While COVID19 related issues have overshadowed most aspects of life, including work, for the last six months, non-COVID 19 related employment law developments have continued. Here we consider the top 10 non-COVID 19 developments since lockdown hit in March:

1. Redundancy: (a) selection within a restructuring exercise and (b) new HR1 form
2. Government resurrects plans for cap on public sector exit payments
3. When is an agency worker a 'temporary' worker protected under the AWR?
4. TUPE: Post transfer change void despite being beneficial to transferred employees
5. Worker status: points to note as we await the Uber judgment
6. NMW: points to note
7. Unfair dismissal: the innocuous last straw
8. Successful internal appeals: the vanishing dismissal
9. Personality clashes: when is it fair to dismiss?
10. Data Protection: EU-US Data Protection Shield invalidated

1. **Redundancy: (a) selection within a restructuring exercise and (b) new HR1 form**

Redundancy selection

Many employers are currently faced with potential redundancy situations due to workplace closures or re-organisations resulting from the impacts of COVID-19. While it is for the employer to determine the selection criteria to be used in a redundancy process, the
criteria chosen should be capable of objective assessment by the managers who will apply them. Having said that, just because selection criteria involve a degree of judgment, it does not mean that they cannot be assessed in a dispassionate or objective way. Essentially, the employer must be able to demonstrate that any criterion adopted is a reasonable criterion and that it has been applied rationally and objectively.

Employers are also under a duty to consider alternatives to redundancy, including any suitable alternative roles that may exist. The principle that redundancy selection should be based solely on objective criteria does not extend to deciding which potentially redundant employee should be appointed to an alternative vacancy. The employer is instead entitled to undertake a competitive interview process and appoint the candidate it considers to be best for the job, even if this is based on its subjective view. It simply needs to act fairly and reasonably, so no unlawful discrimination or retaliation for raising protected disclosures.

In a business reorganisation, is there a difference between reducing three roles to two as opposed to a restructuring of roles to eliminate three roles and create two new roles? Does it matter? Gwynedd Council v Shelley Barrett and other, is a timely reminder that when it comes to judging the reasonableness of the approach to selection of the successful candidate, it does very much matter.

In this case, a number of small schools were to be restructured into a single site school. Staffing of the new school was determined by a competitive interview process, rather than using a selection/scoring process based on objective criteria, with unsuccessful candidates being made redundant. The Employment Appeal Tribunal (EAT) confirmed that the redundancy selection process was unfair due to the use of a competitive interview process. The teachers were effectively asked to apply for the same or substantially the same job, rather than a new post. Instead of a "forward-looking" competitive interview process, the employer should have defined pools for selection with the selection process using objective selection criteria (or at least semi-subjective criteria that is objectively verifiable) applied to the selection pool.

Lesson for employers

There is a subtle difference between allocating staff to newly created roles and selecting staff to remain in a dwindling number of roles. For the former, the employer has a greater degree of flexibility in how it makes its selection, in the latter the employer must follow a more objective selection process scoring the at risk pool against the same criteria.
However, in both cases employers should always remember the touchstone of the reasonable responses test.

**Updated HR1 form and advanced notification of redundancies guidance:**

On 3 August, an updated version of the HR1 form for use by employers to notify BEIS of a proposal to dismiss as redundant 20 or more employees was published by the Insolvency Service, together with new accompanying employer guidance.

Essentially, the HR1 is now three pages instead of four with the guidance notes previously contained within the HR1 moved to a separate 'Advanced notification of redundancies: guidance for employers' form without any substantive changes.

**2. Government resurrects plans for cap on public sector exit payments**

The Government has resurrected the long foretold plans to restrict public sector exit payments. The introduction of a £95,000 cap on the total pre-tax aggregate value of exit payments made to most types of public sector employee was first consulted on back in 2015 and more recently in April 2019. On 21 July 2020, the Government finally published its Response to the 2019 Consultation and a couple of days later the latest draft of The Restriction of Public Sector Exit Payments Regulations 2020.

