Annual Review of Employment Law

Northern Ireland 2019

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Part 1

Whilst the on-going Brexit related paralysis ensued for most of 2019 there was a hint in the dying embers of the Theresa May premiership that something "Taylor" related could be afoot and that potential employment law reform could be on the cards for mid-2020.

Summer 2019 saw no less than 10 consultation documents being issued in GB and draft legislation for April 2020 being made ready for implementation. Headline grabbers included – the abolition of the Swedish Derogation, the right to a statement of written particulars for workers from day one and extending the holiday pay reference period from 12 to 52 weeks. So far so gig, sorry, so good. But this was all before the high political drama began and consultations and draft legislation started to pale into insignificance.

In Northern Ireland we have been used to the expression "the political situation" as a by-word for everything from drama to delay to deadlock and it now seems that in GB they now have their very own "political situation" with drama unfolding on an almost daily basis.

From a Northern Ireland perspective, without a functioning Assembly and Executive for nearly three years now, any talk of reforming employment law in GB has simply meant an ever widening gulf in the differences in employment law between the two jurisdictions.

Employment law stakeholders in Northern Ireland have become somewhat used to being reasonable people and concerned onlookers (not so much on the Clapham Omnibus but more on the Translink Glider to NorthernIrelandise it) as the potential tide of reform ebbs and flows from week to week.

In the absence of a devolved Minister and minimal use of the much vaunted "Karen Bradley" legislation the NI inertia has sustained whilst in GB plans (be-they best laid or otherwise) to modernise employment law are very much behind the scenes as far as the Conservative Party are concerned.

Meanwhile the Labour Party held their party conference in late September and announced a 4 day week as part of their manifesto commitment should they be elected and this only served to highlight the strange days within which we live as three weeks beforehand the Office for Budget Responsibility forecast 40,000 job losses in Northern Ireland in the event of a no-deal Brexit!

As was the case in 2018 the judiciary kept working and making decisions that filled the policy void and none more so than the Supreme Court decision on the legality of the prorogation of Parliament. Meanwhile practitioners were perhaps just as interested in the "Agnew" decision (see Louise McAloon's analysis in your packs) regarding the calculation of holiday pay for PSNI officers who had been working and regularly achieving voluntary overtime.

Permission to appeal the "Agnew" decision to the Supreme Court was sought shortly after the NI Court of Appeal decision and we wait with bated breath to see the outcome. All the while the introduction of Early Conciliation in Northern Ireland loomed large throughout 2019 with the Labour Relations Agency meeting stakeholders to explain what the changes mean and make the case for a culture change regarding disputes and the clear benefits of early and alternative dispute resolution without resorting to the industrial tribunal.

It can be difficult to engage in conversation without looking through the lens of Brexit as it is now a code-word for uncertainty, polarisation and everything being contingent upon the type we are left with. Case law has always filled in the gaps and 2019 was a bumper year for decisions from EAT to the Supreme Court that have meant practitioners do not operate in a vacuum and need to be aware of what the courts are now saying about real-life practical matters in the world of work.

On the statutory side there was a degree of predictability about what Statutory Rules and Instruments were coming down the track, especially on matters regarding – compensation rates, statutory payments, minimum wage (NB - the Chancellor Sajid Javid announcing at the Tory Conference in late September that it would be changed to £10.50 within the next 5 years and the qualifying age lowered from 25 to 21).

Other less predictable reforms related to technical Brexit related reforms largely around the use of language in a No Deal Brexit scenario and ramifications for things such as requests to establish European Works Councils after Brexit day (**which as it stands at the time of writing is 31/10/19 – so Withdrawal Deal Brexit/No Deal Brexit – Please delete as appropriate)** which will not be granted. This is not indicative of the beginning of a repeal of EU law but rather a pragmatic reality of no longer being in the European Union.

Rumours about not being able to stick by previous "levelling the playing field for workers" and fears about employment law de-regulation in order to make the UK an attractive investment in a WTO context abounded in the latter part of October 2019 with a "new Brexit deal" being touted as a basis for going forward.

With no devolved Assembly, all the tailored NI employment law as part of the review back in 2014 is now beginning to feel like a distant memory and it is difficult to ascertain a direction of travel save for consultations that may or may not result in reform.

Thus, as has been the case for the last nearly 3 years, we in NI again look to GB to see the direction of travel for employment law reforms in 2020.

However, in the meantime looking back –

Northern Ireland Statutory Rules and Instruments related to employment passed in 2019 – There was little in the way of anything new regarding employment related reforms apart from the old perennials associated with statutory rates – see below

The Social Security Benefits Up-rating Order (Northern Ireland) 2019

This is essentially the annual increases in core statutory payment rights such as maternity pay, shared parental pay, adoption pay, sick pay and so on. They normally take place over the course of the first week in April each year – for example see below –

> Article 8 increases the rate of statutory sick pay = £**94.25** from April 2019 (1/4/19)
>
> Article 9 increases the rate of statutory maternity pay = £**148.68** from April 2019 (6/4/19)
>
> Article 10 increases the rates of statutory paternity pay, statutory adoption pay and statutory shared parental pay = **£148.68** from April 2019 (7/4/19)

The National Minimum Wage (Amendment) Regulations 2019

These Regulations amended the National Minimum Wage Regulations 2015 ("the 2015 Regulations"). These Regulations came into force on 1st April 2019.

Regulation 2(2) increases the rate of the national minimum wage for workers who are aged **25 or over** ("the national living wage rate") from £7.83 to **£8.21** per hour (

Regulation 2(3) (a) increases the rate of the national minimum wage for workers who are aged **21 or over (but not yet aged 25)** from £7.38 to **£7.70 per hour**

Regulation 2(3) (b) increases the rate of the national minimum wage for workers who are aged **18 or over (but not yet aged 21)** from £5.90 to **£6.15 per hour**

Regulation 2(3) (c) increases the rate of the national minimum wage for workers who are aged **under the age of 18** from £4.20 to **£4.35 per hour**

The **apprenticeship rate** applies to workers within regulation 5(1) (a) and (b) of the 2015 Regulations. Regulation 2(3) (d) of these Regulations increases the rate for such workers from £3.70 to **£3.90 per hour**

Regulation 2(4) increases **the accommodation offset** amount which is applicable where any employer provides a worker with living accommodation from £7.00 to **£7.55 for each day that accommodation is provided**

The Employment Rights (Increase of Limits) Order (Northern Ireland) 2019

This Order increased, from 6th April 2019, the limits applying to certain awards of industrial tribunals, the Fair Employment Tribunal or Labour Relations Agency statutory arbitration, and other amounts payable under employment legislation, as specified in the Schedule to the Order.

