Annual Review of Employment Law Northern Ireland

2020

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Part 1

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Legal Island Annual Review 2020

Part 1

Introduction

2020 started out as just another ordinary year from a devolved employment law perspective and by March everyone "had gone to Hell in a handcart" as people from the countryside are prone to say. As I sit to write the narrative for this Legal Island Annual Review for the fifteenth year, I can safely say without fear of contradiction that this year has been like no other, for very obvious reasons.

At the time of writing the Chancellor had just announced the Job Support Scheme which replaced the Job Retention Scheme which was colloquially referred to as "furlough". It is staggering to think that six months ago we had never heard of such things and yet in a matter of months into the year 9.6 million workers in the UK were relying on it.

Practitioners up and down the land have been muddling through the mysteries of the new schemes as they are superimposed onto the pre-existing legal framework and in turn throwing up more questions than answers about everything from redundancy pay in a furlough context to the carry-over of annual leave which has not been taken due to the pandemic.

Some answers have been coming through specific legislation (the two issues above being examples) but many other issues have been the subject of speedily drafted "Treasury Guidance" which has become de facto legislation despite not having gone through any legislative processes, checks or balances with the result that whilst well-intentioned it is flawed.

Hastily cobbled together, principle based guidance with legal effect which is amended frequently and has weekly iterations has proved to be migraine inducing for lawyers, HR professionals, trade unionists and anyone involved in the realm of employment and to that end there are still more questions than there are answers and the courts have not been operating in order to see how these are to be legally interpreted and construed.

At last count, the guidance material that I have compiled for Covid-related employment law matters ran to over 1,100 pages and is still growing. To that end it is nigh on an impossible task to present an employment law Q and A that meets a comprehensive need and identifies the ever-changing evolution and iterations of the guidance that has been issued from May-November.

What is abundantly clear is that the devolved employment law policy agenda in Northern Ireland has had to take a back seat. In January 2020 with a new Minister for Employment in situ the hot topics were early conciliation and the intention to address the lacuna in the law regarding parental bereavement leave https://www.economy-ni.gov.uk/consultations/parental-bereavement-leave-and-pay and then to look at the ramifications of what GB was bringing into effect in April 2020.

With developments in GB already in motion and April 2020 reforms a mere formality, practitioners in Northern Ireland were left wondering what aspects of the "Good Work Plan" in GB would be adopted as policy in NI – for example – would we extend the right for "workers" to receive a statement of written employment particulars from day one? Would we lower the information and consultation trigger threshold from 10% to 3%? Would we ensure agency workers received clear succinct written agreements from the outset of their assignment? These are three examples of reform that would appear at face value to be quite straightforward and lacking in controversy from stakeholders such as NIC-ICTU, CBI (NI), IOD (NI).

Other reforms such as the abolition of the "Swedish derogation" and the re-defining of holiday pay reference periods are less straightforward given the jurisdictional complexities of NI and would need to be thrashed out.

In addition question marks remain over the commitments made in the New Decade New Approach (NDNA) agreement which looked at creating good jobs and protecting worker rights and providing workers with a voice, job security, satisfying work and a decent income and conditions. Specifically, NDNA looked at NI reform regarding – devolving minimum wage powers to NI and also banning zero hours contracts. There is perhaps a question of affordability regarding the said reforms and yet more questions exist around unimplemented aspects of the Employment Act (NI) 2016 such as pay gap (gender, race, disability) reporting and how the zero hours regulation component fits with the NDNA plan to ban.

The reality is we did not even get that far because as March 2020 approached we were superseded by events, normal employment law policy development in NI was put on hold, pre-planned GB reforms came in with no fanfare whatsoever and suddenly life in lockdown became a harsh reality. Employment law invariably was from there on in viewed through the contextual lens of Covid and furlough and practitioners were then having to wrestle with key constructs like sickness absence, redundancy, holidays, health and safety but in a totally alien environment with context informing every single decision leaving the door open for accusations of inconsistent practice.

Suddenly, without the checks and balances of a normal law making process and policy making being rapid and "on the hoof" the focus turned to clear interpretation of key terms like – "essential travel" and "key worker" but then narrowed to everyday words like "should" and "if". From here the debate about the status and enforceability of "guidance" and "protocol" began to be queried with the term "soft law" being bandied around.

From an employment law perspective, the almost weekly iterations of Treasury Guidance became the focal point as it was de facto law and soon became a ritual for practitioners to wait for their Thursday evening or late Friday afternoon fix of updates, clarifications, detail and nuance.

Practitioners were then left to apply the principles in to the context in which they found themselves with hastily drafted Q and A (see samples later in document) and

FAQ's being shipped out on a weekly basis in order to quell the insatiable desire for Covid-in-context answers.

However, before we get into the complexities of Covid or the bewilderment of Brexit, we first must look back to the start of the year and the normalities that were January and February of 2020.

The launch of Early Conciliation was at the forefront of many practitioners minds as 2020 commenced and there was a fair amount of fanfare given to the legislation derived from a policy initiative designed to change workplace dispute resolution culture in NI so that the gap between grievance and discipline and the industrial tribunal could best be exploited to allow parties to settle their differences. (See later material on Early Conciliation – the story so far).

GB experiences aside (given the tribunal fees context for most of its operation) Early Conciliation has been given a fair wind and in late January 2020 we began to see the legislation being enacted.

