BLAKE MORGAN

Public Sector Network Group

Employment Law Update

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Overview of today's session

- Update on the:
  - Coronavirus Job Retention Scheme
  - Coronavirus Job Retention Scheme Bonus
  - Job Support Scheme
  - Job Support Scheme Extension
- Public sector exit payments
- Unfair dismissal case law developments
- Employment Tribunal trends and new Rules
- Vicarious liability case law developments

Coronavirus Job Retention Scheme

- Better known as the furlough scheme:
  - It was announced by the Government on 20 March and was originally intended to last for 3 months
  - The scheme was extended twice and ends on 31 October
  - According to the most recent statistics, 9.6 million people have been furloughed at a cost of £39.3 billion
- From 1 July, the revised scheme allowed for flexible furlough whereby employers are required to pay employees in full for the hours worked

Coronavirus Job Retention Scheme

- Changes to the scheme from 1 October mean that employers need to fund 20% of furloughed employees' usual wages for the hours not worked and continue to pay their employer NICs and pension contributions
- It is estimated that £215.7 million of furlough money has been voluntarily returned to the Government by employers after finding it had not been needed or had been over-claimed by mistake
- HMRC estimate that between 5% and 10% of funds may have been claimed fraudulently or in error, amounting to as much as £3.5 billion

Coronavirus Job Retention Scheme Bonus

- The Bonus was first announced on 8 July and further details and guidance were published on 1 and 2 October
- The purpose of the Bonus is to encourage employers to continue the employment of their employees
- It is a £1,000 one-off taxable payment, available as a bonus to the employer, for **each** eligible employee
- The employer must pay the employee at least the minimum income threshold of £1,560 gross in the three tax months between 6 November 2020 to 5 February 2021 with at least one payment of taxable earnings (of any amount) in each month

Coronavirus Job Retention Scheme Bonus

- An employer can claim for employees who:
  - Have previously been furloughed
  - Have been kept employed continuously by the employer until 31 January 2021
  - Are not serving a contractual or statutory period of notice for the employer on 31 January 2021
- Claims can be made within a six-week window between 15 February 2021 and 31 March 2021
- Guidance on how to make a claim is expected by the end of January 2021 but useful guidance about the minimum income threshold is already available

Job Support Scheme

- On 24 September, the Chancellor of the Exchequer announced the new Job Support Scheme as part of a package of measures to support employment when the furlough scheme ends
- The scheme will open on 1 November 2020 and will run until the end of April 2021
- It is designed to support “viable” jobs and employees cannot be made redundant/put on notice of redundancy during the period the employer is claiming the grant
- It is available for employees whether or not they were furloughed previously

Job Support Scheme

- For the first three months of the scheme, the employee must work at least 33% of their usual hours, paid for by the employer on their usual contracted wage
- This will then be “topped up” by the Government and employer to a maximum of two thirds of the employee’s usual wage for unworked hours
- The Government’s contribution is capped at £697.92 per month
- Grant payments will be **made in arrears**, reimbursing the employer for the Government’s contribution and the employer still pays the employer NICs and pensions

Job Support Scheme

- All employers are potentially eligible but large businesses will have to meet a financial assessment test, SMEs will not have to but there is no guidance yet on what is an SME/large business
- Employees need to have been on the payroll on 23 September 2020
- The scheme will not affect eligibility for the separate Coronavirus Job Retention Scheme Bonus

Job Support Scheme Example

- Assuming the employee works the minimum 33%
- The remaining 66% is dealt with:
  - 22% unworked hours paid for by the employer
  - 22% unworked hours paid by the Government subject to the cap
  - 22% forgone by employee
- The employer has to pay the employee for the hours worked and the unworked hours (making 55%) but also the Government's element and then claim in arrears for that part

Job Support Scheme Extension

- On 9 October, the Chancellor of the Exchequer announced an extension to the Job Support Scheme for Closed Business Premises
- The scheme will apply to businesses whose premises have been legally required to close as a direct result of Coronavirus restrictions set by one or more of the four governments of the UK
- The scheme will be available to employers for six months, from 1 November 2020 and will be reviewed in January
- Guidance will be published in the coming weeks

Job Support Scheme Extension

- Employers must be instructed to and cease work for a minimum of 7 consecutive (or calendar) days
- Employers will be required to cover employer NICs and automatic enrolment pension contributions in full but are not required to make further contribution to wage costs
- Employees will receive 67% of their wages for time not worked up to a limit of £2100 per month
- Payments will be made in arrears, reimbursing the employer for the Government's contribution
- Employees cannot be made redundant or put on notice of redundancy during the period the grant is claimed

Public Sector Exit Payment Cap

- Government first consulted on the cap in August 2015
- In April 2019 it launched a further consultation regarding the £95,000 cap together with draft regulations, accompanying guidance and directions
- Government published its response on 21 July 2020
- The Restrictions of Public Sector Exit Payments Regulations 2020 were laid before Parliament on 21 July, approved on 30 September so can now be made law
- Implementation is imminent and once made law the Regulations come into force 21 days thereafter - final guidance to accompany the Regulations is still awaited

Public Sector Exit Payment Cap

- Which bodies are in scope?
- Which payments are in scope?
- Relaxation of the powers?
- Challenges?

