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a word from the editor

'this was certainly a meaningful and worthwhile challenge in changing the way we think and perceive people'

Much of the recent news has been around the interview that Meghan Markle and Prince Harry gave to Oprah Winfrey, and whether the allegations they made are true. The interview has had a mixed reaction on the issues it raised about racism and mental health – both of which as employment lawyers we deal with in practice. Whether you believe the allegations to be true or not, they are important ones in today's society.

There have, of course, been a number of protests relating to the death of Sarah Everard, the Police, Crime, Sentencing and Courts Bill, and lockdown measures that some say impact human rights and civil liberties. All of these appear to have breached the Government's guidelines on meeting people. Some commentators have suggested that it is the police's responsibility to ensure Covid-19-safe demonstrations – how practical this is in reality is another matter.

Clearly freedom of speech and freedom of expression are hot topics and I would anticipate that such topics are going to become hotter this year – especially if the Government's roadmap on lifting lockdown measures goes ahead as planned.

It has been a year (to the day, as I write) since the UK's first national lockdown commenced and how life has changed globally. After a year of mostly terrible and often distressing news, more positive items are emerging in the news. A nationwide vaccination programme is proving successful and fears around the Oxford/AstraZeneca vaccine have been dispelled. The Government is on course to deliver its promise to vaccinate all over-50s by the end of this month.

Members may be interested to know that ELA's recent 21-Day Racial Equity Habit-Building Challenge © is the brainchild of Dr Eddie Moore Jr, one of the US's top motivational speakers and educators on diversity and leadership. The challenge involved accessing relevant resources over a 21-day period, with the aim of stimulating debate and developing greater awareness about the issues faced by those from black and ethnic minority backgrounds. This was certainly a meaningful and worthwhile challenge in changing the way we think and perceive people.

Keeping with the theme of trying to affect change, I recently watched an on-demand ELA webinar, 'Creating habits for success in a distributed world'. One of the takeaways from this session was the concept of being '1% better every day'. You don't need to be twice as good to get twice the results; you just need to be slightly better. This concept will better equip us to successfully navigate our daily challenges and those we advise.

Change is not always easy. As employment lawyers, we may be asked to advise on change in the workplace on, say, a company restructure involving redundancies resulting from the pandemic. Change may be internal such as a merger of firms. Change may also be grappling with new legislation that challenges what we have for years considered the norm. Whether change is necessary will depend on its own facts, but it is unlikely to be free from stress.

I sign off this month with a quote from US author and coach Tony Robbins: "By changing nothing, nothing changes."

MARC JONES, IBB Law LLP

It's been another busy period for ELA and, as Marc and I highlighted last month, I am keen to ensure members are able to keep up to date with its activities.

Recent activities

- **Training Committee** webinars: 'Domestic and economic abuse', 11 February; 'Complex gender identities and the Equality Act', 26 February; 'A conversation with Regional Employment Judges Wade, Taylor and Freer', 26 March; 'TUPE law and practice modular course', 29 March; and 'IR35 update', 30 March.
- **The Legislative and Policy (L&P) Committee** has submitted responses to consultations on: Equity in the STEM Workforce; the evaluation of the Senior Managers and Certification Regime; measures to extend the ban on exclusivity clauses; measures to reform post-termination and non-compete clauses in contracts of employment; and on the independent Human Acts Review. It has been working with Acas on issues arising out of 'fire and rehire', and has met with BEIS and SRA.
- **International Committee**: Chair Kathleen Healy and I took part in the American Bar Association webinar on 23 February on the impact of Covid-19 on employment litigation. I set out ELA's role and aims, and Diya Sen Gupta QC spoke about her observations and experiences of litigation during the pandemic.
- **The Junior Committee** has been refreshed and is now building links across the country. A speed mentoring event was held on 4 February.
- **The regions**: the Lower South East region held an event on remote hearings on 18 February with Employment Judge James Dawson and Stephen Wyeth of 3PB Chambers. Midlands had an event on 22 March with Employment Judges Findlay and Swann.
- **Pastoral Committee** events included 'Resilience under pressure' sessions on 16 and 17 March. Please get in touch if there are further ways in which you consider ELA could support members.
- **Diversity**: the '21-day Racial Equity Habit Building Challenge' was well received in February. A member survey was sent out following its conclusion. We are continuing to analyse the data returned by firms on the conclusion of last year's equitable briefing of counsel project.
- **External survey**: 'How are workplaces changing through Covid-19'. Members are invited to take part in this survey: https://wh1.snapsurveys.com/s.asp?k=160086642469
- 'New employment judges are far from inexperienced'. My *Times* piece on 11 February set the record straight on the newspaper's investigation.

'if you have any comments on any of our programmes, please do get in touch'

Looking ahead

- **The Training Committee** is busy planning this year's virtual annual conference, with the main theme of 'The future world of work'.
- **Junior, In-House and International committees**: plans are in hand to run an event to provide junior ELA members with an insight into in-house work.
- **L&P Committee**: Please look out for a survey on tribunal use and experience over the last year, which will include questions on resources and delays. The committee is in the process of submitting evidence to the Scottish National User Group on the use of witness statements in Scotland and has ensured that ELA will be represented at each of the Regional Tribunal User Groups, as well as at the regular National Tribunal User Group meetings.
- **International Committee**: future events include a Brexit training session and a further session on the impact of Brexit on litigation. A joint session with Northern Irish and Irish Employment law associations on the practical impact of Brexit from a UK/NI/Irish perspective is planned for June. Planning also continues on the 2021 Virtual ABA/ELA Transatlantic Conference.

I hope you find this helpful. If you have any comments on any of our programmes, please do get in touch.

MARIAN BLOODWORTH, Deloitte Legal and ELA Chair

in brief

Division of labour

The decision in *ISS Facility Services v Govaerts* (C-344/18) caused shudders among TUPE practitioners a year ago when the ECJ held that contracts of employment of transferring staff could be split between several transferees. The EAT has now held that this case can apply to service provision changes under TUPE reg 3(1)(b), as well as standard business transfers under reg 3(1)(a). Following a service provision change where the service is divided between two or more new suppliers, transferring employees could end up with multiple contracts of employment with different employers. *ELA Briefing* will explore some of the practical consequences of this judgment in a future article (*McTear Contracts Ltd v Bennett* UKEATS/0023/19/SS).

Modern Slavery Act 2015 statements

Following consultation on transparency in supply chains, the Government has proposed a legal requirement for organisations to publish their Modern Slavery statements on a central website. It is encouraging publication of the statements on a recently launched new registry service, with the intention that, while this remains voluntary for now, it will become the legal requirement when legislative changes are taken.

Defining Islamophobia

A recent report by the Muslim Council of Britain, 'Defining Islamophobia', looking at the issue of Islamophobia includes reference to a number of workplace practices that could be altered to enhance inclusion and 'assist in the cultivating of an organisational culture that is considerate of Muslim employees'. The report offers some practical suggestions such as ensuring a variety of different work social functions that Muslim staff may be able to attend and proposing an alternative to the common handshake by using a hand on heart gesture instead.

'in high-profile positions, individuals must accept some limitation on public expression of beliefs'

Expressions of belief

The Court of Appeal has looked again at the potential friction between an individual's personal religious beliefs and the exercise of their professional obligations in two cases brought by Mr Page, a Christian who was outspoken in his beliefs that same-sex marriage and homosexual activity are wrong. In *Page v NHS Trust Development Authority* [2021] EWCA Civ 255, the authority had decided not to renew Mr Page's term as a non-executive director following several media interviews he had given expressing disapproval of same-sex adoption. He brought claims of indirect and direct religious discrimination, victimisation and breach of Article 9 of the European Convention of Human Rights (ECHR) relating to freedom of religion. The court agreed with the tribunal that Article 9 had not been engaged but, even if it had, the limitations would have been necessary and proportionate in the circumstances. This also applied to the claim of indirect discrimination. Direct discrimination and victimisation had not occurred as Mr Page was removed for repeated media interviews without permission, and not for the beliefs themselves.