The £95,000 cap will apply to the vast majority of public sector authorities and offices that are set out in a lengthy schedule to the draft 2020 Regulations. The cap will apply to any non-exempt termination payments that represent a cost to the employer, including redundancy payments, employer pension contribution top up payments, ex gratia sums, voluntary exit payments, a payment in lieu of notice that exceeds one quarter of the employee's annual salary, and shares and share options.

Any payments made pursuant to an award of compensation under the ACAS arbitration scheme or a settlement or conciliation agreement are also caught, but a special mandatory relaxation of the rule will apply in discrimination, whistleblowing, and health & safety detriment or dismissal claims. Relaxation of the rules will also be applied to payments made as a result of TUPE and there will be a discretion to relax the rule if applying it would cause undue hardship or significantly inhibit workforce reform.

Payments specifically excluded from the cap include death in service payments, injury compensation, pay in lieu of untaken holiday, payments made in compliance with a court order, and pay in lieu of notice that does not exceed one quarter of the employee's annual
salary.

Where two or more public sector exits occur in respect of the same person within a period of 28 consecutive days, the total amount of the exit payments made to that person cannot exceed the £95,000 cap, with the draft 2020 Regulations setting out the sequence in which exit payments will be considered paid when applying the cap. Public sector workers will be obliged to disclose their departure and eligibility to an exit payment to any other interested or affected public bodies, for example those responsible for paying them as office holders.

One to watch

The date the cap will apply from has not yet been confirmed.

The Government is also expected to resurrect "in due course" separate proposals to enable recovery of exit payments made to high earning public sector employees who return to the public sector within a year.

3. When is an agency worker a 'temporary' worker protected under the AWR?

Following the controversial 2013 EAT decision in Moran v Ideal Cleaning, the number of agency workers potentially falling within the provisions of the Agency Workers Regulations 2010 (AWR 2010) is significantly fewer than originally anticipated. Not all agency workers are covered - it is only those supplied to work temporarily. Those placed indefinitely (meaning open-ended in duration) are not placed 'temporarily' and are therefore outside the scope of the AWR.

In Angard Staffing Solutions Ltd and anor v Kocur and ors, the EAT has now confirmed that an agency worker who had an open-ended contract of employment with an agency was nonetheless supplied to work 'temporarily' for an end-user, satisfying the definition of 'agency worker' in the AWR 2010. Although the worker in this case only ever worked for one end-user for over four years, he did so under a series of separate assignments, each of which was for a defined period.

The issue is not whether the relationship between the agency and the agency worker is temporary or permanent. Instead, the issue is whether the supply of the worker's services to the end-user is temporary. If there is an express end date for each assignment
(whether by fixed period, on the completion of a particular task, or on the occurrence of some other event) then the supply will be temporary, even if continuous. A temporary supply may be followed by another supply to work for the same hirer temporarily, and then another, and another.

**Lesson for employers**

The Moran judgment created and continues to leave a significant gap in the protection of the AWR 2010. Agency workers placed indefinitely with an end-user (only terminated by notice rather than an ascertainable date) still fall outside the protection of the AWR. However, Kocur significantly narrows the potential size of the gap illustrating that a series of continuous temporary placements may nonetheless attract the protection of the AWR. As ever, each case will be fact-sensitive.

**4. TUPE: Post transfer change void despite being beneficial to transferred employees**

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), the starting point is that any purported variation to a transferring employee’s contract is void if the sole or principal reason for the variation is the transfer (regulation 4(4)). In *Ferguso and ors v Astrea Asset Management Ltd*, the EAT confirmed that regulation 4(4) applies to all variations, not just those that are adverse to the transferring employee.

In this case, directors of the transferor company who agreed very favourable contractual enhancements to their own contracts of employment in the run up to and in preparation for the TUPE transfer were unable to enforce those enhanced terms against the transferee. The EAT went on to hold that, in the alternative, the changes would have been void under the EU ‘abuse of law’ principle. The purpose of the EU Acquired Rights Directive that TUPE implements, is to safeguard employees’ rights, not improve them, and there was ample evidence that the transferor directors’ intention was to obtain an improper advantage via the TUPE rules.