Which bodies are in scope?

- The Regulations apply to a “relevant authority” and the bodies in scope are set out in the Schedules to the Regulations
- Include County Councils, NHS, Fire and Rescue Service, Police, BBC, CQC, CPS
- There is a specific list of Welsh Bodies including Arts Council for Wales, Careers Wales, Cardiff International Airport, HEFCW, Transport for Wales, Wales Audit Office, Welsh Government

Which bodies are in scope?

- **However**, the draft guidance issued in July states that "The cap will apply to the whole of the public sector. In order to determine whether a body is 'public sector' for the purposes of the cap, HM Treasury will be guided by the **Office for National Statistics** (for National Account purposes) classification of bodies….Where a body or office is not included in the schedule, there will be no legal obligation under the regulations to apply the cap to an exit payment. **However, the Government expects public sector authorities which are not currently listed to apply commensurate arrangements voluntarily, including relevant aspects of this guidance**."

Which payments are in scope?

- Payment made on account of dismissal for redundancy (excluding statutory redundancy)
- Pension strain costs
- Payments made under a COT3 or settlement agreement other than in respect of discrimination and whistleblowing claims
- Severance/ex gratia payments
- Payment in the form of shares or share options

Which payments are in scope? contd

- Any payment on a voluntary exit
- Payment in lieu of notice due under a contract (where it exceeds ¼ of annual salary
- Payment to extinguish liability to pay money under a fixed term contract
- Any other payment under contract or otherwise, in consequence of termination of employment or loss of office

Which payments are exempt?

- Some payments are exempt from the cap, including:
  - Payments for Death in service
  - Payments for Incapacity as a result of accident, injury or illness
  - Certain payments to fire fighters
  - Payments for accrued but untaken annual leave
  - Payment in compliance with a court or tribunal order
  - Payment in lieu of notice not exceeding ¼ annual salary

HM Treasury Direction on relaxation

- The Regulations give powers to ministers to relax the cap in limited circumstances (in Wales, Welsh Ministers)
- A **mandatory Direction** has been issued by the Treasury **requiring** the cap to be relaxed in certain situations:
  - Where the obligation to make the payment arises as a result of the TUPE;
  - Where compensation is paid for a discrimination and/or whistleblowing claim because the minister is satisfied the Employment Tribunal would award compensation; and
  - Where certain payments are made by the Nuclear Decommissioning Authority

HM Treasury Direction on relaxation

- It is anticipated that when the Regulations come into force, that a final version of the Guidance and a further HM treasury Direction will be made to widen the scope of the mandatory waiver to include:
  - Health and safety-related detriment; and
  - Unfair dismissal claims

HM Treasury Direction on relaxation

- There is also a **discretionary** power for a minister to relax the cap if these exceptional circumstances exist:
  - Not exercising the power would cause undue hardship; or
  - Not exercising the power would significantly inhibit workforce reform; or
  - An exit agreement was made before the coming into force of the Regulations and: (i) it was the intention of both parties that the exit would occur before that date; and (ii) any delay to the date of exit was not attributable to the employee

Public Sector Exit Payment Cap

- Reporting requirements on the event of relaxation of the cap are strict
- A written record must be kept (for 3 years) of:
  - The fact that the power to relax the cap has been exercised
  - The name of the person in respect of whom the power was exercised
  - The amount and type of exit payment in respect of which the power was exercised
  - The date on which the power was exercised; and
  - The reason why the power was exercised

Public Sector Exit Payment Cap

- At the end of each financial year the relevant authority must publish:
  - The amounts and types of exit payments made in respect of which the power was exercised
  - The dates on which the power was exercised
  - The reason why the power was exercised

Unfair Dismissal Developments

- **Failing to follow any procedure did not make dismissal unfair**
- G*allacher v Abellio Scotrail Ltd EAT 2020*
- In rare cases, failing to follow any procedure will not make a subsequent dismissal unfair:
  - There had been a breakdown in working relations between the claimant and her line manager
  - The claimant was told at her annual appraisal that she was being exited from the business due to a lack of trust