The court's view was that a balancing exercise should always be undertaken between the rights of an individual and the legitimate interests of the organisation they work for. However, where individuals, who have particular religious beliefs work for institutions, particularly in high-profile positions, they must accept some necessary limitation on public expression of those beliefs on sensitive matters. This view was confirmed in the claim brought by Mr Page for his removal from the office of lay magistrate (*Page v Lord Chancellor* [2021] EWCA Civ 254). The court upheld the finding that he had not been victimised due to his complaints of discrimination, but rather the reason for his removal was his public declaration that he could not exercise his judgment impartially on cases involving adoption by same-sex couples. There was also no breach of the right to freedom of expression under Article 10 of the ECHR.

ANN LEIGH-POLLITT, Xerox Europe

The right to know your comparator's earnings

DAPHNE ROMNEY QC, Cloisters

The Equal Pay (Information and Claims) Bill 2020 proposes a 'right to know' a comparator's earnings before issuing an equal pay claim. The ELA Briefing explains how this would work.

In an equal pay claim, a woman must point to a term or terms in her comparator's contract that is or are more favourable than in hers, or which he has in his contract and she does not. However, how can she identify these terms when she does not have the relevant information and no way of discovering it?

Public sector employees can make a Freedom of Information Request, but their private sector counterparts cannot; and although equal pay legislation once permitted those suspecting any sort of discrimination to pose questions by way of a statutory questionnaire under s.138 EqA, that right was abolished in England, Scotland and Wales by s.66(2) ERRA. The EqA was never introduced in Northern Ireland, and would-be litigants retain the right to issue a questionnaire under s.6B EPA(NI).

Current options

What options are currently available to a woman who wants to pursue equal pay against a possible comparator?

- She could ask her employer, but there is no statutory obligation to answer her questions, although an employment tribunal might draw inferences from any refusal (para 445 of the explanatory notes, ERRA). But silence would not give the woman the information she needs to consider and issue her claim.
- She could ask a potential comparator what he earns, but he is also not obliged to answer either. He may be reluctant because of a clause in his contract prohibiting him from discussing his salary. Section 77 of the EqA renders such a clause unenforceable (as opposed to rendering it void, which was the original intention) and further provides that any action taken by either party to the discussion constitutes victimisation. However, the enquiry must be made 'to find out whether or to what extent there is, in relation to the work in question, a connection between pay and having (or not having) a particular protected characteristic'.
- The Gender Pay Gap Reporting Regulations 2017 provide little assistance to a potential claimant, primarily because the pay and bonus information is given in percentages, not in figures, and the quartiles into which employees are split are identified neither by pay nor grade; and they only apply to employers with 250+ employees.
- She can issue proceedings and seek disclosure. Claims then get stuck in a merry-go-round in which respondents refuse to give disclosure unless claimants plead the comparator's terms complained of; claimants reply they cannot plead them until after disclosure of the comparator's pay slips. Equally, amending a claim to add new comparators incurs costs and the arrears period runs from the date of amendment, not issue. The chargeable hours rack up and years go by. In other cases, claimants do not know the comparator's exact job title, and their applications for disclosure using an inaccurate job title are met with the response 'we have no-one with that job title'. It is little wonder that some equal pay cases have dragged on for over a decade.

The right to know

These factors prompted a Fawcett Society Equal Pay Working Group, which I chaired, to consider ways to cut through the preliminaries and to save both sides time and money. The group comprised equal pay lawyers, equal pay litigants, HR practitioners and Fawcett Society officers. The fruits of our labour, the Equal Pay (Information and Claims) Bill had its first reading in the Commons on 20 October 2020 with cross-party support, but awaits a date for its second reading.

The Bill promotes a new concept, the 'right to know'. This is how it works. A has the right to know prescribed

'under the Bill, the secretary of state must make regulations no longer than 12 months after the passing of the Act'

information from P about B before issuing a claim. A is or was an employee, a worker or an office holder who suspects that B is a comparator for the purposes of Part 5 EqA; B is either a named person or a group of persons doing a type of work identified by A, allowing A to point to a named individual or to the work he does, avoiding the obfuscations where A does not know a jobholder or his job title. P is or was A and B's employer, associated employer, a single source, responsible or for the remuneration in respect of A as an office-holder.

Under the Bill, the secretary of state must make regulations no longer than 12 months after the passing of the Act, prescribing both form and contents to prevent unwieldy and unreasonable requests. The prescribed information under the intended s.77A EqA *must* include:

- B's gross annual basic pay and hours worked in respect of such pay or, if B is unknown, a list in rank order for each worker in that group with those details;
- information about other terms in relation to pay or benefits, such as bonus, overtime, shift working, bank holidays, attendance allowance and PRP;
- if the information sought concerns a term which is not in B's contract, a statement to that effect;
- the information contained in B's P60(s);
- B's job description, including a previous one if duties have changed;
- whether there is a job evaluation study, and if so, A's and B's grades; and
- P's statement of any material factor explaining any difference in terms between A and B.

P has 20 days to provide the information, (or longer in exceptional circumstances).

Under the proposed s.77B, the information is to be used only to pursue P for a contravention of Part 5 EqA and can only be shared with a limited category of people, including A's legal or union representatives, so it is not for general distribution or canteen chatter. This seeks to allay concerns about privacy in a culture where pay secrecy is ingrained. Similarly, P would be entitled to refuse to answer a fanciful request; for example, a middle manager comparing herself with the managing director, which would feed into the tribunal's discretion as to costs and other steps detailed below.

What if P fails to give A the requested information? The proposed s.77C provides that if P does not comply with a request under s.77A, so that A is forced to issue proceedings and then apply for disclosure, or, having issued, to apply to amend her claim to include further information following disclosure, the tribunal must consider whether to order P to pay the costs of the application. If so ordered, P must pay within 28 days or be debarred from defending the claim to avoid respondents racking up costs for the claimants. The tribunal may also order that P cannot rely on any material factor defence he has failed to mention in answer to a s.77A request; and it may also draw inferences from any failure to comply. Clause 2 amends the EqA 2006 by empowering the EHRC to issue a notice of, and enforce, acts of non-compliance under what is proposed to be s.24B of that Act.

Pay secrecy

In introducing the Bill at its first reading, Stella Creasy MP referred to 'breaking the culture of discrimination and the culture of secrecy that causes it'. Equal pay claims present a singular set of circumstances. In other areas of discrimination, an employee knows certain material or has facts – s/he is not selected for promotion, or is selected for redundancy, or is treated less favourably that other employees on return from maternity leave, or is called names or is harassed, sexually or otherwise, or is victimised after a complaint.

The same is true in cases of protected disclosure. With pay discrimination, the employer has all the relevant information and may not want to share it. Pay secrecy makes it difficult, if not impossible, for a woman to know whether she is paid in accordance with the law. It is therefore a question of balancing the comparator's right to privacy against a woman's statutory right to equal pay in circumstances where she cannot enforce her right without knowing the confidential information.

Of course, it may be that once the prescribed information is made available, there may be no need for litigation. P could show there is no pay differential on a particular term or that there is a material factor that explains it, such as qualifications, experience or different duties. Conversely, P could decide to remedy the pay differential. Either way, much time and expense could be saved if the parties can concentrate on the fundamental issues of equal work and material factor rather than attending a succession of preliminary hearings merely to establish the basic information needed to progress the claim, thereby gumming up the tribunal timetables and racking up costs.

'pay secrecy makes it difficult, if not impossible, for a woman to know whether she is paid in accordance with the law'

Other proposed changes

Clause 3 of the Bill amends s.79 EqA by adding a statutory definition of a 'single source', namely: 'A single person or body which has the power to rectify any difference in the terms of work applicable to A and B.' The wording reflects the ECJ's definition of single source in *Lawrence* and subsequent cases.

Clauses 4-6 of the Bill propose other changes to bring consistency to procedures for equal pay law and other discrimination claims. A tribunal may extend time on a just and equitable basis in other discrimination claims; the Bill seeks to amend s.129 EqA to permit tribunals to extend time. Equally, there is no provision for compensation for injury to feelings and loss of pension rights in equal pay claims, so the Bill seeks to add these to s.132 EqA.