**Lesson for employers**

All types of variation to a contract of employment (even those that are favourable to the employee) are rendered void if the transfer is the sole or principal reason for the variation.
The only exception to this is where the variation falls within reg 4(5)(a) of TUPE 2006 being:

- the sole or principal reason for the variation is an economic, technical or organisational reason (ETO reason) entailing changes in the workforce, and
- the employer and employee agree that variation.

Unless the exception applies, attempts to vary contracts of employment whether positive or negative for the employee and whether before or after a transfer will be void.

5. Worker status: points to note as we await the Uber judgment

On 22 and 23 July, the Supreme Court heard the long-running case that has become the poster-child for gig economy worker status cases: Uber BV and ors v Aslam and ors.

Back in December 2018, the Court of Appeal upheld the findings to date that Uber drivers are ‘workers’ entitled to national minimum wage (NMW), paid annual leave, and whistleblowing protection, but only by a majority. A dissenting judgment in favour of independent contractor status suggests all is still to play for. Will the Supreme Court agree that much of the contractual documentation could be disregarded as it did not reflect the reality of the agreed working relationship? Or, as held by the minority, did the contractual documentation reflect the reality of what the parties agreed, albeit unfairly disadvantageous to the individual drivers?

While we await what should prove to be one of, if not ‘the’, most significant employment law judgments of 2020, we have had a couple of recent judicial points to note regarding worker status and ‘dominant’ purpose.

In Varnish v British Cycling Federation, the EAT held that a professional cyclist participating in an Olympic training programme was not an employee or a worker of the British Cycling Federation. Before considering questions such as whether there is any ‘mutuality of obligation’ between the parties, in some cases the first essential question is whether the individual was engaged in ‘work’ at all. Consideration of the ‘dominant purpose’ may be a better starting point. If the dominant purpose is not personal service of ‘work’ for the other party then that will be a factor pointing away from the relationship being one that lies in the world of employment.

In O’Eachtiarna and others v CitySprint (UK) Ltd, a tribunal held that cycle couriers were
workers when working 'on the circuit'. Although there was a contractual right of substitution, it was a theoretical right only and had never been exercised. Following the 2018 Supreme Court judgment in Pimlico Plumbers Ltd v Smith, the tribunal assessed that the dominant feature of the contract remained personal performance.

Lesson for employers

The test for determining worker status continues to develop, with consideration of the contract's 'dominant purpose' being increasingly important when assessing the important 'personal service' factor.

6. NMW: points to note

On 12 and 13 February, the Supreme Court heard the high profile NMW 'sleep-in' shifts case, Royal Mencap Society v Tomlinson-Blake. Where a worker is required to work a number of "sleep-in" night shifts at the employer's premises, and be available in case of an emergency, does the full night shift constitute 'working' for the purposes of the NMW? Alternatively, is the worker only 'working' for NMW payment purposes when they are awake to carry out any relevant duties?

In one of the most controversial employment law cases of 2018, the Court of Appeal overturned numerous EAT judgments to rule that the only time that counts for NMW purposes during sleep-in shifts is the time when the worker is required to be awake for the purpose of working ([Sleeping on the job take two: National minimum wage and 'sleep-in' shifts](#)).

This surprise Court of Appeal judgment had a huge impact on the care sector. While we await another contender for the most significant employment law judgment of 2020, we have had recent judicial guidance on NMW regarding (1) deductions from wages for accommodation costs and (2) post-termination deductions for the recovery of mandatory training costs: [Commissioners for HM Revenue and Customs v Ant Marketing Ltd](#).

Accommodation costs

Under the NMW legislation, any deduction the employer is entitled to make, or payment the employer is entitled to receive, "as respects the provision of living accommodation by the employer to the worker" is treated as a reduction in pay for NMW purposes, to the
extent it exceeds the current accommodation allowance. In this case, the EAT agreed that deductions from wages for rent, where the landlord was a separate property company connected to the employer, were not to be treated as reductions for the purposes of calculating the NMW. BUT, this was because HMRC brought the case solely on the basis that the term 'employer' should be construed widely to include a connected company. If the case had been brought on wider grounds, namely that the employer had still been responsible for providing the accommodation to the worker notwithstanding that it was not the landlord, the EAT noted that it is "quite possible" the outcome would have been different.