Unfair Dismissal Developments

- There had been at least two previous meetings about the working difficulties, there was a personality clash and the claimant had no interest in repairing the relationship
- The EAT upheld the ET decision:
  - Failure to carry out any procedure would usually mean dismissal was outside the band of reasonable responses
  - Where following procedures would be futile and make the situation worse, the procedures could be dispensed with

Unfair Dismissal Developments

- **Relying on an anonymous witness did not make dismissal unfair**
- *Tai Tarian Limited v Christie EAT 2020*
- The claimant was summarily dismissed for allegedly making homophobic remarks to a tenant who had been interviewed as part of the investigation and who had requested anonymity
- The claimant's unfair dismissal was successful as the ET held that it was outside the band of reasonable responses for the employer to rely on an anonymous witness in the circumstances

Unfair Dismissal Developments

- The EAT allowed the employer's appeal
- The ET was wrong to substitute its view for the employers about the credibility of the anonymous witness
- In assessing credibility, the ET had failed to demonstrate any good reason, or logical and substantial grounds for finding that the employer could not reasonably accept the evidence of the anonymous witness as truthful
- It remitted the case to a new ET for re-hearing

Unfair Dismissal Developments

- **ET wrong to strike out claim because there was no prospect of monetary award**
- *Evans v London Borough of Brent EAT 2020*
- The claimant, a deputy head teacher, was dismissed for gross misconduct for financial mismanagement
- He received unauthorised overpayments from the school and allowed unauthorised overpayments to a third party
- He brought an unfair dismissal claim but this was stayed pending a High Court action

Unfair Dismissal Developments

- The High Court ordered the claimant to repay over £46,000 to the school (£200,000 was held to be irrecoverable due to limitation issues)
- The ET struck out the unfair dismissal claim as due to the High Court's findings, there were no reasonable prospects of success and any compensation would be zero even if there had been procedural failings
- The EAT upheld the claimant's appeal
- It is not in the interests of justice to fail to hold an employer to account for procedural unfairness even if that cannot lead to any financial award

Unfair Dismissal Developments

- **Considerations when granting interim relief**
- *Morales v Premier Fruits (Covent Garden) Ltd ET 2020*
- The claimant was helped by a trade union to raise a grievance about a reduction in wages implemented due to the COVID-19 pandemic and a lack of personal protective equipment (PPE)
- He argued that a 25% pay cut and taking one week's unpaid leave a month caused him detriment and that the health and safety of staff was being endangered by a lack of PPE

Unfair Dismissal Developments

- He was dismissed after the grievance process in July 2020 for refusing to consent to the reduction in wages
- He brought proceedings for unfair dismissal:
  - Under section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 dismissal for being a member of a trade union or making use of trade union services) and
  - On grounds that he had made protected disclosures related to health and safety under the Employment Rights Act 1996 (ERA 1996)

Unfair Dismissal Developments

- He successfully applied for interim relief
- The ET considered that it was likely that the claimant would be able to show that he was dismissed because he had sought the assistance of a trade union to bring a grievance
- The ET made an order for reinstatement but declined to order interim relief for whistleblowing as that case was less persuasive

Unfair Dismissal Developments

- **Teacher charged but not prosecuted, had been unfairly dismissed**
- *K v L EAT 2020*
- The claimant was a teacher with long service and an unblemished disciplinary record:
  - The police raided his home because of intelligence that indecent images of children had been downloaded to an IP address associated with him
  - The claimant's son also lived at the property

Unfair Dismissal Developments

- The claimant informed the school about the investigation but denied that he was responsible for the images being on the computer
- He was suspended and although later charged by the police he was not in fact prosecuted
- Although there was insufficient evidence that the claimant downloaded the images, he was dismissed:
  - There would be an unacceptable risk to children if he returned to teaching
  - There was a reputational risk to the Council in continuing to employ him

Unfair Dismissal Developments

- The ET rejected the claim for unfair dismissal but the claimant successfully appealed to the EAT:
  - The school did not initially mention reputational damage and it could not dismiss him on that ground
  - If he was dismissed for misconduct, the school had to decide whether he was guilty of downloading the images and should not have dismissed him based on a possibility that he had downloaded them
  - The *Burchell* guidelines state that the employer must have a "reasonable suspicion amounting to a belief that the employee is guilty of the conduct in question"