The Bill amends s.1 ERA to provide that the statement of terms includes a description of the employee's equal pay rights under the EqA. Finally, clause 7 of the Bill amends s.78 EqA so that pay gap reporting is expanded to include ethnicity as well as gender.

The Government published a consultation paper on ethnicity pay gap reporting in October 2018, but although the deadline for responses was January 2019, no regulations have since been proposed, which suggests either great reluctance to proceed or a difficulty in deciding how to define 'ethnicity'. This clause seeks to advance that reporting and throw light on the intersectionality of pay differentials.

So, will the Government back the Bill? Watch this space …

Daphne Romney is the author of Equal Pay – Law and Practice (OUP).

KEY:

EqA	Equality Act 2010
ERRA	Enterprise and Regulatory Reform Act 2013
EPA (NI)	Equal Pay Act (NI) 1970
Gender Pay Gap Reporting Regulations	Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 (SI 2017/172) (private sector); (SI 2017/35) (public sector)
Lawrence	*Lawrence v Regent Office Care Ltd* (C-320/00) [2002] IRLR 822
ERA	Employment Rights Act 1996

Volunteers needed for Employment Law Telephone Advice Line (ELTAL)

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The BPP University Pro Bono Centre successfully runs an employment law telephone advice line staffed by volunteer lawyers, volunteer students and supervised by Pro Bono Centre staff. The line advises more than 400 clients annually and is insured by LawWorks.

The lines operate as follows: potential clients leave a message on the BPP telephone line and a BPP law student calls them back. The students interview the callers, taking details about them and their employment law issue. Student directors send client information sheets with these details to a volunteer lawyer who delivers initial legal advice over the telephone on Tuesday evenings between 6.30pm and 8pm on a rota basis.

The Pro Bono Centre seeks volunteer lawyers to join the ELTAL team. This is a commitment to make calls from your own office (or from home, if you prefer) on a rota basis on Tuesday evenings (6.30 to 8pm). Usually, you will be placed on the rota once every four to six weeks and asked to make approximately two calls per session.

Volunteers must be fully qualified specialist employment lawyers with at least two years' PQE.

Anyone interested should contact Laura Richards – probonowaterloo@bpp.com or telephone 0207 633 4346

Domestic abuse in the workplace: an emerging issue in employment law

MARIA STRAUSS and TABITHA JUSTER, Farrer & Co

There has been a renewed focus and national conversation about gender-based violence, of which domestic abuse is one form. The statistics show that during the pandemic, domestic abuse charities have seen a shocking rise in the rates of demand for their services.

The pandemic has resulted in victims being unable to access support in the same way as before, being confined largely to the home and unable to attend work or school, or see friends or other support. According to research by Women's Aid, 67.4% of victims who are currently experiencing abuse said the abuse had got worse during the pandemic.

Following a consultation on workplace support for victims of domestic abuse in 2020, the Government published a report and open letter to employers in January 2021, urging employers to 'look at what more your organisation can do to help survivors of domestic abuse'. Although there is currently no specific domestic abuse legislation giving rise to obligations on employers, we believe employers will be expected to take steps in future. We advocate that employers should develop a domestic abuse strategy, informed by specialist agencies.

Why is domestic abuse an issue for employers?

Domestic abuse is very common; one in four women and one in six men will experience at least one incident in their lifetime. It is likely that members of most workforces will have some experience of it. We believe there is a clear moral obligation on employers to deal with perpetrators in the workforce. In addition, there are commercial reasons why employers should take steps.

The impact on performance

Victims may experience depression, sleep deprivation, inability to concentrate, loss of appetite or physical pain. These factors could result in performance issues, absenteeism or presenteeism, and consequently reduced productivity and lost output. Research by KPMG for Vodafone indicates that £316m in economic output is lost by UK businesses each year as a result of absences related to domestic abuse. In addition, the potential loss of earnings per female victim is £5,800 per year. Spotting the signs of domestic abuse at an early stage can facilitate early help and the right interventions, which may help victims and save employers time and costs associated with performance management or capability procedures.

Domestic abuse can enter the workplace

Research shows that up to 75% of employed victims are harassed by their abusers while at work. This could be through repeated calls or visits to the workplace. This can impact on colleagues who may find themselves taking messages from the perpetrator, shielding the victim from unwanted calls or other interruptions, taking on the victim's duties or covering for their absence. In some cases, they may inadvertently put themselves at risk.

Organisational culture

An employer that fosters a culture of openness, commits to protecting workers from all forms of abuse and seeks to support victims is likely to be well placed to recruit and retain high-performing employees.

There are also circumstances where an employer may be liable for steps taken (or not taken) relating to domestic abuse, which we discuss below.

The statutory framework

The Government currently uses a non-statutory definition of domestic abuse: 'Any incident or pattern of incidents of controlling, coercive or threatening behaviour, violence or abuse between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality. It can encompass, but is not limited to, the following types of abuse: psychological; physical; sexual; financial; emotional.'

'with the exception of coercive or controlling behaviour, which is a crime, there is no specific criminal offence of "domestic abuse"'

At the time of writing, the Domestic Abuse Bill is moving through Parliament. It will introduce, among other things:

- a statutory definition of domestic abuse, which includes economic abuse; and
- clarification that a person cannot consent to actual bodily harm, more serious injury or, by extension, their death for the purposes of sexual gratification (ie abolition of the so-called 'rough sex' defence).

The Government also confirmed on 1 March that it would introduce an amendment to the Bill to include a new specific offence of non-fatal strangulation, which would be punishable by five years' imprisonment.

With the exception of coercive or controlling behaviour, there is no specific criminal offence of 'domestic abuse'. However, criminal law criminalises domestic violence through offences that also apply in non-domestic contexts, including battery, sexual assault, rape and harassment.

It may be helpful for employers to understand the statutory agencies' response to domestic abuse. Most local authority areas now use the Domestic Abuse, Stalking and Honour Based Violence Risk Identification Checklist (DASH-RIC) to assess the level of risk to victims. Multi-Agency Risk Assessment Conferences (MARAC) are regular meetings that take place in each local area, usually chaired by the police, where statutory and voluntary sector partners work together. MARAC considers cases identified as 'high risk' by use of the DASH-RIC and develops a coordinated safety plan to protect each victim.

Relevant legal issues

There is currently no specific domestic abuse legislation giving rise to obligations on employers. That said, employers' existing legal obligations are relevant, including:

- employers have a duty to take reasonable care of the health and safety of employees, arising from common law, the Health and Safety at Work Act 1974 and other health and safety regulations. The Management of Health and Safety at Work Regulations 1999 (SI 1999/3242) oblige employers to conduct a suitable and sufficient risk assessment and identify preventative measures. Employers' obligations in relation to health and safety apply, irrespective of whether the employee works from the workplace or from their home, as many currently are. As such, where there is a known risk of domestic abuse, the starting point would be a risk assessment, taking account of domestic abuse risks when working from home and identifying measures to minimise those risks. Breach of health and safety obligations could give rise to a personal injury claim under the tort of negligence or enforcement by the Health and Safety Executive, including criminal sanctions in serious cases;
- if physical or mental injuries arising from domestic abuse have a substantial and long-term adverse effect on the victim's ability to carry out normal day-to-day activities, they will satisfy the definition of a disability under the Equality Act 2010. If an employee is disabled, the employer should make reasonable adjustments to remove substantial disadvantages, including potentially to performance or absence management processes. Failure to make reasonable adjustments could result in a discrimination claim.
- employers have a duty not to treat employees in a way that is calculated or likely to breach the implied term of mutual trust and confidence. An employee with two years' service could, in theory, bring a claim for constructive dismissal if they allege breach of the implied term – for example, because they feel the employer failed to support them – and resign in response to the alleged breach; and
- other legal rights may be relevant depending on the circumstances. For example, if the victim and perpetrator are co-workers, the employer would need to be alive to other potential claims under the Equality Act 2010 (for example, harassment) if the perpetrator's conduct towards the victim is related to a protected characteristic. A claim under the Protection from Harassment Act 1997 may also be relevant if the conduct is not related to a protected characteristic but is a course of conduct which amounts to harassment which the perpetrator knows or ought to know amounts to harassment.