Perhaps the most relevant figure in the annual "increase in limits" is that of a weeks' pay for the purpose, amongst other things, calculating statutory redundancy pay. See table with rates below –

There were also some quite “technical” Brexit related reforms pertaining to specific jurisdictions in 2019 but are predicated on the basis of a “No Deal” scenario –

The Employment Rights (Amendment) (Northern Ireland) (EU Exit) Regulations 2019

This statutory instrument (SI) makes amendments to employment law to reflect the withdrawal of the UK from the European Union (EU) in the event that there is no deal with the EU. The amendments ensure the legislation is clear by removing or amending language that is no longer appropriate once the UK has exited the EU.

This SI will come into force in the event that there is no Withdrawal Agreement between the UK and EU to ensure legal clarity and certainty. Amendments are being made to existing legislation to reflect the UK’s withdrawal from the EU and the European Economic Area (EEA).

Technical changes are made to the following legislation relating to Northern Ireland, repealing existing powers to make secondary legislation. • Article 111(3), Employment Rights (Northern Ireland) Order 1996 • Article 21(4), Employment Relations (Northern Ireland) Order 1999 • Section 46(4), Employment Act 2002 • Section 43(5), Employment Relations Act 2004

The following pieces of legislation are being amended to amend references that are no longer appropriate once the UK leaves the EU. These amendments are designed to ensure that the legal positions are clear, and the validity of these provisions continues post exit.

In Northern Ireland the relevant legislation is: • The Statutory Paternity Pay and Statutory Adoption Pay (Persons Abroad and Mariners) Regulations (Northern Ireland) 2002 • The Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 • The Fair Employment Tribunal (Rules of Procedure) Regulations (Northern Ireland) 2005 • The Statutory Shared Parental Pay (Persons Abroad and Mariners) Regulations (Northern Ireland) 2015 • The Working Time Regulations (Northern Ireland) 2016 • The Posted Workers (Enforcement of Employment Rights) Regulations (Northern Ireland) 2016

The amendments to the legislation listed above are intended to ensure that the existing statutory framework continues to operate equally effectively after exit. The amendments remove provisions which are no longer appropriate or relevant if the UK leaves the EU without a Withdrawal Agreement. This SI does not change the operation of these aspects of employment law otherwise.

The Employment Rights (Amendment) (Northern Ireland) (EU Exit) (No. 2) Regulations 2019

The Employment Rights (Amendment) (Northern Ireland) (EU Exit) (No. 2) Regulations 2018 make amendments to employment law to reflect the withdrawal of the UK from the European Union (EU) in the event that there is no deal with the EU. In this event, a number of elements of retained EU law may not operate effectively. The technical amendments ensure the legislation is clear by removing or amending language that is no longer appropriate once the UK has exited the EU. This SI does not make any amendments to existing policy.

The NI SI amends the following legislation: - Article 37 of the Employment Relations (Northern Ireland) Order 1999 provides a power to the Department for the Economy to make regulations in certain circumstances where EU obligations relating to the treatment of employees on the transfer of all or part of an undertaking or business do not apply. Article 37 has so far been relied upon to make the Service Provision Change (Protection of

Employment) Regulations (Northern Ireland) 2006 as the service provision element of the TUPE Regulations 2006 does not extend to Northern Ireland.

From here Article 15 of the Work and Families (Northern Ireland) Order 2006 contains a range of powers enabling the Department for the Economy to make regulations relating to annual leave. Paragraphs 2(g) and 4(b), which are to be repealed by this SI, contain specific powers which are defined by reference to EU obligations.

In simple terms this means that these amendments are intended to ensure that the existing statutory framework continues to operate effectively. The amendments remove provisions which are no longer appropriate or relevant if the UK leaves the EU without a Withdrawal Agreement. The SI does not change the operation of these aspects of employment law in other ways.

GB Only – 2019

Given that GB are already well down the road of things such as Gender Pay Gap reporting some of the 2019 reforms are based on initiatives that are now starting to bed in and as such 3rd snapshot gender pay reports were due in April as were re-visiting modern slavery statements.

In January 2019 regulations made under the Companies Act 2006 require UK listed companies with more than 250 UK employees to report annually on the pay gap between their chief executive and their average UK worker. The first reports are due in 2020.

After some initial confusion about the territorial application of reforms regarding payslips the Employment Rights Act 1996 (GB Only) was amended to incorporate two important changes

The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) Order 2018

The changes cover payslips for pay periods that begin on or after 6/4/19.

Firstly, payslips must include additional information for individuals whose pay varies depending on the number of hours that they have worked. Where an individual's pay varies by reference to time worked, the payslip must set out the number of hours paid for on this variable basis.

For example, where a worker has a fixed salary each month, but works variable overtime with additional pay at an hourly rate, the hours of overtime should be shown. The hours can be shown either as a single total of all such hours in the pay period, or can be broken down into separate figures for different types of work or different rates of pay.

Secondly, the right to a payslip is extended to all workers, rather than just employees, for pay periods that begin on or after 6 April 2019. The statutory vehicle for bringing this change into operation was **The Employment Rights Act 1996 (Itemised Pay Statement) (Amendment) (No. 2) Order 2018** effective from 6/4/19 in GB only.

Other GB only headline grabbing reforms regarding other areas included the pending introduction of parental bereavement leave via **The Parental Bereavement Leave Act (2019).**

The Act amends or inserts a number of provisions into the Employment Rights Act 1996 and the Social Security Contributions and Benefits Act 1992, providing powers to make regulations in relation to Parental Bereavement Leave and Pay for eligible parents.

The Act's powers allow provision to be made for the following:

- Parental Bereavement Leave - a right for employed parents to be absent from work for a prescribed period (to be set at a minimum of two weeks) following the death of a child. All employed bereaved parents who meet the eligibility conditions, regardless of how long they have worked for their employer, will be entitled to this leave.
- Parental Bereavement Pay – a right for those eligible parents who meet minimum requirements relating to continuity of employment (at least 26 weeks with their current employer) and earnings to be paid during that leave at the statutory flat rate (currently £140.98 a week) or 90% of average earnings (whichever is lower). In line with other entitlements to paid statutory leave, the Bill allows provision to be made for employers to reclaim payments from the Government.
- Employment protections – parents taking Parental Bereavement Leave will have the same employment protections as those associated with other forms of family related leave (i.e. Maternity, Paternity, Adoption and Shared Parental Leave). This includes protection from dismissal or detriment as a result of having taken leave.

GB Only – Early 2019 – A sneak peek at what is to come in 2020

At the beginning of 2019 the Government in GB made an announcement regarding legislating for the Taylor reforms which caught all parties a little unawares as the presumption was that Brexit trumped everything and that no new employment law reforms would be announced before March 2019.