Unfair Dismissal Developments

- The Acas Code of Practice on Disciplinary and Grievance Procedures still applies during the COVID-19 pandemic
- Note however that Acas has provided guidance on how to handle disciplinary and grievances procedures during the pandemic
- https://www.acas.org.uk/disciplinary-grievance-procedures-during-coronavirus

Employment Tribunal Developments

- The latest quarterly statistics for the period April to June 2020 were published on 29 September and coincide with the first few months of the furlough scheme
- The statistics show:
  - An 18% increase in single Employment Tribunal receipts
  - An increase in outstanding caseload of 31% to a record 37,000 cases, higher than the previous peak in the second quarter of 2009/10

Employment Tribunal Developments

- The statistician's comment is interesting
- *“An increase in unemployment rates across the country due to the impact of Covid-19 on the economy has led to the highest level of Single ET claims since 2012/13, and an increase in the outstanding caseload. This rise in Employment receipts is likely to continue as the government’s Job Retention scheme comes to an end at the end of October.”*

Employment Tribunal Developments

- That comment is consistent with the view of the Employment Tribunals national user group
- The group expects there to be a pandemic-related increase in claims and a further increase arising from the winding down and closure of the furlough scheme
- For example:
  - Pandemic-related claims relating to health and safety and whistleblowing
  - Unfair redundancy dismissal claims and contested protective award claims.

Employment Tribunal Developments

- The Presidents of the Employment Tribunals advised the group that health and safety detriment, unfair dismissal or protected disclosure claims would be treated as priority claims and triaged for early determination in England, Wales and Scotland
- This is because they are public interest cases and concern whether it is safe for employees to return to work during the pandemic

Practice and Procedure

- Practice and procedure in the Employment Tribunals differs from that in the civil courts, and is governed by its own set of rules, principally the following:
  - The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (SI 2013/1237) (ET Regulations)
  - The Employment Tribunal Rules, as set out in Schedule 1 to the ET Regulations (ET Rules)

Reform of Practice and Procedure

- The Government has been considering reform since 2016
- In February 2017, it confirmed that it would make certain key changes including:
  - Digitising the whole claims process
  - Delegating a broad range of routine tasks from judges to caseworkers
  - Tailoring the composition of Employment Tribunal panels to the needs of the case

2020 Rules

- New regulations to amend the Employment Tribunal Rules were laid before parliament on 16 September 2020
- These are the Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020 SI 2020/1003 (the 2020 Rules)

2020 Rules

- The objective is to increase Employment Tribunals' capacity to hear claims and include:
  - Allowing for more flexibility in remote hearings
  - Widening the scope for multiple claimants and respondents to use the same ET1 and ET3 forms
  - Allowing claim forms to be accepted despite an error in the early conciliation (EC) number
- The majority of the changes came into force on 8 October 2020
- There will also be an amendment to the Early Conciliation (EC) rules to change the default EC period from one calendar month to six weeks which will come into force on 1 December

Key Points

- Regulation 8 - is amended to permit a range of non-Employment judges to sit as Employment judges to increase judicial capacity in Employment Tribunals
- New Regulation 10A - allows legal officers to carry out a range of functions, previously carried out by Employment judges, subject to authorisation by the Senior President of Tribunals in a practice direction

2020 Rules

- New Regulation 10B - lists the types of functions that legal officers may be authorised to carry out including:
  - Determining whether a claim form has a substantive defect under rule 12 of the ET Rules; and
  - Determining whether an extension of time should be given for a response under rule 20 of the ET Rules
- Regulation 10A(2) provides that a party may apply within 14 days of a determination being made by a legal officer for the issue to be considered afresh by an Employment judge

2020 Rules

- Regulation 9 - allows any Employment judge to reconsider a rejected claim or response, rather than restricting reconsideration to the judge who originally rejected that claim or response
- Rule 44 of the 2013 Rules (inspection of witness statements) is amended so that, in the case of a hearing conducted by electronic communication, inspection may be otherwise than during the course of the hearing

2020 Rules

- Rule 46 of the 2013 Rules (hearings by electronic communication) previously required that, in a remote hearing, the parties and members of the public must be able to hear what the Employment Tribunal hears and see any witness as seen by the Employment Tribunal
- Following amendment, the requirement is that the parties and members of the public can hear what the Employment Tribunal hears ‘and, so far as practicable, see any witness as seen by the Tribunal’

2020 Rules

- There is wider scope for parties to deal with multiple claims or responses on one form
- Rule 9 allows two or more claimants to make their claims on the same claim form if their claims are ‘based on the same set of facts’
- This is amended so that multiple claimants may use the same claim form if they ‘give rise to common or related issues of fact or law or if it is otherwise reasonable for their claims to be made on the same claim form’
- A corresponding amendment is made to Rule 16 to allow for multiple responses on the same form