A perpetrator in the workforce

A recent report by the CIPD and Equality and Human Rights Commission recommends that employers should challenge perpetrators in the workplace. An employer would benefit from having a clear domestic abuse strategy and policy in place to deal with alleged or admitted perpetrators. Even if the abuse takes place outside work, it may be possible to discipline the employee. To assist, the disciplinary policy should make clear that domestic abuse (wherever it occurs) can result in disciplinary action up to and including dismissal or notification to the police or regulators. When faced with an admitted or alleged perpetrator, considerations include:

'a domestic abuse strategy … need not require significant ongoing costs for clients but could have a genuinely life-changing impact on victims in the workplace'

- whether the misconduct was linked to their employment (for example, if it was at work or the perpetrator used the employer's equipment to carry out the abuse);
- any impact on the victim or other colleagues;
- any impact on the employer's reputation;
- whether it impacts on the employer's trust and confidence in the employee to perform their role, or undermines their suitability for the role; and
- any criminal proceedings.

Records should be maintained justifying the reasons for disciplinary action. To guard against potential unfair dismissal claims, the employer should carry out an investigation and follow a fair process. Per the Acas Code of Practice, being charged with or convicted of a criminal offence is not normally a reason in itself for disciplinary action. The CIPD/EHRC report notes that if an employee is charged or convicted, the above considerations will still apply to determine the impact of the charge or conviction on the employment relationship. It also recommends that the disciplinary policy states that gross misconduct includes evidence of commission of a criminal offence, to make it easier to discipline ahead of a criminal trial (if relevant). The report notes that an employer may also be required to disclose a perpetrator's misconduct to a regulator, for example the FCA.

Implementing a domestic abuse strategy

Developing a domestic abuse strategy will assist employers in dealing with cases of domestic abuse in the workforce. Engaging with dedicated domestic abuse agencies will help ensure a domestic abuse strategy is inclusive and informed by experts. A domestic abuse strategy could include the following.

Training

The Government report found that managers and HR professionals can lack confidence in dealing with domestic abuse cases. Employees, particularly HR and managers, should receive specialist training to spot the signs of domestic abuse and respond accordingly. Victims may be reluctant to disclose abuse, but many report that they hope that someone will ask them. Repeated enquiry over time also increases the likelihood of disclosure. It is crucial that such enquiries are made when the person is in a situation that will not increase risk to them.

Domestic abuse policy

A domestic abuse policy should be tailored to the business and tell employees what they can expect from the employer if they disclose domestic abuse. It should also confirm that disclosures will be treated in confidence, except where there is a risk of harm to a child, vulnerable adult or staff member. It should be reviewed against other relevant policies, including the disciplinary policy and code of conduct, to ensure they are consistent.

Raise awareness

Employers can play an important role in raising awareness and setting out the support that can be offered to victims, both by specialist agencies and within the organisation. Communications should not make assumptions about domestic abuse; for example, that it solely affects women or is perpetrated by men.

Share knowledge and best practice

Domestic abuse cases are complex, and it can be valuable to share knowledge and best practice with other employers. The Employers' Initiative on Domestic Abuse is a network of businesses whose mission is to support employers to deal with domestic abuse.

Employers may be able to offer other practical help, including: formulating a safety plan for the victim, potentially including steps to ensure that the perpetrator cannot identify their location; paid leave to attend appointments related to the abuse or to look for a new house or school; advances on pay or loans; and counselling.

Conclusions

We believe employers can play an important role in supporting victims of domestic abuse. In turn, employment practitioners can help employers navigate cases of domestic abuse in their workforce. Implementing a domestic abuse strategy and responding sensitively to cases need not require significant ongoing costs for clients but could have a genuinely life-changing impact on victims in the workplace.

The authors would like to thank Jane Foster, safeguarding specialist and consultant at Farrer & Co, for contributing her knowledge and insights for this article. There is a free 24-hour national domestic abuse helpline (run by Women's Aid and Refuge): 0808 2000 247 or a live online chat; see: https://www.nationaldahelpline.org.uk/Contact-us

IR35/off-payroll working rules tax reforms: the essentials

GWYNNETH TAN and STUART LAWRENSON, Shoosmiths LLP

This time last year, many private and third sector organisations were grappling with the planned reform to the IR35 and off-payroll working legislation, which were due to come into force on 6 April 2020. Then the pandemic hit and the focus for many businesses turned to closures, redundancies and furlough. As a result, implementation was postponed until 6 April 2021.

Why is reform needed?

IR35 was introduced in 2000 to prevent tax avoidance and to ensure that someone working like an employee, but through an intermediary, typically their personal service company, paid tax like other employees. Originally, all individual contractors were essentially responsible for making their own employment status assessments to HMRC. In April 2017, IR35 reforms in the public sector shifted the responsibility for carrying out these tax assessments from the contractor to the public sector client. Public sector reform was so successful – increasing HMRC revenue by an estimated £250 million in the first 12 months – that the Government decided to extend them beyond the public sector. The changes are set out in the Finance Act 2020.

From 6 April 2021, under the new Off-Payroll Working Rules (OPWR) (chapter 10 of ITEPA), large and medium-sized non-public sector organisations (and their subsidiaries) who engage contractors operating through an intermediary will be responsible for determining the contractors' tax status in respect of that engagement.

Will the OPWR apply to all end clients engaging contractors?

Clients

There is a specific exemption for small businesses. A small business is one that meets two of the following criteria:

- an annual turnover of no more than £10.2 million;
- a balance sheet total (assets) of no more than £5.1 million; and
- no more than 50 employees.

For these organisations, the current position will remain in place, and the intermediaries through which the contractor is engaged will retain responsibility for assessing the contractor's tax status under the original IR35 legislation (chapter 8 of ITEPA 2003).

A contractor can ask for confirmation of a client's size in order to check whether the OPWR apply. A client should respond to such a request within 45 days.

OPWR will not apply to wholly overseas clients or to clients who have fully outsourced a service.

Contractors

OPWR will apply only to those contractors who are contracting through an intermediary. It does not apply to contractors who are engaged directly or to any individual who is already subject to PAYE and NIC deductions, typically agency workers, or those providing services through a traditional umbrella company arrangement.

What are the obligations of clients under the new rules?

Clients must decide the employment status for tax for each contractor on every engagement undertaken by the contractor and must take reasonable care in reaching that determination. The client must then inform both the individual and the party it has contracted with in the labour supply chain of the outcome and the reasons for it, in a status determination statement (SDS).

The SDS must continue to be passed down the labour supply chain until it reaches the fee-payer. The fee-payer,

'clients must take "reasonable care" when making employment status determinations'

who will be the deemed employer, is the party immediately above the intermediary in the contractual chain provided the contractor has neither control of nor a material interest in it.

If the client determines that the contractor is inside OPWR, then the responsibility for employment taxes and applying any apprenticeship levy falls to the fee-payer before paying the fees due for the services.

There is no prescribed form for an SDS, which must state whether the contractor would be/is an employee or office holder for tax and NICs purposes if they were directly engaged by the client and provide the reasons for coming to that conclusion.

If a party in the labour supply chain receives the employment status determination, but does not pass it on, they will become both the fee-payer *and* responsible for the employment taxes and paying these to HMRC.

If HMRC is unable to collect outstanding tax or National Insurance contributions from the fee-payer or any parties in the chain, then it may seek to recover these sums from the first intermediary in the chain, failing which, recovery will be sought up the chain with ultimate responsibility potentially resting with the client. The transfer of liability in this way is likely to be a concern for clients who will want to ensure appropriate indemnities are in place in any agreements with intermediaries in order to protect their position.

HMRC has frowned upon blanket status determinations being applied to any grouping of contractors, as employment status will differ from contractor to contractor, on an engagement-by-engagement basis, depending on the facts of each case. OPWR case outcomes from first-tier tax tribunals have shown that cases with similar facts may have very different outcomes, and blanket determinations will not work. However, we have seen some businesses requiring contractors to provide their services through umbrella companies or to become employees so as to operate PAYE and through payroll in order to take the working arrangement outside of the OPWR. However, as this approach is detrimental financially to contractors, the issue then becomes a reputational one and a question of whether the best talent may be retained by taking this approach.