- With a timetable focusing in on April 2020 the key headlines on the legislative front as derived from Taylor are as follows –
- The abolition of the "Swedish Derogation" in agency staff arrangements
- Aligning tax and employment law by bringing in legislation to "improve the clarity of the employment status tests"
- Zero hours contract workers will have the right to request "a more stable and predictable" contract after six months' service
- A written statement of employment rights will be a day one right for both employees and workers.
- The holiday pay reference period will be extended from 12 weeks to 52 weeks to smooth out the peaks and troughs of the level of "normal remuneration" (e.g. overtime and commission) so that individuals can take rest periods when they wish.
- There will be harsher penalties in the employment tribunals for employers who flout the rules. Guidance will encourage judges to use their powers to impose aggravated breach penalties on employers and the maximum penalty will be raised from £5,000 to £20,000
- Changing the rules on continuity of employment, so that a break of up to four weeks (currently one week) between contracts will not interrupt continuity
- A ban on employers making deductions from staff tips (presumably just by extending the existing unlawful deduction laws to cover tips, although the paper does not say this)

It was not that these were not discussed in the much debated Taylor Report but the subjects selected for legislation are not easy to address (or resolve long standing complexities associated with them).

Shortly after the headline announcements the following draft Statutory Instruments were released on Gov.UK –

The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 comes into force on 6 April 2020. It provides that the written statement of employment particulars must be given from day one of employment. It also changes the rules for calculating a week's pay for holiday pay purposes, increasing the reference period for variable pay from 12 weeks to 52 weeks.

The Agency Workers (Amendment) Regulations 2018 abolishes the Swedish Derogation for agency workers. It also comes into force on 6 April 2020.
The Employment Rights (Miscellaneous Amendments) Regulations 2019 extends a ban on employers making deductions from staff tips (presumably just by extending the existing unlawful deduction laws to cover tips, although the paper does not say this)the right to a written statement to workers (previously employees), increases penalties for aggravated breaches of employment law, and lowers the percentage required for a valid employee request for the employer to negotiate an agreement on informing and consulting its employees.

The details of the above will be detailed in **Part 2** of the Annual Review later is this narrative document.

GB Only – Summer 2019 – Consultations galore

Out of nowhere in the last days of the Theresa May Premiership, 10 separate consultation documents were launched, all of which were related to employment and to a large extent to the "Taylor Report".

In no particular order the consultations were (in summary) –

1. **Right to reasonable notice of work schedules and compensation for cancelled shifts**

Under proposed rules under consultation until October 2019, workers would be entitled to "reasonable" notice of their work schedule. What would be considered "reasonable" is as yet unclear, but the government has said employers would incur a penalty if they fail to do this.

If a worker's shift or hours are cut at the last minute the worker would be entitled to compensation, under a new rule also contained in the "one-sided flexibility" consultation. Options for the level of compensation awarded include: the amount the worker would have earned from the hours or shift; their national minimum wage (NMW) rate multiplied by the number of hours cancelled; and a set multiple of their NMW rate.

2. **Extended redundancy protections for new parents and neonatal leave**

Parental leave and pay

New and expectant mothers, and staff who have adopted or are taking shared parental leave, will soon be protected against being made redundant until six months from the date they

return to work. The redundancy protection period will also apply from the point they inform the employer they are pregnant.

However, the government acknowledged shared parental leave works differently to maternity and adoption leave in that it offers more flexibility around when the leave can be taken. The government will consider this when designing how protections can be implemented.

Parents of babies in neonatal care could receive neonatal leave and pay for as long as their baby is in hospital. One of the final consultations issued under Theresa May's government is seeking views on whether the rights should be targeted at the parents who are most in need of the additional time off work, such as those whose children have spent a minimum of two weeks in hospital or are most seriously ill; and whether it should be a right from their first day in their role or after a qualifying period of employment.

3. 'Flexible' parental leave and family leave and pay transparency

A parental leave consultation introduces the idea of "flexible" parental leave, where parents can take their entitlement it in days, half-days or blocks separated by periods of work; introducing a leave and pay entitlement for all working parents, not just employees; and the ability to transfer leave between parents. The government is also considering creating more incentives to encourage certain parental behaviours, such as fathers taking a greater role on the care of their child. Proposals include the requirement for organisations that employ 250 or more staff to publish their family leave and pay policies, including those related to flexible working. The government has also mooted the idea of a central database – similar to the gender pay gap reporting portal – for policies to be submitted. Employers could also be required to say whether flexible working was possible in their job adverts.

4. Banning NDAs from use in sexual harassment or discrimination cases

New legislation will be introduced to prohibit confidentiality clauses from being used to prevent individuals from disclosing information to the police, health workers or professionals such as doctors, lawyers or social workers. They will still be allowed for legitimate reasons, such as protecting trade secrets or other confidential information, but individuals signing an non-disclosure agreements (NDA) will be entitled to receive independent legal advice on the limitations of the contract.

Sickness absence and pay

5. Phased returns for workers on sick leave

Employees returning from a period of sickness absence will be entitled to a flexible, phased return to work, earning partly statutory sick pay (SSP) and partly their usual wages, under plans revealed in a consultation by the Department for Work and Pensions and the Department of Health and Social Care. The government will also fine organisations that do not pay staff the SSP they are owed.

6. Right to request workplace adjustments

Employees with health conditions will also be given the right to request workplace adjustments on health grounds under the DWP's and DHSC's plans. An organisation would have to demonstrate it has a legitimate business case for its decision if a request is refused.

7. **Modern slavery reporting in the public sector**

Tougher measures to tackle modern slavery include extending the requirement to publish modern slavery statements to the public sector; ensuring organisations publish by a single annual deadline; and the requirement to publish statements on a single online registry. The Home Office consultation runs until September.

8. **Ex-offenders no longer need to disclose certain lengthy sentences**

New laws will be introduced to remove the requirement for rehabilitated offenders to disclose some sentences of over four years to employers after a specified time has passed. Currently where a sentence of more than four years is passed, people must disclose it for the rest of their lives. Detailed proposals will be released later this year. The relaxation will only apply to non-sensitive roles, with stricter rules for those working with children or vulnerable adults, in national security roles, or positions of public trust.

9. **Creation of a single employment enforcement body**

The government has launched a consultation on the proposals for a new Single Labour Market Enforcement body saying it would create a strong, recognisable single brand and would make it easier for individuals to know where to go for help and make it easier to support businesses comply with the law.

10. **Stronger sexual harassment protections**

The Government Equalities Office has published a consultation on plans to strengthen protections against sexual harassment at work, including harassment from third parties. It is asking for views on whether it should introduce a new duty on employers to prevent staff from being harassed; whether legal protections should be extended to volunteers and interns; and whether the law around harassment by customers and other third parties should be clarified.