NI Employment legislation – Developments 2020

The Employment Act (Northern Ireland) 2016 (Commencement No. 3) Order (Northern Ireland) 2020

This Order brought into operation certain provisions of the Employment Act (Northern Ireland) 2016 on 27th January 2020.

Article 2(a) to (e) commence provisions on early conciliation of employment disputes.

Article 2(f) commences the provision which places an obligation on the Department to review early conciliation.

Article 2(g) and (h) commences the provisions that permits the Department to make regulations which provide that the members of the panel of chairmen of industrial tribunals and Fair Employment Tribunal may be referred to as employment judges.

Article 2(i) commences the provision which prohibits the Labour Relations Agency, or persons appointed by the Agency, from releasing information relating to a worker, employer of a worker, or a trade union, that they hold in the course of performing their functions.

Article 2(j) corrects a small number of references in the Social Security Contributions and Benefits (Northern Ireland) Act 1992, dealing with statutory shared parental pay, which were introduced by the Work and Families Act (Northern Ireland) 2015.

Article 2(k) updates legislative references in Schedules 2 and 4 to the Employment (Northern Ireland) Order 2003.

Article 2(l) and (o) gives effect to the dispute resolution repeals in Schedule 3 of the Act.

Article 2(m) and (n) gives effect to Schedules 1 and 2, which respectively, make minor and consequential amendments to existing legislation, and set out how the relevant time limits for bringing a claim will be extended where necessary to provide sufficient time for early conciliation to take place and to ensure that the claimant is not disadvantaged.
The Employment Act (Northern Ireland) 2016 (Commencement No. 3) Order (Northern Ireland) 2020

The Industrial Tribunals (1996 Order) (Application of Conciliation Provisions) Order (Northern Ireland) 2020
This Order amended Article 20(1) of the Industrial Tribunals (Northern Ireland) Order 1996. Article 20(1) lists the proceedings which are "relevant proceedings" for the purposes of Early Conciliation and other conciliation services provided by the Labour Relations Agency. The amendments made by this Order update the list of jurisdictions in Article 20(1)
The Industrial Tribunals (1996 Order) (Application of Conciliation Provisions) Order (Northern Ireland) 2020

The Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020
These Regulations and Rules of Procedure establish requirements in relation to proceedings before industrial tribunals (ITs) and the Fair Employment Tribunal (FET). They revoke and replace earlier regulations and rules which separately dealt with these tribunals. The 2020 Regulations provide a revised and consolidated text for the rules and procedures of the industrial tribunals and the Fair Employment Tribunal while simplifying language and structure, being consistent with better regulation principles. The 2020 Regulations also take account of the introduction of Early Conciliation; in particular setting out the implications arising from the adherence, or non-adherence, to the requirements of Early Conciliation.
The Industrial Tribunals and Fair Employment Tribunal (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2020

The Industrial Tribunals and Fair Employment Tribunal (Early Conciliation: Exemptions and Rules of Procedure) Regulations (Northern Ireland) 2020
The Employment Act (Northern Ireland) 2016 amended the Industrial Tribunals (Northern Ireland) Order 1996 and the Fair Employment and Treatment (Northern Ireland) Order 1998 to introduce a requirement for prospective claimants to contact the Labour Relations Agency before they are able to present a claim to an industrial tribunal or the Fair Employment Tribunal. This requirement applies to claims which are relevant proceedings under Article 20(1) of the Industrial Tribunals Order or Article 38 of the Fair Employment and Treatment Order.

Regulation 3 sets out the circumstances in which a claimant may present a claim dealing with relevant proceedings without complying with the requirement for early conciliation.

The exemption in regulation 3(1)(a) relates to claimants who are presenting a claim on the same claim form as other claimants or joining a claim which has already been presented to an industrial tribunal or the Fair Employment Tribunal by another

claimant (so called ‘multiples’); in such circumstances, a claimant may rely upon the fact that another claimant has complied with the requirement for early conciliation and has a certificate from the Agency.

The exemption in regulation 3(1)(b) means that if a claim for relevant proceedings appears on the same claim form as proceedings which are not relevant proceedings, there is no need for a claimant to satisfy the early conciliation requirement in relation to those relevant proceedings.
The Industrial Tribunals and Fair Employment Tribunal (Early Conciliation: Exemptions and Rules of Procedure) Regulations (Northern Ireland) 2020

The Transfer of Undertakings and Service Provision Change (Protection of Employment) (Amendment) Regulations (Northern Ireland) 2020
These Regulations amended the Transfer of Undertakings (Protection of Employment) Regulations 2006, insofar as those Regulations apply to Northern Ireland, to take account of the introduction of Early Conciliation by the Employment Act (Northern Ireland) 2016(1). These Regulations also make corresponding amendments to the Service Provision Change (Protection of Employment) Regulations (Northern Ireland) 2006.