What are the considerations for making an employment status determination?

A client will need to carefully consider both the written contract detailing the arrangements for the provision of the services as well as usual day-to-day working practices and the practical reality of the arrangement.

The three main factors determining employment status for tax purposes are mutuality of obligation between the parties; how much control each party has over the engagement; and the extent personal service is provided and whether there is a right of substitution. Other factors such as financial risk and integration into the business will be relevant, but there is no definitive list to tick off. The tax tribunals have consistently stated that all factors must be considered, and a picture painted of the whole arrangement to arrive at an employment status determination. The importance of determining status on the facts of each case is borne out by different employment status outcomes in the tax tribunals even where facts appear similar at first glance, as can be seen from the relationship between several television presenters and the BBC (see *Atholl House, Paya Ltd* and *Christa Ackroyd*).

How would an employment status determination be made?

HMRC has developed an online tool known as the 'Check Employment Status for Tax' (CEST), to support clients in making employment status determinations. HMRC is actively encouraging the use of CEST by its commitment to stand by the results reached by it, if questions have been answered accurately, honestly and with reasonable care, and if CEST is used in accordance with the guidance issued by HMRC.

CEST should be completed using HMRC's Employment Status Manual as guidance and before each new engagement with a contractor and again if the working practices or terms of an engagement change.

HMRC views the fact of a contractual relationship signifying the existence of mutuality of obligation. Interestingly, despite strong criticism, and the rejection of HMRC's position on mutuality of obligation by the Upper Tribunal in *Professional Game*, mutuality of obligation is missing as a factor from CEST.

In some cases, CEST will be unable to provide a conclusive answer and a client will need to consider the working relationship further to reach its own conclusion.

What will be the risk of getting it wrong?

Clients must take 'reasonable care' when making employment status determinations. HMRC's Employment

'clients should ensure compliant policies and procedures are in place to determine how to resolve any disputes'

Status Manual clarifies that clients should 'act in a way that would be expected of a prudent and reasonable person' in the client's position, and this will be interpreted differently, depending on a client's circumstances, experience and abilities. For example, larger organisations will be expected to take a greater degree of care, than smaller ones.

HMRC has also provided a non-exhaustive list of what would amount to not taking reasonable care, including:

- blanketly applying determinations and not considering the different working arrangements for each worker;
- inputting inaccurate information in CEST;
- the individual tasked with completing a status determination statement not possessing the knowledge required to complete it or does not have the necessary level of support; and
- absence of any proper training.

Clients who fail to take reasonable care will be responsible for the employment taxes and any apprenticeship levy, even if they are not the fee-payer.

In order to allow for businesses to adjust, no penalties will be imposed on clients for errors relating to off-payroll in the first year from the introduction of the OPWR, except in cases of deliberate non-compliance. HMRC has also previously made promises to focus on educating businesses, including helping clients to amend errors to ensure correct status determinations going forwards.

Can an SDS be challenged?

Either the contractor or the fee-payer has the right to appeal the SDS.

Legislative requirements are minimal. The appeal may be made verbally or in writing. The client must review its decision and respond (stating reasons) to the appeal within 45 days of receiving it provided the appeal is made before the last chain payment is made to the intermediary in relation to that engagement. During this time, the client should continue to apply the rules in line with their original determination. Following the review, a client needs to confirm whether the determination has changed. If the client agrees that the original SDS was wrong, it must issue a new SDS confirming the date from which it is valid and state the withdrawal of the original SDS. If it misses the deadline, the contractor's tax and National Insurance contributions become the client's responsibility.

Clients should ensure compliant policies and procedures are in place to determine how to resolve any disputes and specifying clear time limits for which the worker or fee-payer must challenge the SDS.

Conclusion

In summary, clients should be taking the following steps now in preparation:

- carrying out a full audit of their existing contractor workforce, to identify who may be subject to a status determination under the new rules;
- opening dialogue with contractors who have been identified as having employee status for tax purposes;
- training managers on OPWR compliance;
- keeping detailed records of all decisions and processes, including a live up-to-date list of contractual arrangements and the individuals involved and implement appropriate policies to resolve disputes; and
- reviewing contracts with any third-party supplier to ensure relevant warranties and indemnities in respect of OPWR compliance.

KEY:

ITEPA	Income Tax (Earnings and Pensions) Act 2003
Atholl House	*Atholl House Productions Ltd v HMRC* [2021] UKUT 0037 (TCC)
Paya Ltd	*Paya Ltd v HMRC* [2019] UKFTT 0583 (TC)
Christa Ackroyd	*Christa Ackroyd Media Ltd v HMRC* [2019] UKUT 326 (TCC)
Professional Game	*Revenue and Customs Commissioners v Professional Game Match Officials Ltd* [2020] UKUT 147 (TCC)

'Uber and out' in the UK, France and Australia

SHERYN OMERI, Cloisters

The Briefing examines the Supreme Court's landmark decision in Aslam, and looks at two other cases involving Uber in France and Australia.

19 February 2021 and 4 March 2020 are dates forever etched in the minds of the tens of thousands of Uber drivers in the UK and France respectively. On them, the highest courts of each country determined that Uber drivers are 'workers' and 'employees', respectively. In the UK, following *Aslam*, drivers are entitled to be paid the national minimum wage and holiday pay, and to protection from being subjected to detriment, including dismissal, for whistleblowing. It also means that Uber cannot discriminate against them.

The Supreme Court dismisses Uber's appeal

In the judgment of 19 February, the UK's Supreme Court unanimously dismissed Uber's final appeal against the decision of the Central London employment tribunal on a preliminary hearing, that the claimants fall within the statutory definition of 'worker' set out at s.230(3)(b) ERA. It upheld the tribunal's finding that the claimants worked under an implied contract with Uber London, pursuant to which, they undertook personally to provide transportation services for Uber, which was neither a client nor customer of any profession or business undertaking carried on by them. It also upheld the tribunal's conclusion that they did so every time they logged on to the Uber drivers app until they logged off.

As personal service was not in dispute, the case turned on whether the claimants undertook to provide transportation services 'for' Uber, or whether they were principals in an agency relationship in which Uber London merely facilitated the making of contracts between the claimants and each of their passengers as a booking agent.

This question required the Supreme Court to: (i) consider the place of the ordinary principles of contract and agency in the world of work; and (ii) apply the common law tests for employee status, particularly those of control and integration, but bearing in mind that 'the basic effect of limb (b) is, so to speak, to lower the passmark, so that cases which failed to reach the mark necessary to qualify for protection as employees might nevertheless do so as workers' (*Byrne Bros* at [17](5) per Mr Recorder Underhill QC). This is not to say that Uber drivers do not meet the common law tests for employee status as has been found to be the case in France; Messrs Aslam and Farrar had not sought to establish this in the English proceedings.

On the matter of the relevance of ordinary principles of contract to this case, the Supreme Court held that, fatal to Uber's argument, was the absence of any written agreement between Uber London (which held the private hire vehicle operator's licence in respect of London and therefore bore responsibility for accepting and fulfilling customer bookings through its drivers), and its drivers, despite the existence of such agreements between the Dutch parent company, Uber BV, and drivers and Uber and passengers. This meant that, the Supreme Court held, at para 49, there was no factual basis for Uber's contention that Uber London acts as the drivers' agent when accepting private hire bookings. In addition, without expressing a concluded view, the Supreme Court held, at para 48, that an agency arrangement would not be compatible with the PHV licensing regime. The latter must have implications for all PHV operators who consider themselves mere agents of independent contractor drivers (see *Lange*); licensing law may not allow for this.

Court goes beyond Autoclenz

Of even wider import was what the court had to say about the relevance of the ordinary principles of contract to the world of work. Uber had contended that whether a person is a 'worker' ought, in principle, to be approached, as the starting point, by interpreting the terms of any applicable written agreements; *Autoclenz* had said just this, but to the extent it could be supposed that it had said differently, it was wrongly decided.