Matters of a European nature 2019

Given that these matters may be of less significance in around three weeks it is worth pointing out that in 2019 there were some important developments at EU level including –

The **European Labour Authority** (ELA) was announced in September 2017 by President Juncker in his 2017 State of the European Union address to ensure that EU rules on labour mobility be enforced in a fair, simple and effective way**.**

Following consultations and an impact assessment, a legislative proposal was presented in March 2018. The Commission, the Parliament and the Council reached a provisional agreement on the proposal in February 2019. The Parliament and the Council have now formally adopted the Regulation establishing the European Labour Authority, which will enter into force shortly.

The Authority should be up and running in 2019 and reach its full operational capacity by 2024. Bratislava will host its seat.

The role of the ELA is –

- Facilitate access for individuals and employers to information on their rights and obligations as well as to relevant services
- Support cooperation between EU countries in the cross-border enforcement of relevant Union law, including facilitating joint inspections.
- Mediate and facilitate a solution in cases of cross-border disputes between national authorities or labour market disruptions.
- The European Labour Authority will be a permanent structure, made up of approximately 140 staff members, some of them seconded from EU countries and acting as National Liaison Officers.
- It will be steered by a Management Board, with representatives from each EU country and the European Commission.
- A dedicated Stakeholder Group including EU social partners will provide further expertise and have an advisory role.
- It will have an annual budget of approximately EUR 50 million.

The ELA will –

- Provide national authorities with operational and technical support to exchange information, develop day-to-day cooperation routines, carry out inspections and, if necessary, settle disputes.
- Ensure synergies with existing EU agencies by relying on their expertise in terms of skills forecasting, health and safety at work, the management of company restructuring and tackling undeclared work.
- Integrate a number of existing committees and networks, thereby simplifying cooperation amongst EU countries and eliminating fragmentation.

Regarding amendments to the **Posted Workers Directive** – The Directive has been under review and it has now been decided that based on the evaluation exercise, the Commission report concludes that it is not necessary to propose amendments to the directive at this stage. Nonetheless, the implementation by Member States can be improved in some areas, such as decreasing the administrative burden.

The Commission will continue working with the Member States to ensure that the directive is completely and correctly transposed and applied across Europe.

Top 10 cases of 2019

10. Kuteh v Dartford and Gravesham NHS Trust

Religion in the workplace has always caused problems and the increasing body of case law addressing the “clash of rights” especially on things such as freedom of expression has grown exponentially in recent years. Personal religious conviction is one thing but crossing the line into proselytising is another and the lines are now quite clear.

The Claimant was a nurse, working in a pre-operative assessment role. During assessments, she often took the opportunity to talk to patients about religion as it was a requirement to ask about it on a pro-forma. Complaints were made about this by patients, leading the matron to speak to the Claimant about the inappropriateness of her actions. She assured the matron she would no longer initiate conversations with patients about religion. She then breached that assurance, including by saying prayers for patients and asking a patient to sing a psalm with her. Disciplinary proceedings were brought and the Claimant was dismissed.

The employment tribunal found the dismissal fair and the EAT refused permission to appeal. On appeal against that refusal, the Claimant complained that the tribunal had failed to distinguish between true evangelism and improper (my emphasis) proselytism in considering the impact of the right under Article 9 of the European Convention of Human Rights to manifest religion on the fairness of the dismissal.

The Court of Appeal dismissed the appeal. The Court considered that the Claimant had acted inappropriately both by improperly proselytising to patients and by failing to follow a lawful and reasonable management instruction. Given that the disciplinary process was fairly carried out and the conclusion reached was reasonable, the appeal was dismissed and the fairness of the dismissal was upheld.

Evangelism in the workplace is not unknown in Northern Ireland and many organisations have religious underpinnings but as this case shows lines can be easy to cross.

9. Tillman v Egon Zehnder

This is an “interesting” case not least because it largely revolves around the word “interest”. It is not uncommon to find detailed restrictive covenants contained within the contract of employment. Many such clauses extend to the post-termination situation and whilst these are not unusual the reasonableness of the restriction always needs to be assessed by the affected employee - preferably in advance of signing the contract.

The enforceability of such clauses has always provided fertile ground for litigation with the courts grappling with interpretation and what is reasonable and enforceable and what is unreasonable and thus void.

The question in this case related to a particular word within a clause, raising the question about whether the offending word could be extracted from the clause and leave the clause still enforceable minus the “offending” word. Enter that writing implement of legal folklore – the “blue” pencil (The colour is important – don’t ask why)

The Respondent left her employment with the Appellant, and agreed to comply with all covenants in her contract apart from a non-competition covenant which stated that she should not "directly or indirectly engage or be concerned or interested" in any competing business; she alleged that this covenant was in unreasonable restraint of trade and thus void.

The High Court granted an interim injunction restraining the Respondent from working for a competing business, but the Court of Appeal considered that the words "or interested" would prohibit even a minor shareholding and refused to sever those words; accordingly, the covenant was held to be void as an unreasonable restraint of trade. The Appellant appealed, and raised the issues whether (1) the covenant fell entirely outside the restraint of trade doctrine, (2) the words "interested in" prohibited any shareholding, and (3) the correct approach to severance was applied.

The Supreme Court held that (1) the restraint of trade doctrine did apply on the facts, and (2) the natural meaning of "interested" included shareholding so that, subject to severance, the covenant would be void as an unreasonable restraint of trade; however, (3) on the facts, and preferring the approach in Beckett Investment Management Group Ltd v Hall [2007] ICR 1539 (CA) to Attwood v Lamont [1920] 3 KB 571 (CA), the words "or interested" were capable of being removed from the covenant without the need to add to or modify the wording of the rest of the covenant, and removal of the prohibition against the Respondent being "interested" would not generate any major change in the overall effect of the restraints.

Consequently, the High Court injunction would be formally restored, subject only to the removal of the words "or interested", even though the contractual period of restraint had since expired.

Superior courts grappling with interpretation, scope and reasonableness is not uncommon but what is less common is when it turns simply on one or two words and whether excising them would leave the clause affected or unaffected in terms of its over-riding intention and thus taking a new stance on the Attwood principle from the 1920's and a more pragmatic look at whether the clause goes further than necessary to protect legitimate business interests.

8. Patel v Folkestone Nursing Home Ltd

Employment lawyers and HR practitioners will be well versed in the construct known as "the vanishing dismissal" where in essence a decision to dismiss is overturned in an internal appeal. The picture can become complicated when there are more than one "charges" against the employee and this was a feature in this case. In Patel v Folkestone Nursing Home Ltd [2018] EWCA Civ 1689 the Court of Appeal has held that there was no dismissal where a contractual disciplinary appeal was successful.