The amendments provide for extension of time limits in respect of prospective claims to an industrial tribunal so as to facilitate Early Conciliation by the Labour Relations Agency. Consequential amendments are also made to cross references to new conciliation provisions set out in Articles 20A to 20C of the Industrial Tribunals (Northern Ireland) Order 1996(2).
https://www.legislation.gov.uk/nisr/2020/15/contents/made

The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations (Northern Ireland) 2020
These Regulations provide that a person who is isolating themselves, as far as possible, from other people, in line with guidance provided by the Regional Agency for Public Health and Social Well-being relating to coronavirus, is deemed to be incapable of work, and therefore entitled to Statutory Sick pay.
https://www.legislation.gov.uk/nisr/2020/32

The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 2) Regulations (Northern Ireland) 2020
These Regulations will ensure that Regulation 2 of the Statutory Sick Pay (General) Regulations (Northern Ireland) 1982 is amended to reflect the date of the latest guidance provided by the Regional Agency for Public Health and Social Well-being relating to coronavirus. It ensures that a person who is following that guidance and is self-isolating is deemed to be incapable of work, and therefore entitled to Statutory Sick pay.
https://www.legislation.gov.uk/nisr/2020/37

The Social Security Benefits Up-rating Order (Northern Ireland) 2020
This Order, which corresponds to an Order (S.I. 2020/234) made by the Secretary of State for Work and Pensions under sections 150, 150A, 151 and 151A of the Social Security Administration Act 1992, alters the rates and amounts of certain social security benefits and other sums.

Statutory sick pay - In section 153(1) of the Contributions and Benefits Act (37) (rate of payment) for "£94·25" substitute "£**95·85**".

Statutory maternity pay - In regulation 6 of the Statutory Maternity Pay (General) Regulations (Northern Ireland) 1987(38) (prescribed rate of statutory maternity pay) for "£148·68" substitute **"£151·20**".

Statutory paternity pay, statutory adoption pay and statutory shared parental pay - In the Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations (Northern Ireland) 2002(39)—In regulation 2(a) (weekly rate of payment of statutory paternity pay) for "£148·68" substitute "**£151·20**"; and - in regulation 3(a) (weekly rate of payment of statutory adoption pay) for "£148·68" substitute "£151·20". In regulation 40(1)(a) of the Statutory Shared Parental Pay (General) Regulations (Northern Ireland) 2015(40) (weekly rate of payment of statutory shared parental pay) for "£148·68" substitute **"£151·20**".
https://www.legislation.gov.uk/nisr/2020/40/made

The Employment Rights (Increase of Limits) Order (Northern Ireland) 2020
This Order increases, from 6th April 2020, the limits applying to certain awards of industrial tribunals, the Fair Employment Tribunal or Labour Relations Agency statutory arbitration, and other amounts payable under employment legislation, as specified in the Schedule to the Order. Article 33(2) of the 1999 Order provides that the limits on various statutory awards and payments under employment rights legislation are index-linked. It requires the Department to modify these limits to reflect the annual percentage change in the Retail Prices Index (RPI) between one September and the next. In this instance the Order revises limits in accordance with the change in RPI from September 2018 to September 2019. 3.2 Article 33(3) requires the Department to round sums to the nearest whole pound, taking 50p as nearest to the next whole pound above.

Rate change examples – Cap on a week's pay for redundancy and unfair dismissal calculations £560, Guarantee Pay £30, Unfair dismissal compensatory award maximum £88,693.
https://www.legislation.gov.uk/nisr/2020/42/made

The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations (Northern Ireland) 2020
These Regulations suspend the limitation, set out in section 151(1) of the Social Security Contributions and Benefits Act (Northern Ireland) 1992, that Statutory Sick Pay is not payable for the first three qualifying days in a period of entitlement. They also amend the Statutory Sick Pay (General) Regulations (Northern Ireland) 1982 ("the 1982 Regulations") to specify when a person is isolating by reason of coronavirus is deemed to be incapable of work.

Statutory sick pay is not payable for the first three qualifying days of a period of entitlement to statutory sick pay. These days are known as "waiting days". Regulation 3 disapplies the waiting days where an employee is incapable of doing the work the employee can reasonably be expected to do under the employee's contract of service, or where the employee is deemed to be incapable, because of coronavirus. This applies retrospectively from 13th March 2020.

Regulation 3 amends the 1982 Regulations. It inserts a Schedule into those Regulations which specifies when a person is deemed to be incapable of work because the person is staying at home. This includes persons with symptoms of coronavirus staying at home for 7 days and persons living in the household of a person with symptoms of coronavirus staying at home for 14 days.

Regulations 4 and 5 omit the provision that previous Regulations amending the 1982 Regulations will expire after 8 months. The Secretary of State will keep the provisions under review in line with corresponding provision in the Coronavirus Act 2020.
https://www.legislation.gov.uk/nisr/2020/54

The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 3) Regulations (Northern Ireland) 2020
These Regulations amend the Schedule to the Statutory Sick Pay (General) Regulations (Northern Ireland) 1982. The Schedule sets out categories of persons who are deemed to be incapable of work by reason of coronavirus. Regulation 2 adds a new category of persons. These are persons defined in guidance issued by the Regional Agency for Public Health and Social Well Being as being extremely vulnerable and at very high risk of severe illness from coronavirus because of an underlying health condition, and who have been advised, in accordance with that guidance, to follow rigorously shielding measures.
https://www.legislation.gov.uk/nisr/2020/66/made

The Working Time (Coronavirus) (Amendment) Regulations (Northern Ireland) 2020
These Regulations provide an exception relating to the effects of coronavirus to the bar on carrying forward untaken leave under Regulation 15 of the Working Time Regulations (Northern Ireland) 2016. They came into operation on 24th April 2020.