'in France, where "worker" status does not exist, the Cour de Cassation … went further in holding that Uber drivers are employees'

The court not only affirmed *Autoclenz*; it went considerably further. It first endorsed the approach referred to by Lord Clarke in *Autoclenz* of courts considering what was actually agreed between the parties either as set out in written terms, or if it is alleged that such terms are not accurate, what is proved to be the actual agreement at the time the contract was concluded (at paras 62 and 84). However, at para 68, the Supreme Court went further, pointing out that the theoretical justification, limited to the inequality of bargaining power between employers and workers in *Autoclenz*, had not been fully spelt out in that case.

From para 69, the court reasoned that applying ordinary principles of contract law would give employers a free hand to contract out of statutory employment protections. As a result, 'the task for the tribunals and the courts was not … to identify whether, under the terms of their contracts, Autoclenz had agreed that the claimants should be paid at least the national minimum wage … It was to determine whether the claimants fell within the definition of a 'worker' in the relevant statutory provisions so as to qualify for these rights irrespective of what had been contractually agreed. In short it was a question of statutory interpretation, and not contractual interpretation.'

Considering statutory purpose

Statutory interpretation involved consideration of statutory purpose which, in the case of the statutes invoked by Messrs Aslam and Farrar, was 'to protect vulnerable workers from being paid too little … required to work excessive hours or subjected to other forms of unfair treatment' (para 71) and that: 'Once this is recognised, it can immediately be seen that it would be inconsistent with the purpose of this legislation to treat the terms of a written contract as the starting point in determining whether an individual falls within the definition of a "worker"' (para 76).

Were the primary question not one of statutory, rather than contractual interpretation, the law would in effect be according Uber 'power to determine for itself whether or not the legislation designed to protect workers will apply to its drivers' (para 77).

This heralds a new dawn in employment status litigation. Henceforth, when making submissions to tribunals on this subject, practitioners will no longer be required, or even permitted, to commence with the written contract. While it has long been understood that the label the parties ascribe to the relationship is not determinative, since 19 February 2021, it is now not even the starting point. It is to be accorded no greater primacy, even *prima facie*, than any other facts or circumstances of the working relationship.

Significant control over drivers

Applying the common law tests for employee status, the Supreme Court held that five aspects of the relationship in particular demonstrated the significant control over drivers which Uber exercised, sufficient for them to fall within the definition of 'worker'. These were that:

- remuneration paid to drivers is fixed by Uber;
- contractual terms on which drivers perform their work are dictated by Uber;
- although never obliged to log on to the drivers app, once logged on, a driver's choice about whether to accept requests for rides is constrained by Uber; Uber controls information provided to the driver in advance of accepting a ride and monitors drivers' rates of acceptance of ride requests;
- Uber exercises significant control over the way drivers perform their services, including vetting the types of cars drivers may use, directing them to passengers' pick-up locations and from there to their destination and using its own rating system as an internal performance management tool; and
- Uber restricts communication between drivers and passengers to the minimum required to perform any given trip.

Hence, the transportation provided by drivers is designed and organised in such a way as to provide a standardised service, from which *Uber*, rather than the drivers, obtains the benefit of customer loyalty and goodwill (para 101). This is a matter of great significance to the gig economy as a whole; it is difficult to fathom how any gig economy enterprise will be able to attract and maintain customer loyalty to its 'brand' other than by providing a standardised service. That must necessarily involve controlling the way workers undertake their work.

That must also have been the answer to Uber's initial public statements, that the Supreme Court's decision only applied to the claimants in that case. Uber does not negotiate individual (implied) contracts with each driver.

'it seems doubtful that that common law jurisdiction has seen the last of the question of the employment status of those who provide services for Uber'

Although it may, during the course of this litigation, have changed some of its terms in order to loosen its grip on its drivers, all 30,000 drivers who drove for it in London at the time Messrs Aslam and Farrar did must be able to take the benefit of the judgment. Whether they are now out of time to bring claims against Uber for payment of minimum wage and holiday pay, and whether Uber intends to rely on this technicality remains to be seen. Happily, on 17 March, Uber indicated that it would recognise its *current* drivers as workers, pay them at least the national minimum wage, holiday pay and pension contributions. However, it made clear that it would not so recognise its Uber Eats delivery people. It further suggested that it would only pay the national minimum wage in respect of time drivers spend driving passengers from their pick-up to their destination and not in respect of all of the time drivers spend logged on to the drivers app, in defiance of the Supreme Court's judgment. These areas will remain fertile ground for future litigation.

Uber in France ...

In France, where 'worker' status does not exist, the Cour de Cassation arguably, even in the absence of such status, went further in holding that Uber drivers are employees.

It held that the claimant driver met the test for employee status under French law; he provided services under terms and conditions placing him in a relationship of permanent legal subordination with regard to the principal. Such subordination must be characterised by the performance of a job under the authority of an employer that has the power to give orders and instructions, to oversee performance thereof, and to sanction the subordinate for any breaches – not a world away from our own control test.

In reaching its ultimate conclusion, the French court took into account that the use by Uber drivers of the app did not lead to their obtaining their own client base nor to their being free to set their own fares or to determine the terms and conditions for conducting their own so-called 'transportation service business'; and such terms are determined entirely by Uber.

... and in Australia

In Australia, a fellow common law country, but where, as in France, 'worker' status does not exist, the Fair Work Commission at both first instance and on appeal held that Uber Eats delivery person, Amita Gupta was not an employee (*Gupta*).

When Ms Gupta appealed to the Federal Court, counsel for Uber submitted that, beyond affirming that there was no employment relationship between Uber and Ms Gupta, the court was not required to make any positive finding about what the nature of the relationship was. In response however, White J said: 'We actually operate in the real world here. Judgments are practical things, especially in this context. This is not a debating club. We've not just got a theoretical construct to ask ourselves about. I'm puzzled as to why your client doesn't offer the court an analysis of the true factual element of the characterisation of the relationship.'

Shortly thereafter, the case was settled and a finding that Ms Gupta was an employee was avoided on that occasion. But it seems doubtful that that common law jurisdiction has seen the last of the question of the employment status of those who provide services for Uber.

Sheryn Omeri was junior counsel for Messrs Aslam and Farrar.

KEY:

Aslam	*Uber BV v Aslam* [2021] UKSC 5
ERA	Employment Rights Act 1996
Byrne Bros	*Byrne Bros (Formwork) Ltd v Baird* [2002] ICR 667
Lange	*Addison Lee v Lange* [2019] ICR 637
Autoclenz	*Autoclenz v Belcher* [2011] ICR 1157
Gupta	*Gupta v Portier Pacific Pty Ltd; Uber Australia Pty Ltd t/a UberEats* [2020] FWCFB 1698

Sex and gender in the workplace: a counterpoint

ROBIN MOIRA WHITE, Old Square Chambers

The author offers a response to Anya Palmer and Monica Kurnatowska's article in last month's Briefing, believing it offers only one view of the correct approach to the law on sex and gender in the workplace.

2020 cases: Forstater and Higgs

The theme that emerges is that holding so-called gender-critical beliefs may be one thing, but manifesting them in the workplace to the detriment of trans employees or customers is another. Misgendering or deadnaming (calling a person by their pre-transition name) would be likely to create the offensive environment for trans folk, which would found a case of unlawful harassment, and a person holding a belief, which they believe entitles them to do these things appears to cross the line.

Scope of protection under the Equality Act 2010

The previous authors suggest that *Taylor* merely showed that a trans person was protected even if they were at 'any point in the transition process'. That is not the ratio of the case. The respondent argued that Ms Taylor was not protected by the EqA because she was non-binary and gender fluid, and was therefore not undergoing gender reassignment (paras 166-169). The tribunal were clear (para 178) that transition did not have to mean a move all the way along the gender spectrum.

In their comments on *Taylor*, the previous authors explicitly and unnecessarily refer directly to Ms Taylor's pre-transition gender. Even for trans individuals who have not suffered workplace harassment like that in *Taylor*, the decision to transition is often reached after an intense personal struggle and insensitive reminders of that should be avoided by employers and professionals alike. On those rare occasions when reference to a pre-transition state needs to be made, sensitive language should be used, as *this* paragraph has done.

Single-sex exemptions

There are *exemptions* that *permit* but do not *require* an employer to provide single sex facilities as an *exemption* from the normal principle that separate provision of services would be discriminatory. The previous authors note that the exemption has to be proportionate, but it also must comply with a *legitimate* aim.