The Court of Appeal has upheld the decision of the Employment Appeal Tribunal that there was no dismissal where an employee who, following his appeal under a contractual disciplinary procedure, was told that the decision to dismiss him had been revoked. This was despite the appeal only addressing one of the two disciplinary allegations that had resulted in his dismissal.

The Claimant was a care assistant, dismissed over two charges of misconduct. He appealed under a contractual procedure, and was told by letter that his appeal had been successful, but without being told if one allegation had been overturned. The Claimant refused to return to work and claimed unfair dismissal.

The Court of Appeal held that if an employee has a contractual right to appeal a disciplinary sanction, it is implicit in the contract that if an appeal is pursued and is successful, then the employment relationship is to be treated as having remained in existence throughout. The dismissal will be treated as having no effect.

However, the Court of Appeal noted the fact that the employer's letter allowing the employee's appeal did not deal with one of the allegations against him. It was held that it was arguable that this lack of clarity and failure to resolve that issue was a breach of the implied term of trust and confidence that might justify the employee treating himself as constructively dismissed. Since the employer did not appear at the hearing, the parties were invited to make written submissions as to whether the appeal should be allowed on this other basis.

In effect, this decision means that a successful appeal will revive the employment relationship and 'wipe out' the dismissal, leaving the employee unable to pursue any unfair dismissal claim. The concept of effectively leaving charges on the books but unresolved either by accident or design is fraught with legal risk and the importance of disaggregating minor misconduct (s) and dealing with them proportionately and in accordance with the law and relevant codes cannot be over emphasised.

This decision does serve as a reminder to employers to follow a fair procedure and address all relevant issues at appeal stage, otherwise an employee may still be able to claim that they have been constructively dismissed on the basis that the wide ranging and potentially contract ending the implied duty of trust and confidence has been fundamentally destroyed.

7. Phoenix House v Stockman

Surreptitious (or secret) recording of internal hearings has become somewhat of a hot topic in recent years with EAT decisions (think Punjab National Bank v Gosain back in 2014) even giving direction on admissibility as evidence in tribunal depending on things such as who was actually present in the room whilst the recording is taking place. The issue of what happens to the implied duty of trust and confidence in such cases always looms large as does the question of whether such behaviour is explicitly classified as a gross misconduct offence.

This case involved an employee who had been the financial accountant of a charity but who had obtained a lower position following a reorganization. She alleged wrong-doing on the part of her employer i.e. that the Director of Finance had treated her differently and that the restructuring process had been biased against her. Following a difficult meeting, she was interviewed by an HR representative.

She secretly recorded that meeting. The recording was not known about until it came to light in the discovery process of tribunal proceedings - the claimant had not attempted to use it internally - but, nonetheless, internal action was taken. After disciplinary action, counter grievance, absence from work and a failed attempt at mediation, the claimant was eventually dismissed due to an irretrievable breakdown in the relationship, even though the claimant had said she could put everything behind her and work professionally with the Director of Finance.

The claimant won her unfair dismissal case, although the tribunal refused to order her preferred remedy of reinstatement. The employer appealed the decision and argued that no award of compensation should have been made because, had they known about the covert recording, the claimant would have been dismissed for gross misconduct. However, it came out in evidence at the EAT that, not only had covert recording of meetings not been set out as an offence in the disciplinary procedure before dismissal, it had still not been added as an offence at the time of the EAT appeal.

The EAT concluded the tribunal had been correct to find in favour of the claimant and also that it had been correct to not award reinstatement or reengagement. She had not intended to use the recording to entrap the employer but there had been a breakdown in the

relationship - reinstatement was not appropriate. A 10% reduction in compensation could not be interfered with.

In relation to covert recordings, the EAT concluded that the action may, or may not, be a disciplinary offence, although the EAT also said, "...we consider that it is good employment practice for an employee or an employer to say if there is any intention to record a meeting save in the most pressing of circumstances; and it will generally amount to misconduct not to do so."

The EAT offered further guidance:

"We do not think that an ET is bound to conclude that the covert recording of a meeting necessarily undermines the trust and confidence between employer and employee to the extent that an employer should no longer be required to keep the employee. An ET is entitled to make an assessment of the circumstances.

The purpose of the recording will be relevant: and in our experience the purpose may vary widely from the highly manipulative employee seeking to entrap the employer to the confused and vulnerable employee seeking to keep a record or guard against misrepresentation. There may, as Mr Milsom [counsel for the employer] recognised, be rare cases where pressing circumstances completely justified the recording.

The extent of the employee's blameworthiness may also be relevant; it may vary from an employee who has specifically been told that a recording must not be kept, or has lied about making a recording, to the inexperienced or distressed employee who has scarcely thought about the blameworthiness of making such a recording. What is recorded may also be relevant: it may vary between a meeting concerned with the employee of which a record would normally be kept and shared in any event, and a meeting where highly confidential business or personal information relating to the employer or another employee is discussed (in which case the recording may involve a serious breach of the rights of one or more others).

Any evidence of the attitude of the employer to such conduct may also be relevant. It is in our experience still relatively rare for covert recording to appear on a list of instances of gross misconduct in a disciplinary procedure; but this may soon change."

6. Pazur v Lexington Catering Services Ltd

Being denied a rest break is one thing, and then refusing to return to work until you have your rest break (because of the previous denial) is another thing entirely, indeed it is detrimental treatment if it the refusal is met with a threat to dismiss.

The Claimant, Mr Pazur, worked for Lexington Catering Services Ltd, as a kitchen porter and was assigned to work for various clients at different locations each week.

In November 2017, when working on site for a client, the Claimant was denied a rest break of at least 20 minutes during an 8 hour shift, contrary to reg.12 of the WTR 1998. His line manager and the client's chef had asked him to stay longer, but he refused. The Claimant complained to the Respondent about the incident, but this was not followed up.

On 4 December 2017, the Claimant was reassigned to the same client but refused to go, citing the client's earlier refusal to let him have his rest break. The Respondent sent the

Claimant a text, threatening to dismiss him if he did not go. The Claimant did not go and was subsequently dismissed.

The Claimant claimed that the threat of dismissal was an unlawful detriment under s.45A(1)(a). He also claimed that his subsequent dismissal was automatically unfair under s.101A, and that it was a wrongful dismissal.

The Employment Tribunal (ET) rejected both the unlawful detriment and automatic unfair dismissal claims.

The ET acknowledged that the refusal of the rest break was the reason why the Claimant had refused the request to stay at work longer during the November assignment, and it was the very thing he had complained about after the shift. However, he had also referred to the chef being unpleasant to him, which the employer submitted was a reason which did not attract the protection of the relevant statutory provisions. The ET was therefore not satisfied that the Claimant had provided sufficient evidence to establish his refusal to return.