Regulation 15 of the WTR entitles workers to 4 weeks of annual leave in each leave year. Where any of this leave remains untaken at the end of the leave year, regulation 15(5)(a) prevents that leave being carried forward into the next year. This is amended by regulation 2(2) of these Regulations, which inserts an exception to this bar on carrying forward untaken leave. The exception applies where at the end of a leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under regulation 15 as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society). In this case the untaken leave may be carried forward and taken in the following two leave years.

Regulation 17 of the WTR provides for a payment in lieu of any untaken annual leave where a worker's employment terminates. This regulation is amended by regulation 2(3) of these Regulations to provide for a payment in lieu of any leave that carried forward under the exception inserted by regulation 2(2) and remains untaken on the date of termination.
https://www.legislation.gov.uk/nisr/2020/68/made

The Maternity Allowance and Statutory Maternity Pay (Normal Weekly Earnings etc.) (Coronavirus) (Amendment) Regulations (Northern Ireland) 2020
These Regulations amend the Statutory Maternity Pay (General) Regulations (Northern Ireland) 1987 and the Social Security (Maternity Allowance) (Earnings) Regulations (Northern Ireland) 2000.

The purpose of the Rule is to prevent an employee from experiencing disadvantage in relation to Statutory Maternity Pay and Maternity Allowance as a result of their being 'furloughed' under the Coronavirus Job Retention Scheme ("the CJRS"). It modifies the way in which Normal Weekly Earnings (NWE) are calculated in cases where an employee has been on furlough for all or part of the relevant assessment period. The amendments ensure that an employee's eligibility for their earnings related rate of Statutory Maternity Pay (SMP) and Maternity Allowance (MA) remains the same as it would have been had they never been furloughed.
https://www.legislation.gov.uk/nisr/2020/69/made

The Statutory Paternity Pay, Statutory Adoption Pay and Statutory Shared Parental Pay (Normal Weekly Earnings etc.) (Coronavirus) (Amendment) Regulations (Northern Ireland) 2020
The purpose of the Regulations is to prevent an employee from experiencing disadvantage in relation to certain family-related statutory payments (specifically Statutory Paternity Pay (SPP), Statutory Adoption Pay (SAP) and Statutory Shared Parental Pay (SShPP)) as a result of their being placed on temporary leave under the Coronavirus Job Retention Scheme ("the CJRS"). The effect of the amendments is to ensure that an employee's eligibility for SPP, SAP (including the earnings-related rate of SAP) and SShPP is the same as it would have been had they not been furloughed.
https://www.legislation.gov.uk/nisr/2020/70/made

The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 4) Regulations (Northern Ireland) 2020
These Regulations amend the Schedule to the Statutory Sick Pay (General) Regulations (Northern Ireland) 1982 ("the 1982 Regulations"). Regulation 2 of the 1982 Regulations provides that a person who is self-isolating in accordance with the Schedule is deemed to be incapable of work.

Regulation 2 of these Regulations adds a new category of person to the Schedule. This is a person who has been notified that they have had contact with a person with coronavirus or a person who has symptoms of coronavirus, and who is self-isolating for 14 days from the latest date on which that contact occurred, or a date specified in the latest notification.
https://www.legislation.gov.uk/nisr/2020/89/made

The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) (No.2) Regulations (Northern Ireland) 2020
This instrument amends the Statutory Sick Pay (General) Regulations (Northern Ireland) 1982 (S.R. 1982 No. 263) ("the SSP Regulations") in order to clarify eligibility of the shielding group for Statutory Sick Pay (SSP). It also sets out how this group will be advised when shielding will come to an end. This instrument also provides that where a person self-isolates for less than 7 or 14 days because they or

a member of their household or an extended household receives a negative test result for coronavirus, they will still be eligible for SSP for the days in self-isolation and do not have to serve waiting days. It also provides that a person who has formed an extended household and is self-isolating because a member of that other household has symptoms of coronavirus may be eligible for SSP.
https://www.legislation.gov.uk/nisr/2020/134/made

THE STATUTORY SICK PAY (CORONAVIRUS) (FUNDING OF EMPLOYERS' LIABILITIES) (AMENDMENT) REGULATIONS AND THE STATUTORY SICK PAY (CORONAVIRUS) (FUNDING OF EMPLOYERS' LIABILITIES) (NORTHERN IRELAND) (AMENDMENT) REGULATIONS 2020

These regulations amend the Statutory Sick Pay (Coronavirus) (Funding of Employers' Liabilities) Regulations 2020 and the Statutory Sick Pay (Coronavirus) (Funding of Employers' Liabilities) (Northern Ireland) Regulations 2020. These amendments ensure employers can continue to access support with the costs of paying eligible Statutory Sick Pay (SSP) to their employees. Specifically, they reflect further changes made by the European Commission to the provision of State aid to small and medium-sized enterprises (SMEs) in difficulty (a SME is a business with fewer than 250 employees and either turnover below €50m or balance sheet total below €43m), ensure that SSP can be reclaimed by employers in line with the changes made by the Department for Work and Pensions to extend eligibility to receive coronavirus related SSP and change the notification mechanism for employers who realise they have mistakenly overstated the amount of a previous claim.
https://www.legislation.gov.uk/uksi/2020/1030/made

The Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020
These Regulations revoke and replace the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020, with savings. They require the closure of certain businesses, services and premises listed in the Schedule, to protect against the risks to public health arising from coronavirus, except for limited permitted uses. They impose restrictions on gatherings, both indoor and outdoor, of more than 30 people, unless for certain purposes and the organiser or operator of the gathering undertakes a risk assessment and complies with relevant guidance. They also impose restrictions on gatherings in private dwellings, of more than 30 people outdoor or 10 people indoor, subject to exceptions.

