whether the constructive dismissal was fair, and for the wrongful dismissal and redundancy pay claims to be heard.

Argos may well be on the back foot in persuading the EJ that the dismissal was fair in circumstances where there has been a fundamental breach of contract. It is essential that employers follow fair and reasonable procedures when carrying out redundancies, even in circumstances such as this when the intention of the employer was that the employee would continue in employment.

Allay (UK) Limited v Gehlen [2021] UKEAT 0031_20_0402

Equality and diversity training is something that many employers invest in, primarily in terms of ensuring a positive working environment free of discrimination. Often it will form part of induction training for new starts, or perhaps management training on promotion. However, in some cases, even when training has been provided acts of discrimination, harassment or victimisation may still occur.

In terms of the Equality Act 2010, any act carried out by an employee during the course of their employment is treated as also having been done by the employer - potentially rendering the employer vicariously liable for acts of discrimination. Employers can however avoid such liability if they can show they have taken "all reasonable steps" to prevent the employee from carrying out the discriminatory act.

In the case of Allay (UK) Limited v Gehlen, the claimant had been subjected to harassment related to race by a colleague, a Mr Pearson. The claimant raised this with his employer following his dismissal which had been for performance related reasons. The employer investigated the allegation, upheld it and required Mr Pearson to undergo further equality and diversity training. Mr Pearson had already undergone anti-bullying and harassment training and equality and diversity training in 2015, around 20 months before the claimant began his employment. During the investigation it became clear that three of the claimant's colleagues had been aware of the harassment when it happened but had not taken any action.

The employment tribunal dismissed a claim of direct race discrimination but upheld a claim of harassment related to race, holding the employer vicariously liable for the acts of their employee. The employer had attempted to defend the vicarious liability claim on the basis that the training Mr Pearson had attended in 2015 meant that they had taken "all reasonable steps" to prevent the harassment from occurring. The training covered harassment related to race, and also what employees should do if they heard unacceptable remarks or had it reported to them. However, the tribunal found that the reasonable steps defence was not made out. The training was "clearly stale". Mr Pearson had not recognised his banter as harassment and the other employees had failed to act when it was brought to their attention. In the circumstances it would have been reasonable to provide refresher training and consequently the employer had not taken "all reasonable steps".

The employer appealed to the EAT arguing that the effectiveness of training that has been given was irrelevant to the question of whether it was a reasonable step. The EAT disagreed finding that in assessing whether all reasonable steps had been taken, consideration had to be given to the nature of the training and the extent to which it was likely to be effective. Whether initial training was effective would impact on the question of whether all reasonable steps had been taken or whether more needed to be done.

The purpose of the reasonable steps defence is to encourage employers to take significant and effective action to combat discrimination. Although there was sufficient evidence for the employment tribunal in this case to have reached its conclusion that the training was no longer effective, the EAT criticised the tribunal for failing to consider in more detail the steps the employer had taken to prevent the harassment. The tribunal judgment seemed to accept that the training itself was adequate, just stale and in need of refreshment. The EAT meanwhile considered the training not to have been very impressive "even for a relatively small employer" and they also criticised the quality of the equal opportunities and anti-bullying and harassment policies. As the EAT observed, the less effective the training is, the more quickly it will become stale.

This case highlights the need for employers to invest in good quality training - something that is both educational and memorable - if they are going to attempt to rely upon the reasonable steps defence. Employers also need to consider whether refresher training is required and if so at what intervals - in this case the EAT had commented that the tribunal should, having found refresher training was needed, have considered the appropriate interval in its judgment. In what is very much a sign of the times, the EAT also drew an analogy with the COVID-19 vaccination programme. Not only are we interested in how effective the vaccine is in eliciting an immune response, but also how long that response will last. As with most things in people management, training is an ongoing requirement and not just a tick box exercise.

Future Cases To Look Out For

In 2021 we will see a number of interesting judgements from cases heard in 2020 including:-

Royal Mencap Society v Tomlinson-Blake - concerns the correct approach to determining whether employees who "sleep-in" in order to carry out duties (if required) engage in time work for the full duration of their night shift. The case was heard by the Supreme Court on 12 and 13 February 2020 and the judgment is expected to be handed down imminently.

The judgment is also awaited in Asda Stores Ltd v Brierley and Others which concerns comparators for equal pay claims.

There are also a number of high profile cases due to be heard in 2021 (although the hearing dates may be impacted by the pandemic), most notably:-

Lee v Ashers Baking Co Ltd and Others is still awaiting a date for a hearing before the European Court of Human Rights ("ECHR"), the Supreme Court having held that refusing to provide a cake supporting gay marriage is not discrimination. This is a case which deals with discrimination in terms of access to goods and services rather than employment law but it establishes precedents which may be relevant to future cases concerning discrimination in the employment field. Before the ECHR the case is brought against the UK rather than Ashers Baking Co Ltd, with Mr Lee claiming that in

reaching its decision the Supreme Court failed to give appropriate weight to his rights under the European Convention of Human Rights.

Kostal UK Ltd v Dunkley & Others is due to be heard on 18 May 2021. This addresses the tricky issue of when employers can approach staff directly to agree temporary changes to contracts following the breakdown of negotiations with unions under collective bargaining arrangements.

A hearing is fixed for Flowers and others v East of England Ambulance Trust on 22 June 2021 which will consider whether holiday pay must include regular voluntary overtime.

On 23 and 24 June 2021, the Supreme Court is due to hear Chief Constable of the Police Service of Northern Ireland and another v Agnew and others which concerns whether a "series" of unlawful deductions from holiday pay is interrupted by gaps of more than three months.

Towards the end of the year - 9 November 2021 - the long running case of Harpur v Brazel will be heard by the Supreme Court. This looks at whether workers who only work part of the year should have their annual leave capped at 12.07% of annualised hours.

Permission is being sought to appeal to the EAT in Mackereth v The Department for Work and Pensions and another which found that a doctor who refused to address transgender patients by their chosen pronoun was not discriminated against on the grounds of religion or belief when his contract was terminated.

An appeal has also been lodged in the case of Davies v Scottish Courts and Tribunals Service which relates to a dismissal and disability discrimination which arose out of conduct caused by the symptoms of menopause.

16 March 2021