Regarding unfair dismissal, the Tribunal held that the dismissal had taken effect when the Claimant sent the text message and accepted that the reason for dismissal was because the Claimant refused to return to the client. However, it considered that there was insufficient evidence about why the Claimant refused and felt unable to conclude that it was because he expected the chef to refuse him his break again. However, the ET upheld the Claimant's claim of wrongful dismissal, finding that there was no proper basis for his summary dismissal.

The Claimant appealed to the Employment Appeal Tribunal (EAT).

The EAT confirmed that the Claimant would have had to explicitly refuse to comply with the employers requirements to work in breach of the WTR to be successful in his detriment and automatic unfair dismissal claims.

The EAT held that the ET had erred in concluding that there was insufficient evidence of the reasons for the Claimant's refusal. The ET had found that the threat of dismissal was made because the Claimant refused to return to the client. If the Claimant's reason for refusing was because it would mean complying with the requirement to forego his rest break under the Regulations, he would be entitled to the protection of s.45A(1)(a) and s.101A, but if it was for some other reason, he would not. The ET had made a clear finding that the Claimant refused to return because he had been denied his break and because there was a breakdown in his relationship with the chef. The two reasons could be seen as one and the same and it was inconsistent for the ET to have concluded that there was insufficient evidence as to the reason for refusal. It was also clear that the Claimant's refusal had materially influenced the Respondent's threat and the detriment claim therefore succeeded. Accordingly, in respect of the detriment claim, the ET's judgment was set aside.

With regards to unfair dismissal, the issue was whether the Claimant's refusal to return to the Claimant was the reason, or principal reason, for the dismissal, rather than a material influence. The ET had not expressly stated its view. It could find that it was the breakdown of the relationship with the chef which had weighed with the employer at the time of dismissal, or that the dismissal was partly based on an earlier incident when the employee had refused to return to the site of another client. The point was remitted back to the ET to determine whether the Claimant's refusal, or proposal to refuse, was the reason or principal reason for his dismissal.

5. Hargreaves v Governing Body of Manchester Grammar

Within the employment lawyers and HR practitioners fraternities it has long been accepted that high quality employment investigations are essential to demonstrating the underpinning substantive fairness of process and any subsequent decisions arising thereof.

However, high quality should not be conflated with acquiring the “smoking gun” as it is a common misunderstanding that the investigator must have irrefutable proof in the form of cast iron evidence on which to form the basis of a recommendation. If there has been a witness or perhaps two witnesses who say they did not see anything, what is the effect of not including their existence in the report if it does not impact on the outcome?

Sometimes a case will turn on whose version of events is believed on the balance of probabilities and that such a belief is genuine and reasonable in all the circumstances.

In this case Mr Hargreaves was employed as an art and design teacher at Manchester Grammar School. He was dismissed for allegedly ‘grabbing and shoving’ a pupil in the corridor. It was also alleged he had pushed two forefingers against the pupil’s throat.

Mr Andrew Smith, Deputy Head of the School who had overall responsibility for safeguarding and pastoral care, launched the initial investigation into the allegations. He was obliged to inform the local authority’s designated officer, Ms O’Hagan, about the allegations.

A number of witnesses conceded they had not seen the incident, however, the school’s proctor, Dr Burch, said that he had spoken with Mr Hargreaves after the purported incident, claiming he had been very ‘agitated’. Dr Burch claimed the pupil in question appeared ‘subdued and upset’.

Mr Hargreaves denied the accusations, claiming he had simply grabbed the pupil’s backpack in order to prevent him from rugby tackling another pupil. He was invited to an investigation meeting, the findings of which Mr Smith outlined in a report. The report summarised the allegations, the investigation, points of disagreement and dispute and set out concluding remarks over four pages. He concluded:

"This investigation has identified two polarised accounts of the incident. Either there has been a malicious allegation of physical abuse levelled against JH or he has acted in a way that could be viewed as serious professional misconduct.

“In my role as Investigating Officer my recommendation is this incident is progressed to the disciplinary stage for further consideration by the High Master.”

A disciplinary panel upheld the allegations leading to notification of his dismissal. The claimant appealed the findings, claiming his “hard-won career was potentially now in ruins,” yet the decision was upheld.

The initial Employment Tribunal ruled the investigation was not biased and held the decision to dismiss fell within the band of reasonable responses. The EAT was in agreement. Judge Eady said:

“Weighing up all the evidence, I come to the conclusion that it is more likely than not that the claimant did… engage in unwarranted and unreasonable physical conduct by pushing Pupil A up against a wall and pushing his fingers against Pupil A’s throat.

This was gross misconduct. The respondent was not, therefore, in breach of contract by dismissing the claimant without notice. I conclude that the complaint of wrongful dismissal is not well founded."

There is little doubt that some jobs/careers/professions seem to always be on the back foot when it comes to "one word against the other" based investigations and this is largely due to the nature of the relationship (and where the balance of "power" lies therein) between the employee and those they provide their service to – teachers and pupils, doctors and patients, and so on.

That is why trade union representatives will make the reasoned argument that the investigator should go the extra mile in such profession-based investigations as the outcome could provide the basis of a career ending decision by a disciplinary panel.

In this case it was held to be within the band of reasonable responses for the school to decide not to put forward to Mr Hargreaves and the disciplinary panel details about interviews with those who had seen nothing. The excluded evidence was immaterial and could not assist the disciplinary panel.

It is worth remembering that a court or tribunal will not and must not substitute its view for that of the employer, but rather apply the test of reasonableness (think "Hitt") to the investigation process and make a decision accordingly (not on what they – as a tripartite industrial jury would have done have done in the same circumstances). That being said this case does not give a green light to withholding witness statements as this may well affect the fairness of a case with different fact sensitivities than this one.

4. Shelbourne v Cancer Research UK

Some employers saw the decision in this case as a very necessary antidote to the direction of travel that was seemingly being followed by the judiciary in cases such as Bellman v Northampton Recruitment (a case highlighted in last years' Annual Review). There have been a long line of authorities widening the potential field for employers to be held liable despite employer protestations regarding the matters that are out-with their ultimate control.

Indeed employer's representatives began to get very nervous about the Pandora's Box that had been opened by the "Mohamud" case regarding the circumstances in which an employer could be held vicariously liable for the acts of their employees.

Once again this is a Christmas party case and whilst it is readily accepted that this is an extension of the workplace the focus has moved away from "in the course of employment" and towards the meaning and interpretation of "connectivity" and "field of activities". This case brought a new dimension into the courts basis for its decision- that of "social justice".