The need for the restrictions must be reviewed by the Department of Health every 28 days, with the first review taking place by 21 August 2020.
https://www.legislation.gov.uk/nisr/2020/150

The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 5) Regulations (Northern Ireland) 2020
These Regulations amend the Statutory Sick Pay (General) Regulations (Northern Ireland) 1982 in order to extend eligibility for Statutory Sick Pay (SSP) to cover people where they are self-isolating for a minimum of 10 days in line with the

Statement from the UK Chief Medical Officers (CMO) on the extension of self-isolation period on 30 July 2020.
https://www.legislation.gov.uk/nisr/2020/167/made

The Employment Rights (Northern Ireland) Order 1996 (Coronavirus, Calculation of a Week's Pay) Regulations (Northern Ireland) 2020
The Statutory Rule ensures that various statutory entitlements based on a week's pay and connected with termination of employment are not reduced as a result of an employee being furloughed under the Coronavirus Job Retention Scheme (CJRS). The entitlements are: redundancy pay; notice pay; compensation for unfair dismissal; a payment resulting from failure to provide a written statement of reasons for dismissal; a payment resulting from failure to comply with an order for reinstatement or re-engagement; and remuneration for time off to look for employment or arrange training.
https://www.legislation.gov.uk/nisr/2020/178/made

The National Minimum Wage (Amendment) Regulations 2020
This instrument amends the National Minimum Wage Regulations 2015. 2.2This instrument increases the single, main hourly rate of the National Living Wage or "NLW" which was introduced in April 2016 for working people aged 25 and over. This instrument also increases the hourly rate of the National Minimum Wage or "NMW" for workers aged 21 years or over (but not yet aged 25), workers aged 18 years or over (but not yet aged 21), those under the age of 18 and apprentices who are under the age of 19 or in the first year of their apprenticeship. 2.3The rates have been increased in line with the recommendations of the Low Pay Commission ("LPC"). The LPC is an independent and expert body which makes recommendations to the Government on the rates of NMW and NLW as well as other wage related issues. Each of the rates listed in the table below have been accepted by the Government and are due to come into force on 1 April 2020,

(25+) £8.21- £8.72

Adult rate (21-24 year olds) £7.70 - £8.20

Development rate (18-20 year olds) £6.15- £6.45

Youth rate (under-18 year olds) £4.35£4.55

Apprentice rate £3.90- £4.15
https://www.legislation.gov.uk/uksi/2020/338/made

The National Minimum Wage (Amendment) (No. 2) Regulations 2020
This instrument amends the National Minimum Wage (NMW) Regulations 2015 in order to reduce burdens on businesses employing salaried staff (those paid an annual salary in equal instalments) from complying with the NMW rules, without removing protections or benefits for workers.

The NMW Regulations 2015 contain different rules for calculating minimum wage pay depending on how the worker is paid. This instrument widens the range of pay arrangements that are compatible with the worker being treated as a salaried hours

worker under the NMW rules. The range of compatible payment cycles is increased (such as being paid every two or four weeks), and premium payments (for example for working on bank holidays) become compatible.

The instrument also enables employers to specify the 'calculation year' for their salaried workers (the reference point to identify when in a year a worker's basic annual hours, for which they receive their salary, are exceeded). These amendments to the NMW Regulations 2015 have been made in line with evidence from the Government consultation on salaried work and salary sacrifice schemes.

This instrument also changes the rules on payments by workers which reduce pay for NMW purposes. Where a worker makes a purchase form the employer that is in connection with their employment, this no longer reduces pay for NMW purposes if the employer reimburses the worker. These provisions come into force on 6th April 2020.
https://www.legislation.gov.uk/uksi/2020/339/made

The Statutory Sick Pay (General) (Coronavirus Amendment) (No. 6) Regulations (Northern Ireland) 2020
These Regulations amend the Statutory Sick Pay (General) Regulations (Northern Ireland) 1982 in order to extend eligibility for Statutory Sick Pay (SSP) to cover people where they are self-isolating prior to admittance to hospital for planned or elective surgery.
https://www.legislation.gov.uk/nisr/2020/186/made

Other **generalist Covid related legislation** such as the myriad of The Health Protection (Coronavirus, Restrictions) (No. X) (Amendment No. X) Regulations (Northern Ireland) 2020 impacted on organisations by virtue of things such as restrictions on hospitality businesses and it was from here that employers and their advisers and employees and their representatives had to determine what the impacts and employment law ramifications were for things such as – regional lockdowns, business specific restrictions on opening, reduced demand for employees as business had dwindled and so on.

Since early 2020 we have passed 84 sets of regulations under the heading "Coronavirus" and these are specific to the Northern Ireland jurisdiction. The figure for the entire UK is approaching 500 and growing and so to ask a practitioner to be able to track these fluid developments is a nigh on impossible task.

One of the difficulties faced by practitioners in all of this was the fact that general Coronavirus/Covid legislation such as The Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020 impact on organisations because of the time-bound restrictions they imposed, for example on – business closures, gatherings and so on. From around July 2020 there were a series of amendments to this legislation which amended, augmented and re-framed the restrictions.