The previous authors also suggest that possession of a GRC is determinative of the sex of a trans individual for the sex provisions of the Equality Act. However, the EqA makes no mention of the GRA. There is no definition on 'man' or 'woman' in the EqA beyond s.212, which defines a man 'as a male of any age' and a woman similarly. There is no definition of 'male' or 'female' and so it would appear that s.212 was intended to do no more than ensure that a 'boy' is a man and a 'girl' is a woman when the Act deals with school education, sport and much more. A short thought-experiment gives the final lie to the 'GRC-dependent' position. If a trans man is perceived as a man and suffers discrimination as such, he is a man for the purposes of the EqA. If the discriminator perceives him as someone different from other men as he has undergone gender reassignment that will be gender-reassignment discrimination. And if the discriminator perceives the trans man as a woman and treats him differently from other men on that basis, he is suffering discrimination as a woman. Discrimination is in the eye of the perpetrator. The EqA must be interpreted purposively.

In addition, the views of the authors of the previous article, namely that a trans woman without a GRC is a man for the purposes of the EqA, no matter how fully she has transitioned physically and socially, is wholly contrary to House of Lords and ECJ authority in this area.

In *West Yorks Police*, Baroness Hale said:'62. She meets entirely the plea of Advocate General Ruiz-Jarabo Colomer in *KB*, at para 79: "To my mind it is wrong that the law should take refuge in purely technical expedients in order to deny full recognition of an assimilation which has been so painfully won."

'it certainly would not be right to suggest that a trans person has to be "open" with the whole workforce about their gender identity'

'63. In my view Community law required in 1998 that such a person be recognised in her reassigned gender for the purposes covered by the Equal Treatment Directive.'

Similarly, the ECJ in *MB*, held: 'Persons who have lived for a significant period as persons of a gender other than their birth gender and who have undergone a gender reassignment operation must be considered to have changed gender.'

In the workplace

Co-operation with the transitioning individual would be a pre-requisite to handling a workplace transition properly. The previous authors suggest that the employer should be 'open'. It certainly would not be right to suggest that a trans person has to be 'open' with the whole workforce about their gender identity and/or transition. After *Taylor*, it is clear that best practice will be for workplace policies to be in place that encompass complex gender identities such as non-binary and gender-fluid individuals.

The suggestion made by the authors that an equality impact assessment should be undertaken for trans-inclusive policies needs unpacking. Let's flip the protected characteristic for a moment. Would we expect an equality impact assessment for policies dealing with race equality or sexual orientation equality in the workplace? Plainly not. And no more so should we with trans equality. It should be a given, not a 'debate'.

The authors comment on workplace toilets. When the fears or concerns of other workers are explored, they are found to be illusory or are allayed. It is very unlikely to be a proportionate means of achieving a legitimate aim to require a trans person to use facilities inconsistent with their affirmed gender and is likely to constitute unlawful harassment.

The previous authors rely on the Workplace (Heath Safety and Welfare) Regulations 1992 to suggest that trans people should be excluded from the facilities consistent with their affirmed gender. But the 1992 Regulations include no definition of 'man' or 'woman' and, secondly, they pre-date the *P v S and Cornwall* case, the 1999 Regulations and both the GRA and the EqA.

The previous authors also cite *Croft* and question whether it was considered in *Taylor*. The respondent in *Taylor* referred to and relied on *Croft*. *Croft* only found that it was, at that time and in that particular workplace, not unlawful discrimination to exclude a trans woman early in her transition from female toilets for an interim period – all fact specific.

Lastly, the previous authors are critical of employers asking staff to use 'preferred pronouns' in communications, which are now regarded as good diversity and inclusion practice. Why would you *not* want to do something to make a marginalised group feel part of the whole?

The one certainty is that there will be some interesting case law in this area in the months and years to come.

The term 'trans' is used in this article to refer to those with the protected characteristic of gender reassignment.

KEY:

Forstater	*Forstater v CGD* [2019] ET 220 0909/2019
Higgs	*Higgs v Farmor's School* ET 140 1264/2019
EqA	Equality Act 2010
Taylor	*Taylor v Jaguar Land Rover* [2020] ET 130 4471/2018
GRC	Gender Recognition Certificate
GRA	Gender Recognition Act 2004
West Yorks Police	*Chief Constable of West Yorkshire Police v A (No.2)* [2004] ICR 806
KB	*KB v NHS Pensions Agency* (C117/01) [2004] IRLR 240
MB	*MB v Secretary of State for Work and Pensions* (C-451/16) [2019] ICR 115
Workplace Regulations	Workplace (Health, Safety and Welfare) Regulations 1992 (SI 1992/3004)
P v S and Cornwall	*P v S and Cornwall CC* (C-13/94) [1996] ECR I-2143; [1996] ICR 795
1999 Regulations	Sex Discrimination (Gender Reassignment) Regulations (SI 1999/1102)
Croft	*Croft v Royal Mail* [2003] EWCA Civ 1045

ELA's 21-Day Racial Equity Habit-Building Challenge ©

PAUL McFARLANE, CLAIRE McCANN and EMMA CLARK

Earlier this year, both ELA members and non-members participated in the challenge. What did they learn and what happens next?

What have we learnt?

The challenge ran for 21 days from 21 January 2021 and attracted more than 1,500 signatories. Each day, they were sent a link to a short article, video, podcast or other resource, which give an insight into the experiences and lives of black and Asian communities. At the end of the challenge we surveyed our members for their views and, at the time of writing, we have received responses from 133 people, and the feedback has been overwhelmingly positive.

Some of the key findings were:

- the resources challenged my views on race relations/discrimination – 84% agreed or strongly agreed;
- I have changed the way I think about certain aspects of race relations/discrimination as a result – 87% agreed or strongly agreed;
- I have made changes to some of my responses on issues of race relations/discrimination as a result of the challenge – 65% agreed or strongly agreed;
- I intend to make changes to some of my responses on issues of race relations/discrimination as a result of the challenge – 89% agreed or strongly agreed;
- the resources didn't tell me anything new on issues of race relations/discrimination – 90% disagreed or strongly disagreed;
- did the challenge change the way in which you engage with your black and minority ethnic colleagues? Yes = 36%, No = 43%, Don't have any = 21%; and
- did any of the resources lead to a breakthrough moment for you? The stand outs were: White privilege/There are no black people in Africa (these were released on the same day) and Black doll white doll test, YouTube – 58% selected these two.

Comments from the survey

- 'I found it a real eye opener … I've never really spoken to my friends about their experiences. Always seeing myself as non-racist as I have friends from various ethnic backgrounds and religions. I've been completely oblivious to white privilege.'
- 'Really well put together and very thought provoking. I've shared it with all my employment team colleagues but also with our wider BAME network leaders and internal EDI&W team.'
- 'I have noticed that the challenge has made it easier for my white colleagues to want to have discussions on the subject of race.'

We are delighted by these and the many other positive responses we have received. They clearly show that there was a need and desire to educate and broaden the discussion on race among our membership.

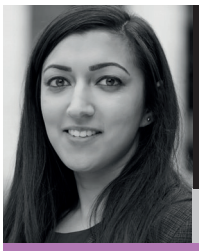
What next?

It is great that the challenge has been so positively received. We now need to build on it to improve equality and diversity in the workplace. ELA wishes to develop this focus by:

- holding a panel session on the challenge at this year's annual conference, where we can discuss: our objectives; the feedback from participants; and explore ideas with attendees on what ELA can do next to encourage discussion about race in the workplace;
- extending the Equitable Briefing project to cover race – we are currently looking at the results we received on how gender has an impact on the selection and instruction of employment counsel, so we can learn any lessons from that project before extending it to race;
- sharing the feedback from the challenge with ELA's new Race & Ethnicity Committee; and
- potentially extending the 21-day challenge to cover other protected characteristics.

As employment lawyers we are very familiar with equality law but it is not always easy to truly understand the issues if you have not experienced them personally. By giving a face and voice to race issues through this challenge, we hope that it has helped our members in their legal work and supporting their clients, and also opened up discussions on racism in their workplace on how the legal profession can become more inclusive.