In 2017 Mrs Shelbourne attended a Christmas party held at Cancer Research UK (CRUK)'s offices. The party had been organised by a group of volunteers within CRUK and was limited to staff, spouses and staff guests. CRUK hired two door staff for the party, primarily to stop employees and guests accessing the office's laboratories.

Mr Bielik, a visiting scientist who was not employed by CRUK but worked at the offices, attended the party and for reasons better known to himself decided to lift several members of staff up over the course of the evening. He attempted to pick up Mrs Shelbourne, slipped, and dropped her resulting in Mrs Shelbourne sustaining a serious back injury. Mrs Shelbourne sued CRUK for negligence.

The Courts considered that CRUK owed Mrs Shelbourne a duty of care; the issue to be decided was at what level that duty was set and for the Court to then determine if CRUK had breached the required standard of care.

At the centre of this deliberation was the provision of alcohol at the employer's event, to what extent this increased the risk factors and whether this increase meant the injury to Mrs Shelbourne was reasonably foreseeable by CRUK in the circumstances.

Mrs Shelbourne argued that, knowing alcohol was to be served, CRUK needed to meet a high standard of care which included attendees signing a declaration of good behaviour and providing trained staff to supervise the event. She also argued that CRUK should have engaged specially trained personnel to complete risk assessments to ensure the assessment covered all envisaged forms of inappropriate behaviour resulting from alcohol.

The Court rejected these arguments, noting that the extent of the duty of care was context-specific, and should include consideration of the social environment in which alcohol is served. For example, a nightclub admitting the general public would need to consider a wider range of alcohol-related risks than an office admitting select guests, particularly as in this case previous events of the same or similar nature had passed without incident.

The Court also had to consider what was just and reasonable and opined that a 'reasonable person of the early 21st Century' would consider Mrs Shelbourne's suggested requirements set the standard of care unreasonably high.

The parties accepted that the relationship between Mr Bielik and CRUK was capable of giving rise to vicarious liability. Therefore the main focus was whether it was just and reasonable in the circumstances to hold CRUK legally responsible.

The Supreme Court in Mohamud v WM Morrisons Supermarkets plc [2016] ruled that this requires analysis of the nature of the job done by the wrongdoer and whether there was 'sufficient connection' between the wrongdoer's job ('field of activities') and the wrongdoing. If the wrongdoing occurred within a field of activities carried out to further the employer's aims, the principle of social justice is applied to decide if the employer is vicariously liable.

Mrs Shelbourne argued Mr Bielik was acting within his 'field of activities' by drunkenly interacting with staff at the party and that this activity had been authorised by CRUK for its own benefit because it stood to gain from better employee morale forged at the party.

The Court considered Mrs Shelbourne's argument overstated the role of CRUK who had, in reality, organised the party via a group of staff volunteers at the expectation of staff, rather than because it expected to gain anything from the exercise. In the Court's view, Mr Bielik's field of activities was limited to his research at CRUK and this was not sufficiently connected to the events at the party to give rise to vicarious liability under the principle of social justice.

3. BA v BALPA

Currently in Northern Ireland industrial action of some form or another seems to be prevalent in most sectors and it is normally found to consist of “action short of strike” as opposed to the stereotypical concerted stoppage of work. Nonetheless work-to-rules, overtime bans and non-engagement are all forms of industrial action and are therefore subject to the same rigours of the law regarding the protocols on notice, ballots and so on.

In order for an employer to prepare for the impact of any form of industrial action, but more specifically all out strike, it is essential that the employer has some sort of idea of who is going the engage in the industrial action. The “who” question has oftentimes been a contentious issue as employers will often want to know which employees will be on strike.

This opens up the can of worms regarding – the extent of the breakdown of the details of type of employees (eg – short-haul pilots or long-haul fleet) and then into the contentious area of names of employees as de facto categories of employees? It has been very clear in any guidance on industrial action that the employer can only get details on categories as the naming of striking employees is a definite no-no.

Disputes at airline companies seem to have a particular bitterness to them and the industrial relations environment is something more akin to trench warfare that collective engagement, but they have quite a unique feature in that there are not a great deal of “categories of staff” who can engage in industrial action. Once you cover – pilots, cabin crew, ground staff you tend to run out of categories and as such that general characterisation of staff may be off little use to an employer trying to limit the impact of industrial action. Thus oftentimes it is a matter of requisite precision regarding categories.

This argument was at the centre of the recent BA case and like the “Tillman” case above this case involved the interpretation of one word, in this case – “categories”.

British Airways argued that the union had breached the labyrinthine balloting rules with which unions must comply before going on strike by not giving enough detail about the “categories” of pilots who were going on strike. The Court of Appeal, accepting BALPA’s arguments, held the union had provided sufficient categories.

The judgment has very important implications for the right to strike because it clarifies that unions are only required to notify employers of the general categories of employees who are to be balloted and go on strike. In the past employers have often stopped strikes by arguing that the details of categories were not specific enough

2. Raj v Capita Business Services

A man touching a woman at work without permission, or vice versa, should invoke the image of a shiny , crisp P45 in most peoples’ minds. Regardless of #metoo it has never been acceptable to touch someone without their consent and doing it in a workplace has just always been wrong regardless of how less enlightened those times were. But, and here is the relevant question - does it always constitute sex based harassment? Although this case is English and based upon the Equality Act 2010 it does raised some technical debate regarding the application of the hurdles of the law.

With the law on sexual harassment in GB currently under review (see material later on consultation on reforming sexual harassment and on non-disclosure agreements) questions abound regarding how fit for purpose the existing anti-harassment protections per se are. This case demonstrates how the current framework operates, sometimes with unexpected results.

The Claimant’s (female) manager had massaged his shoulders in an open office, which the tribunal found was unwanted conduct producing an offensive environment for him. The tribunal rejected part of the manager’s evidence about the massages, but accepted that the conduct was not related to the Claimant’s gender, the reason for it was misguided encouragement, so the harassment claim failed.

In applying the two-stage test in s136 *Equality Act*, the Claimant met stage one by proving unwanted conduct producing an offensive environment. By itself, this was not enough for stage two, to establish a prima facie case that the unwanted conduct related to a protected characteristic (here, the Claimant's sex); the burden of proof had not shifted to the Respondent to prove the reason for the conduct, and even then, the explanation was accepted.

There is no rigid rule of law that a Claimant, having met stage one, will shift the burden of proof for stage two if the tribunal finds that a Respondent has given wrong or untruthful evidence about conduct or why it happened.

This was a botched and misguided attempt at encouragement and was not related to sex (nor was it sexual in nature) and so the case failed.