Thus the extended closure of business which came into effect on 28 March 2020 were lifted on 23 July 2020 and from here we have been subject to fragmented regulations (which again were time-bound and subject to later revocation, hence a

plethora of regulations with the word “revoked” at the end of the title to let you know the restrictions have been lifted.

Examples of the main amendment regulations are detailed below (for historical reference only as they have now been revoked).

The Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020
The Rule revokes and replaces the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020. It requires the closure of certain businesses, services and premises listed in the Schedule, to protect against the risks to public health arising from coronavirus, except for limited permitted uses. It imposes restrictions on gatherings, both indoor and outdoor, of more than 30 people, which are not permitted to take place except for certain purposes and when the organiser or operator of the gathering undertakes a risk assessment and complies with relevant guidance to limit virus transmission. It also imposes restrictions on gatherings in private dwellings, which outdoors must be no more than 30 people and indoors must be no more than 10 people from no more than 4 different households.
https://www.legislation.gov.uk/nisr/2020/150

From here there were frequent amendments –

The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 3) Regulations (Northern Ireland) 2020 –
These Regulations amend the Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020 by removing soft play areas from businesses, services providers and premises subject to closure.

The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 4) Regulations (Northern Ireland) 2020
These Regulations amend the Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020 by applying restrictions in the protected area as defined. The restrictions permit a gathering of one household indoors at a private dwelling, and of up to six persons from up to two households outdoors at a private dwelling. Certain exemptions to those restrictions are allowed.

The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 5) Regulations (Northern Ireland) 2020
These Regulations amend the Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020. A new regulation 4A is inserted which makes requirements regarding music and dancing and the making of a risk assessment at venues where alcohol may be consumed. A new regulation 4B is inserted which makes requirements regarding seating and consumption of food and drink at such venues. A new regulation 4C is inserted which makes requirements regarding the collection and sharing of visitor information by such venues. Regulation 5 is amended to make it an offence for a person to organise or operate a gathering not complying with the conditions in regulation 5 and to require a person who organises or operates a gathering to provide a risk assessment and an account of measures taken to a relevant person.

The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 6) Regulations (Northern Ireland) 2020
These Regulations make changes to the places where restrictions will apply. Outdoor venues where intoxicating liquor may be consumed are now subject to regulations 4A, 4B, and 4C, and places of worship are excluded.

The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 7) Regulations (Northern Ireland) 2020
This regulation amends the Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020. Regulation 3 inserts a definition of "intoxicating liquor". Regulation 4 amends the restrictions on movement within a venue at which intoxicating liquor may be consumed. Regulation 5 adds regulation 4D which places restrictions on the opening hours of certain venues at which intoxicating liquor and food and drink may be obtained or consumed.

The Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 8) Regulations (Northern Ireland) 2020
These Regulations amend the Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020. They introduce restrictions in a designated district, here defined as the Derry and Strabane district area, for a period referred to as the active period, on indoor gatherings, hospitality businesses, guesthouses and hotels, indoor facilities, libraries and outdoor gatherings, with various exemptions.

The Health Protection (Coronavirus, Wearing of Face Coverings) (Amendment No. 2) Regulations (Northern Ireland) 2020
These Regulations amend the Health Protection (Coronavirus, Wearing of Face Coverings) Regulations (Northern Ireland) 2020. They extend the requirement to wear a face covering to a bus, coach, taxi, vehicle being used to train for or take a driving test, an aeroplane, an airport, a restaurant, café, bar or public house , a bank, and public areas of government buildings.

Thus most practitioners focused on the Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020 and from here looked to see what industry/service specific restrictions were imposed and viewed this through the lens of – furlough/redundancy/existing legal framework (delete as appropriate).

Other specific sets of regulations address very context specific issues ranging from – international travel, wearing of face coverings, direct farm payments, universal credit, taxi licensing, single use carrier bags and everything in-between.

Legislating in a pandemic is fraught with difficulties ranging from lack of governance oversight through to problems regarding interpretation. A holistic approach invariably still involves gaps, some people falling through the cracks (atypical workers – agency, self-employed, zero hours etc being the first to come to mind), potential for abuse, inability to apply in certain circumstances.

From here practical "overlay" with existing employment law becomes complex when applied in context – union consultation, decisions on who to furlough, health and safety detriment concerns and the list goes on and on and on and on.

Early Conciliation – The story so far.

As stated earlier it is nearly impossible to look at any subject matter now without viewing it through the lens of Covid19/Coronavirus and early conciliation is no exception. The Labour Relations Agency had only just implemented the requirements to facilitate the third commencement order of the Employment Act (NI) 2016 when 8 weeks later we were in the throes of a global pandemic.

The table below looks at a review period - **1st February to 30th September 2020**.

1/2/19 – 30/9/19 (last year): The Agency received 16,267 receipts – ***of all case types***. Of these, 15,395 were multiples (a mix of Non - ET multiple requests and Tribunal multiples) (holiday pay, redundancy etc). The total number of individual Tribunal cases was **950**.
1/2/20 – 30/09/20 (current year): The Agency received 12,447* receipts – ***of all case types.*** Of these, 10,273 were multiples (of all case types: EC, ET1/ET1F and Non -ET) (holiday pay, redundancy etc). The total number of individual EC Notifications was **1775**. **important to stress that for the majority of this time we haven't received any cases from OITFET due to office closures etc – so this figure may have been higher. Also, some of the multiple cases lodged last year are being re-lodged this year, although relying on the exemption within EC which would result in a reduction in receipts.*

The picture painted by the statistics above is obviously influenced and skewed by a varied set of factors including, but not limited to, multiple cases being continually resubmitted, coronavirus and the Tribunal shutdown. Multiples are explained above but we can see clearly that there has been a substantial increase in individual cases – whether these EC notifications result in increased individual submissions at OITFET is, at this stage, unknown and may be impacted by, again, coronavirus and/or significant backlog at the Tribunal.