Recovery of mandatory training costs

The EAT also confirmed that deductions for training costs, taken out of the workers' wages pursuant to a contractual provision if they left employment within 12 months of completing mandatory induction training for any reason other than redundancy, did constitute reductions for NMW purposes. If the deduction had been made during employment, there is no question that it would have been a reduction for NMW purposes. The fact that it was deducted post-termination and was contingent did not alter the position.

Lessons for employers

Employers should be aware that, even if they do not own property being rented out to workers, if they are connected to the landlord in some way, they are likely to face scrutiny as to whether they are in fact responsible for the provision of accommodation. If so, any deductions from wages for the payment of accommodation costs could well be treated as a reduction for NMW purposes. Likewise, using a repayment of mandatory training costs clause can impact NMW compliance.

7. Unfair dismissal: the innocuous last straw

In order to succeed in a claim of constructive unfair dismissal, an employee has to show that the employer has fundamentally breached a term of their contract of employment. This is often the implied duty of trust and confidence. The 'last straw' doctrine allows an employee to rely on a series of breaches over a period of time which together amount to a breach of trust and confidence. Until recently, case law has held that the 'last straw'
must not be something totally innocuous and that it must contribute something to the breach, although what it adds might be relatively insignificant.

In *Williams v Governing Body of Alderman Davies Church in Wales Primary School*, the EAT has now held that it is possible for a truly trivial act that causes an employee to resign to be relied upon in a claim of constructive unfair dismissal. In cases where there has been previous conduct by the employer in breach, which has not been affirmed (accepted) by the employee, then even a seemingly trivial act that tips an employee into resigning may potentially trigger a successful constructive unfair dismissal claim.

**Lesson for employers**

Employers should be aware that even reasonable and seemingly innocuous acts on their part may revive an earlier fundamental breach of contract, provided that the employee has not already affirmed that breach. In other words, if the earlier fundamental breach contributes to the employee’s subsequent decision to resign, a constructive dismissal claim may succeed even though the last straw identified by the employee meaning they are no longer prepared to put up with the employer’s breach, taken on its own would seem fairly innocuous.

**8. Successful internal appeals: the vanishing dismissal**

In most cases, an employee will have a right to appeal against dismissal set out in an employer’s disciplinary procedure. When a dismissed employee appeals against their dismissal, it is implicit that they are asking their employer to find that the dismissal decision was wrong and to return them to their pre-dismissal position.

The legal effect of a successful appeal against dismissal is that the earlier dismissal simply vanishes. The employer must treat the previous dismissal as having no effect and the employee is bound in the same way. Accordingly, an unfair dismissal claim cannot succeed since there will not have been a dismissal. This will be the case regardless of whether the dismissal stood at the time that a claim was lodged at the tribunal.

In *Phoenix Academy Trust v Kilroy*, an employee was dismissed and then invoked the internal appeal procedure. Before that appeal was held, his solicitors wrote to the employer saying "irrespective of the result of the current appeal there is no question of our client returning to his former employment". After that letter, but before the internal appeal
was heard, the employee submitted a tribunal unfair dismissal claim. When the internal appeal was eventually held, the employer reinstated him subject to a final written warning, requiring his return to work. The employee refused, instead continuing with his constructive unfair dismissal claim.

The EAT reminds employers and employees that where an employee is dismissed and then brings an internal appeal against that dismissal, if that appeal overturns the dismissal then in law it will be as if no dismissal had ever occurred, even if the employee made it explicitly clear when submitting the appeal that they have no intention of returning to their job whatever the outcome of the appeal may be. By invoking the appeal process, the employee was necessarily treating the contractual relationship as continuing to exist.

However, that is not the end of the matter. If breaches of the implied term of trust and confidence continue through the employer's conduct of the appeal process, then the employee may be able to rely on the totality of the employer's acts forming part of a series amounting to a repudiation of trust and confidence. The case was therefore sent back to the tribunal for consideration of complaints raised by the employee about the employer's conduct while the internal appeal procedure was being carried out.