The tribunal had not erred in law by failing to approach the case on the basis that the burden of proof had shifted to the Respondents to show that the conduct in question wasn't related to the Claimant's sex. The tribunal had anyway accepted a non-discriminatory reason for the conduct, so the appeal failed.

1. Harpur Trust v Brazel

This case was raised at last year's annual review but as the holiday pay calculation steam train began to gather momentum the case has taken on greater significance especially as it has now been confirmed at Court of Appeal. By way of recap the Claimant was employed all year round on a permanent contract but she was only paid for work done and for large parts of the year, i.e. the school holidays, she had no work (at least for the Trust) at all. She typically worked 32 weeks a year (although this varied) over 3 terms. Her holiday entitlement was calculated by the Trust that employed her in accordance with a method recommended by ACAS in its guidance booklet Holidays and Holiday Pay for calculating the pay of casual workers.

The Trust calculated the Claimant's earnings at the end of each term and payed her one-third of 12.07% (i.e. 5.6 divided by (52 - 46.4) multiplied by 100) of that figure. The Claimant argued at the ET that that method bears no relation to the calculation required by the WTR and produces a lower figure than taking the average weekly remuneration for the twelve weeks prior to the calculation date and then, by virtue of regulations 13 and 13A, multiplying it by 5.6. She argued that there is nothing in the relevant provisions requiring a different approach where the worker does not work a full year. The ET disagreed but this was overturned by the EAT. The Trust appealed.

The Court of Appeal dismissed the appeal. Despite the fact that the Claimant's method would result in her holiday entitlement being equivalent to 17.5% of her earnings, and could lead to a bizarre result (e.g. a person working just 1 week a year could claim 5.6 week's holiday) on any natural construction the WTR make no provision for pro-rating. They simply require, as the Claimant says, the straightforward exercise of identifying a week's pay in accordance with the provisions of sections 221-224 and multiplying that figure by 5.6.

The Brazel case has now been referenced in new Government guidance on calculating holiday pay but reforms to holiday pay reference periods are on the cards in GB as even the dogs in the street know that when the Supreme Court makes a final decision on holiday pay (as discussed by Louise McAloon earlier regarding the "Agnew" case) there will be a tsunami of cases for incorrectly calculated backdated holiday pay. In the meantime all zero hours

employees who do not work a full year must have their holiday pay calculated using the 12 week averaging method.

This will make for interesting times in NI if and when the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 comes into operation in GB but not here as it provides for the 52 week holiday pay reference period to be used.

Watch this space……

Other 2019 cases of note:

CCOO v DBS– Recording of hours case - Spanish trade union (CCOO) sought a declaration that a bank was under an obligation to establish a system to record the actual number of hours worked daily by its employees. It argued that the requirement for such a system derived not only from domestic law but also from the EU Charter of Fundamental Rights and the Working Time Directive.

Uncertain as to whether Spanish law was consistent with EU law, the matter was referred to the ECJ.

The Advocate General concluded that the absence of such a system makes it much more difficult for workers to enjoy the protection of the rights conferred on them.

He proposed that the ECJ should rule that both the Charter and the Directive require employers to record the actual number of hours worked each day for full-time workers who have not expressly agreed, individually or collectively, to work overtime. Member states should, however, be free to determine the method of recording hours worked.

The European Court of Justice has now concluded that the AG was correct - employers are obliged to set up a system for measuring actual daily working time for individual workers in order to comply with EU laws:

While it is true that the employer's responsibility for observance of the rights conferred by Directive 2003/88 cannot be without limits, it remains the case that the law of a Member State that, according to the interpretation given to it by national case-law, does not require the employer to measure the duration of time worked, is liable to render the rights enshrined in Articles 3, 5 and 6(b) of that directive meaningless by failing to ensure, for workers, actual compliance with the right to a limitation on maximum working time and minimum rest periods, and is therefore incompatible with the objective of that directive, in which those minimum requirements are considered to be essential for the protection of workers' health and safety (see, by analogy, judgment of 7 September 2006, Commission v United Kingdom, C-484/04, EU:C:2006:526, paragraph 43 and 44).

Consequently, in order to ensure the effectiveness of those rights provided for in Directive 2003/88 and of the fundamental right enshrined in Article 31(2) of the Charter, the Member States must require employers to set up an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured.

That conclusion is corroborated by the provisions of Directive 89/391. As is clear from Article 1(2) and (4) and recital 3 of Directive 2003/88 and Article 16(3) of Directive 89/391, the latter directive is fully applicable to matters of minimum daily and weekly rest periods and maximum weekly working time, without prejudice to more stringent and/or specific provisions contained in Directive 2003/88.

In that regard, the introduction of an objective, reliable and accessible system enabling the duration of time worked each day by each worker to be measured falls within the general obligation, for Member States and employers, laid down in Article 4(1) and Article 6(1) of Directive 89/391, to provide the organisation and means necessary for the protection of the safety and health of workers. Moreover, such a system is necessary in order to enable worker representatives, who have a specific responsibility in respect of the protection of the safety and health of workers, to exercise their right, laid down in Article 11(3) of that directive, to ask the employer to take appropriate measures and to submit proposals to it."

Egbayelo v Ocado Central Services – Trade union collective bargaining outcome incorporated into contract. The Claimant works for the Respondent as a personal shopper. She was notified, by way of an on-screen pop-up, that a provision for pay, hours and holiday entitlement to be determined by collective bargaining with the Union of Shop, Distributive and Allied Workers ("USDAW") had been incorporated into her contract, and she accepted pay increases negotiated on that basis.

However, when changes to holiday and pay entitlement were introduced, the Claimant sought a declaration from the ET as to whether those changes formed part of her terms of employment, and the ET held that they did. The Claimant appealed principally on the ground that the ET erred in law in finding that the introduction of the collective bargaining clause was the type of change that was covered by the wording of her terms and conditions.

The EAT held that the ET was entitled to find that the collective bargaining provision had been incorporated into the Claimant's contract by way of her implicit agreement, or that it had become a term of her contract by reason of custom and practice.

By way of interest, the **Conisbee** case in late 2019 determined that being a vegan does not seem to be a protected characteristic as the belief must have a similar status or cogency to religious beliefs. Clearly, having a belief relating to an important aspect of human life or behaviour is not enough in itself for it to have a similar status or cogency to a religious belief. So if an individual is an ethical vegan does that make a difference – the short answer is perhaps!

IR 35 cases – **Mantides (GML) v HMRC** – If you want all the “gig action” before the law in GB changes then it’s the first tier tax tribunal for you (see material below regarding 2020 reforms under – new IR 35 rules for details of this case and the problem with tax law and employment law and what is meant by mutuality of obligation)

Mark McAllister (Director of Employment Relations Services)

October 2019