The number of instances where EC notifications result in a Certificate being issued and subsequently become Tribunal cases will be a significant factor when considering the impact of and reviewing the progress of early conciliation.

Anecdotally, from internal conversations, we can certainly see increased levels of genuine dialogue and engagement in conciliation over the review period. Stakeholders have had to adjust quickly given that it was a new process, and it took time for them to get used to the new processes and the technology. All the while

everyone was perhaps wary of trying to affect a dispute resolution culture change through the blunt instrument of legislation.

However, in the last two-to-three months we have seen an increased willingness to engage in discussions within early conciliation. As with all cases, there will be those where the Claimant just wants their Certificate so they can lodge proceedings (in that situation there would be no discussion with, or certificate provided to, the Respondent – much to their frustration in a lot of circumstances) and other instances where the Respondent has no interest in discussing the case until proceedings are lodged.

However, we are finding with increasing regularity a willingness to engage constructively in discussions during early conciliation – whether that results in a settlement during not, if proceedings are subsequently lodged then these early discussions will prove extremely beneficial in promoting settlement more quickly during 'traditional' post-claim conciliation (i.e. initial groundwork for resolution will have a positive impact later on). It may also be that following a discussion with a Conciliation Officer the Claimant is made aware of a jurisdictional or time-limit issue and decides not to proceed to Tribunal on this basis.

Of course, as with all aspects of life, Coronavirus is having a huge impact on early conciliation. With the current economic situation and outlook, what will the impact be on the contemporary dispute resolution culture in the short to medium term? What will the impact be on early conciliation notifications? Will we see, as we did following the economic crisis at the beginning of the decade, a stark and rapid increase in insolvency-type cases?

Will financial imperatives, for Claimants and Representatives alike, drive an increase in settlement rates within a relatively short timeframe? And what about the time involved in clearing the backlog at the Tribunal? When faced with likely significant delays at the Tribunal will some Claimants decide against lodging proceedings? We are currently experiencing a surge (topical word) in demand for our Non-ET services which reflects the times we live in and unfortunately, this is likely to continue.

Furlough and Signposting

The word "furlough" entered the legal lexicon in March 2020 and was formally announced by the government on 20 March 2020 and opened on 20 April 2020 in response to the COVID-19 pandemic. Under the scheme, until 1 August 2020, all UK employers, regardless of size or sector, could claim a grant from HMRC to cover 80% of the wages costs of employees who are not working but kept on the payroll ("furloughed"), of up to £2,500 a calendar month for each employee or PAYE worker, plus the associated employer national insurance contributions on that wage.

It changed in July to a "Flexi-Furlough" system which permitted furloughed employees to return to work on a part-time basis. They were paid in full for the time worked and the employer could claim from the CJRS in respect of the time they are not working.

The scheme itself did not directly change the employment relationship between employer and employee. Rather, it allowed the employer to agree with employees that they will be put on temporary leave of absence (furlough), and then allows the employer to recover a proportion of pay from HMRC in respect of employees on that leave.

The reimbursement that employers sought per employee was capped: until 1 August 2020 to the lower of 80% of wage costs or £2,500 per calendar month, plus employer national insurance contributions (NICs) and employer auto-enrolment pension contributions on the furlough pay for hours not worked. Many employers therefore sought to amend the contracts of those put on furlough to match the level of reimbursement that can be obtained.

All the while Treasury were spewing out reams of "guidance" on weekly basis and this became something of a running joke for those working in the employment field as Thursday or Friday of each week between 4.45pm and 10pm there would be – new, amended, augmented, updated, varied, revised – guidance which retained some of the previous version content but did not highlight where the amendments necessarily were. Some examples are listed below and acknowledgement here to Practical Law Company for keeping a sequential list (some of which will now be "archive" material –

- The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme Direction (dated 25 June, published 26 June 2020) (third Treasury direction). The third Treasury direction covers the period 1 July to 31 October 2020.

- Steps to take before calculating your claim using the Coronavirus Job Retention Scheme (Preparatory steps guidance) (based on previous information in the 80% guidance).

- Calculate how much you can claim using the Coronavirus Job Retention Scheme (Calculating claims guidance) (based on previous information in the 80% guidance).

- Example of how to calculate the amount you should claim for an employee who is flexibly furloughed (Worked example: full sequence).

- Examples of how to calculate your employees' wages, National Insurance contributions and pension contributions (Worked examples) (based on previous information in the 80% examples).

- Guidance: Check if you can claim for your employees' wages through the Coronavirus Job Retention Scheme (Employers' CJRS guidance).

- Guidance: Check which employees you can put on furlough to use the Coronavirus Job Retention Scheme (Eligible employees guidance).

- Guidance, Individuals you can claim for who are not employees (Eligible workers guidance) (first published 10 July 2020, based on content previously found in the Eligible employees guidance).

- Guidance: Check if your employer can use the Coronavirus Job Retention Scheme (Employees' CJRS guidance).

- Guidance: Claim for wages through the Coronavirus Job Retention Scheme (Claim guide).