Lesson for employers

It is inherent in the very concept of an appeal of a disciplinary dismissal, that if successful the dismissal falls away. Having said that, an employer does not have a clean slate when an employee has affirmed the employment contract by invoking an internal appeal. The employer remains at risk that a further act (or omission) by them may enable the employee to resign and claim constructive dismissal on the basis of a cumulative repudiatory breach of trust and confidence.

9. Personality clashes: when is it fair to dismiss?

When an employee is dismissed as a result of personality clashes or irreconcilable differences between colleagues, it may be difficult to determine whether the reason for the dismissal is misconduct or if the employer can treat the dismissal as being for some other substantial reason (SOSR).

Where irremediable personality clashes between colleagues cause substantial disruption
to the business it may, in some relatively rare cases, be fair to dismiss an employee for SOSR. To do so, employers need to ensure the principal reason for the dismissal is the dysfunctional working environment and not a misconduct dismissal in disguise. It must be the breakdown of working relationships that is the principal reason for dismissal not the conduct that led to the breakdown, a distinction that can be difficult to make.

Why does the distinction make a difference?

The distinction can have a significant impact on what processes the employer should follow. If the reason for dismissal is the fact of the breakdown in working relations itself, than it may be fair to dismiss without going through any conduct or capability procedures (including an appeal).

_Gallacher v Abellio Scotrail Ltd_, is a recent example in which the EAT sitting in Scotland upheld a finding that a dismissal without following any procedure following a breakdown in working relations between two senior managers was not unfair.

In this case, a senior manager's relationship with her line manager and others in her team deteriorated at a critical juncture for the employer's business. The employer decided to dismiss her at an appraisal meeting with no procedure, forewarning or right of appeal.

A tribunal found the dismissal to be fair being within the band of reasonable responses in these particular circumstances, going as far as to find that a procedure would have made the situation worse. Upholding the tribunal's judgment, the EAT noted that there may be cases, albeit rare, where procedures may be dispensed with because they are reasonably considered by the employer to be futile in the circumstances. In this case, taking into account of all the circumstances of the case where both sides had agreed that the working relationship between senior managers had broken down, the dismissal was found to be fair.

But a note of caution! The EAT went on to warn that "dismissals without following any procedures will always be subject to extra caution on the part of the tribunal before being considered to fall within the band of reasonable responses." It should also be noted that an important factor in this case was that the breakdown was between two senior managers whose good working relationship was crucial to the success of the business at a difficult time. The EAT noted that "seniority will always be a relevant factor with any substantial disparity in seniority between protagonists being likely to put the tribunal on high alert that the alleged breakdown in relations is a cloak for another reason for dismissal".
Lessons for employers

A lot can turn on whether an employer characterises a personality problem as a conduct issue or as a SOSR dismissal. There is a very fine line as to whether the reason for dismissal is the employee's conduct or SOSR. A note of caution is needed as tribunals will be 'on the lookout' in cases of this kind to see whether an employer is using the rubric of SOSR as a pretext to conceal a capability or misconduct dismissal that will be subject to the Acas Code of Practice.

10. Data Protection: EU-US Data Protection Shield invalidated

On 16 July 2020, the Court of Justice of the European Union (CJEU) ruled that the EU-US Privacy Shield is invalid as a mechanism for transferring personal data to third parties in the US. The Privacy Shield mechanism does not compensate for the fact that the USA lacks a data protection regime equivalent to the GDPR. The provision for an Ombudsman under the Privacy Shield also does not allow adequate oversight or protection from personal data being accessed by US security bodies.

On the plus side, the CJEU has stated that companies may continue to move data under the alternative mechanism of "standard contractual clauses (SCCs)", but only if a proper assessment of the SCC's effectiveness has been undertaken.

Impact on employers

Organisations should identify contracts under which data has been transferred to the US based on the Privacy Shield and put in place standard contractual clauses instead. For more see our alert 'Déjà-vu - Schrems strikes again: Privacy Shield is invalid'.

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