Paul McFarlane, Claire McCann and Emma Clark, Employment Lawyers Association



The 21-day challenge: a personal view

SACHA SOKHI, Irwin Mitchell LLP

The challenge gave the writer a lot of food for thought, both about her own experiences and the wider employment and legal communities.

Over 21 days, participants were emailed a link to resources that gave an insight into the experiences and lives of black and Asian communities. As well as topical articles and video clips, the challenge also featured an unconscious bias test, designed to test your quick reactions when faced with questions of good v bad compared with black v white. I'd encourage anyone who considers themselves to be 'not-racist' to take the test – you may be surprised by the results.

Intersectionality

While I can sit here and confidently say that, as an Asian woman and a claimant lawyer, I am fully aware that racial prejudice and inequality still exist both in a professional and private sphere, by no means am I unable to educate myself more on this issue. In particular, I was oblivious to the oppressive intersectional issues, or the presence even, of the Black Jewish community that Lara Monroe depicted.

On a personal level, as both a woman and a person of colour, Tsedale Melaku's article resonated with me. Tsedale explores the habitually uncomfortable intersect of race and gender in the workplace, specifically the often heard statement, 'But you don't look like a lawyer'. I, myself, heard this early on in my career as a paralegal. The comment came from a client and fellow Indian and I often wonder whether he would have made that comment had I been a white woman. Was it the fact that I was Asian that he was taken aback by, or that I was a woman? Or, as I suspect, was it both?

Identity

The challenge featured a podcast from Reni Eddo-Lodge, author of *Why I'm No Longer Talking to White People About Race*. Reni talks about the wave of light hearted comedy that emerged in modern Britain that poked fun at racist attitudes. I recall growing up watching *Goodness Gracious Me* and finding it hilarious, but not really understanding the harsh reality behind it until I was much older. For many, becoming aware of the racial inequalities and micro-aggressions that exist happens in the workplace.

As a junior lawyer, it is important for me to see people who look like me in managerial positions. It is also important that those same people actively play a role in promoting diversity and inclusion. Not just paying it lip service, but really encouraging and endorsing those individuals who are on the same path as others but have additional hurdles in their way; be it a protected characteristic or a social mobility issue.

I now look at firms' websites and see a general increase in Asian solicitors but, the higher up I look, the thinner on the ground they are. If I were to look from a black person's perspective, they are almost non-existent. We can only hope that this gap narrows with future generations, and that we challenge why these gaps in ethnicity representation and pay exist. It is clear that these hurdles will exist for many years to come, but we must do what we can to lower them for the lawyers of tomorrow.

Recognition

The challenge was a timely reminder of racial inequality. Not just because of the Black Lives Matter movement, but also when we look at the global pandemic. The poem *You Clap for Me Now* painfully illustrates those BAME frontline workers, teachers and delivery drivers who are so often overlooked for promotion, salary reviews or in Government legislation and Budgets. Yet those same frontline workers were honoured with a weekly clap during the first lockdown. It is this feeling of a lack of recognition, ultimately stemming from barriers caused by race, which creates hostility in the workplace for many.

As *Hamilton* actor Obioma Ugoala put it on day 1 of the challenge; be an effective ally by actively seeing colour, rather than turning a blind eye. By no means is this confined to the notion of 'white privilege'. As an Asian, I need to be

'we, as employment lawyers, have an opportunity and a duty to set the bar high when it comes to diversity and inclusion'

an effective ally to those from other BAME backgrounds. Now is not the time to just 'look after your own'.

Aishnine Benjamin's piece on racial literacy summarises this position well when she states: 'Perhaps you aren't aware that by saying "I don't see race" you are inadvertently putting a negative value on that person's race by suggesting it's not important to you.' Rather than distancing yourself from the 'other', whoever that may be, let us build on this past year of movement and call for change. As many of the resources point to, it is not enough to be 'not-racist', you need to educate yourself to be anti-racist.

Justice

So how can we relate this to our work as employment lawyers and why is it relevant? We are in an age where the majority of discrimination that takes place in the workplace is subtle and understated. If we can address the unconscious bias in our personal lives and tackle that, then surely we would view discrimination claims, whichever side of the tribunal room we sit on, in a clearer, more attentive light.

The challenge incorporated resources from the legal industry, such as employment barrister Mukhtiar Singh's review of the employment justice system. While reading Mukhtiar's views on the 'uncomfortable but necessary discussions' that need to be had to address the imbalance in judiciary and legal representation, I am instantly reminded of the experiences of Alexandra Wilson and many others who often get mistaken for being the defendant in criminal proceedings, simply because of the way they look. We, as employment lawyers, have an opportunity and a duty to set the bar high when it comes to diversity and inclusion, so that other industries take note and follow suit.

In the wake of the BBC partially upholding a complaint about broadcaster Naga Munchetty criticising President Trump on air for racism, a sea of British journalists and television personnel wrote a letter to the BBC (day 17 of the challenge), partly in solidarity with Naga and other BAME employees, but also as a call out to fellow broadcasters, politicians and other industries. One statement that particularly struck me was that 'racism is not a valid opinion on which an "impartial" stance can or should be maintained'. As a legal community, we must address the issues that have long been ignored or unseen. As employment lawyers of all backgrounds, we have an even bigger part to play in addressing these inconsistencies.

For those who are interested in viewing the content, the challenge's resources are still available at: *www.elaweb.org.uk*, and many of the pieces signpost recently written books by BAME authors exploring the above issues and more.

Book review: The Employment Law Handbook (8th edition)

ROSEANNE RUSSELL, University of Bristol

The eighth edition of The Employment Law Handbook provides a pragmatic and comprehensive overview of both employment law and important practical matters, including the calculation of compensation and tribunal hearing preparation. It is a highly readable resource that will appeal to advisers, workers and employers.

Coverage

The book is divided into 17 chapters, ranging from discussions on employment status, whistleblowing, redundancy and TUPE to tribunal procedures. The selection of material is extensive and covers all the key issues that an adviser is likely to encounter when advising on employment rights.

The substantive sections of the book run to almost 400 pages and a line obviously has to be drawn about what should be left out. In this case, the authors have opted to provide a wide overview of those aspects of employment law that crop up in practice without getting caught up in discussion of obscure technicalities. The result is a book that successfully fulfils its aim of being comprehensive but not impenetrable.

Pragmatic and highly readable

The book is written in a highly pragmatic style. The discussion of the variation of terms is an example of this. Over a couple of paragraphs, the authors note that the safest route when the parties cannot agree to a variation is to give notice and offer to start the varied contract immediately. They point out that this carries a risk of unfair dismissal, that any compensatory award will be low in circumstances where little loss is suffered and that an agreed 'cash sweetener' is sometimes offered in return for accepting varied terms given the risk of a basic award. This is just one example of the book's no-nonsense approach that will appeal to those looking for a clear summary of the issues in play.

This pragmatic approach also applies to the language used. As Lord Neuberger states in the foreword to this edition, the authors 'say what the law is' with the intention of making employment law 'simple'. Readers of Daniel Barnett's employment law updates will be familiar with the author's refreshingly direct style that gets straight to the point of what readers need to know. This book is written in a similar manner. For example, when discussing SOSR dismissals or discrimination on grounds of religion or belief, examples are briefly set out in bullet points. Elsewhere we are told that a capability warning is 'pointless' without an employee having an opportunity to improve.

Summary

If advisers or their clients are looking for a clear survey of all major employment law topics, together with practical guidance on points of compensation and procedure, this book will fit the bill.

Sale or return?

Publisher: ELS Publishing, £80

Author: General editor, Daniel Barnett; contributors: Jeremy Scott-Joynt, Nicholas Bidnell-Edwards and Stefan Liberadzki

Suitable for: ☑ Employment law advisers ☑ HR managers ☑ Caseworkers ☑ Workers ☑ Employers

Highlights: Clear, pragmatic, highly readable

Room for improvement: Some readers may want more depth but the book makes clear that it is an 'overview'

diary

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Please check the Training section of the ELA website for details of the webinars we will be offering over the coming months:
https://www.elaweb.org.uk/training-and-events