2020 Rules

- There is a wider discretion to accept claim forms despite error with names or addresses of parties
- Rule 12(2A), which previously allowed the Employment judge to accept a claim form despite ‘a minor error’ in relation to a name or address, is amended so that the claim can be accepted where there is ‘an error’, not only where there is a ‘minor’ error

2020 Rules

- The delegation of certain functions to legal officers and, allowing non-Employment judges to sit as Employment judges are significant
- Will it mean more Employment judges are available for complex hearings?
- Will the parties be more likely to challenge the decisions of legal officers and non-Employment judges?
- Will those challenges cause delays to the process?

Employment Tribunal Costs Award

- Finally, note the recent decision in *Tan v Copthorne Hotels*
- The claimant held a very senior position and after being placed at risk of redundancy, he made numerous allegations of discrimination, victimisation, harassment, whistleblowing detriment and unlawful deductions from wages
- It subsequently transpired he had covertly recorded hundreds of hours of meetings and private conversations with colleagues and sought to wrongly implicate some of them in order to support his claim

Employment Tribunal Costs Award

- The Employment Tribunal ordered the claimant to pay a deposit for some of the claims and gave him the opportunity to withdraw the claim but he persisted
- The hearing lasted seven days and more than 3,000 pages of documents were considered
- All but one of the claims failed and one was withdrawn
- The claimant was described as “duplicitous” by the Employment Tribunal
- It made an award of costs of £432,000, one of the largest costs awards ever

Vicarious Liability Developments

- **Employer not liable for disgruntled employee's deliberate data breaches**
- *WM Morrisons Supermarkets plc v Various Claimants Supreme Court 2020*
- Employers can be vicariously liable for their employees' wrongdoing if there is a sufficient connection between the employment and the employees' acts
- Mr Skelton, worked as an IT internal auditor and in late 2013, in the course of his duties, intentionally leaked the personal data of nearly 100,000 employees to the company's auditors and downloaded a copy for personal use onto a USB stick

Vicarious Liability Developments

- Early in 2014, and aggrieved at an unrelated disciplinary sanction given to him, Mr Skelton uploaded, in his own time, the payroll data to a public file sharing website and sent the same information to three newspapers
- The data disclosed included employees' names, addresses, telephone numbers and bank details
- Morrisons took immediate action to remove the online data and informed the police (Mr Skelton was imprisoned for eight years)
- Morrisons spent over £2.26m dealing with the aftermath of the breach

Vicarious Liability Developments

- A number of employees brought a claim for data protection breaches against Morrisons alleging that it was either directly or vicariously liable for Mr Skelton's actions
- The High Court held that Morrisons was not primarily responsible for the breaches, but was vicariously liable on the basis that there was a sufficient connection between Mr Skelton's role and his conduct
- The Court of Appeal upheld that decision
- Morrisons then appealed successfully to the Supreme Court

Vicarious Liability Developments

- The Supreme Court held that Mr Skelton did not act in the ordinary course of his employment and that it would be unfair and improper to hold otherwise
- The fact that his employment gave him the opportunity to commit wrongdoing was not sufficient to make Morrisons vicariously liable.
- An employer would not usually be vicariously liable where the employee is pursuing a personal grudge, with malicious intent, outside their field of activities for the employer, rather than pursuing their employer's business

Vicarious Liability Developments

- **Bank not liable for self-employed doctor's wrongdoing**
- *Barclays Bank plc v Various Claimants Supreme Court 2020*
- Between 1968 and 1984 Barclays engaged a doctor to carry out medical examinations on its new employees, many of whom were young women and teenage girls
- Barclays arranged the appointments, provided the employees' details and a pro-forma report for completion
- The unchaperoned examinations took place at a consulting room in the doctor's home

Vicarious Liability Developments

- 126 of the women brought claims against Barclays alleging that they had been sexually assaulted during the examinations
- In 2017, the High Court held that Barclays was vicariously liable for any assaults proved because the doctor was carrying out activities for Barclays' benefit when the wrongdoing occurred and their relationship was akin to an employment relationship
- The Court of Appeal upheld this decision

Vicarious Liability Developments

- Barclays appealed to the Supreme Court arguing that as the doctor was engaged as an independent contractor, it could not be vicariously liable
- The Supreme Court agreed
- The doctor was self-employed, he had his own patients and clients one of whom was Barclays, he had set up business on his own account
- Barclays was not vicariously liable for the doctor's wrongdoing

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