- Guidance: Reporting employees' wages to HMRC when you've claimed through the Coronavirus Job Retention Scheme (Reporting wages guidance).

- Coronavirus Job Retention Scheme calculator (CJRS calculator).

- Claim for your employees' wages through the Coronavirus Job Retention Scheme (CJRS): A step by step guide for employers (Step by step guide).

As a snapshot then back in August 2020, employers were required to pay the following contributions towards furloughed employees' 80% (subject to cap) furlough pay:

- August 2020: The employer NICs and employer pension contributions on the furlough pay.
- September 2020: The employer NICs and pension contributions on the furlough pay and 10% of employees' pay, capped at £312.50. The government will pay 70% of employees' pay, capped at £2,187.50.
- October 2020: The employer NICs and pension contributions on the furlough pay and 20% of employees' pay, capped at £625. The government will pay 60% of employees' pay, capped at £1,875.

Then on 24th September 2020 the Chancellor announced the new **Job Support Scheme.** The new scheme differs from the old in the following way:

Job Support Scheme Payment to an employee working one-third of their usual hours (assuming the government contribution has not been capped)			
33%	**22%**	**22%**	**23%**
Paid by employer for hours worked	Paid by employer	Paid by government (up to a maximum of £697.62 per month)	Unpaid
Job Coronavirus Retention Scheme Payment to an employee who didn't work in October 2020			
20%	**60%**		**20%**
Paid by employer	Paid by government (up to a maximum of £2,500 per month)		Unpaid

Comparison between the Job Support Scheme and the furlough scheme

The **Job Support Scheme** is designed to protect viable jobs (my emphasis – not sure how open to interpretation this may become) in businesses who are facing lower demand over the winter months due to Covid-19, to help keep their employees attached to the workforce. The company will continue to pay its employee for time worked, but the burden of hours not worked will be split between the employer and the Government (through wage support) and the employee (through a wage reduction), and the employee will keep their job.

The Government will pay a third of hours not worked up to a cap, with the employer also contributing a third. This will ensure employees earn a minimum of 77% of their normal wages, where the Government contribution has not been capped.

Employers using the Job Support Scheme will also be able to claim the Job Retention Bonus if they meet the eligibility criteria. The scheme will open on 1 November 2020 and run for 6 months, until April 2021.

All employers with a UK bank account and UK PAYE schemes can claim the grant. Neither the employer nor the employee needs to have previously used the Coronavirus Job Retention Scheme.

Large businesses will have to meet a financial assessment test, so the scheme is only available to those whose turnover is lower now than before experiencing difficulties from Covid-19. There will be no financial assessment test for small and medium enterprises (SMEs).

Employees must be on an employer's PAYE payroll on or before 23 September 2020. This means a Real Time Information (RTI) submission notifying payment to that employee to HMRC must have been made on or before 23 September 2020. In order to support viable jobs, for the first three months of the scheme the employee must work at least 33% of their usual hours.

After 3 months, the Government will consider whether to increase this minimum hour's threshold. Employees will be able to cycle on and off the scheme and do not have to be working the same pattern each month, but each short-time working arrangement must cover a minimum period of seven days.

What does the grant cover?

For every hour not worked by the employee, both the Government and employer will pay a third each of the usual hourly wage for that employee. The Government contribution will be capped at £697.92 a month.

Grant payments will be made in arrears, reimbursing the employer for the Government's contribution. The grant will not cover Class 1 employer NICs or pension contributions, although these contributions will remain payable by the employer. "Usual wages" calculations will follow a similar methodology as for the Coronavirus Job Retention Scheme. Employees who have previously been furloughed, will have their underlying usual pay and/or hours used to calculate usual wages, not the amount they were paid whilst on furlough.

Employers must pay employees their contracted wages for hours worked, and the Government and employer contributions for hours not worked. Our expectation is that employers cannot top up their employees' wages above the two-thirds contribution to hours not worked at their own expense.

What does it mean to be on reduced hours? The employee must be working at least 33% of their usual hours. For the time worked, employees must be paid their normal contracted wage. For time not worked, the employee will be paid up to two-thirds of their usual wage.

Employees cannot be made redundant or put on notice of redundancy during the period within which their employer is claiming the grant for that employee.

The scheme will be open from 1 November 2020 to the end of April 2021. Employers will be able to make a claim online through Gov.uk from December2020. They will be paid on a monthly basis.

Grants will be payable in arrears meaning that a claim can only be submitted in respect of a given pay period, after payment to the employee has been made and that payment has been reported to HMRC via an RTI return.

When analysing the figure associated with the Job Support Scheme some legal commentators are suggesting that it is likely to be cheaper for employers to make redundancies than bring high numbers of employees back from furlough, or that it may be more cost effective to bring a few employees back full time, rather than many part-time under the scheme.

Chancellor Rishi Sunak has announced an extension to the Jobs Support Scheme, which began on 1 November 2020.

Last month, the government announced how the Jobs Support Scheme would contribute 1/3rd of the shortfall of wages (capped at £697.72pm) for employees who were working reduced hours, but working at least 33% of their normal (pre-furlough) hours. The employer would contribute a further 1/3rd of the shortfall, and the employee would forego the final third.

The extension applies to any businesses required to close their premises due to local or national coronavirus restrictions. In that situation, the government will pay two thirds of their employees' salaries, up to a maximum of £2,100 per month. Under the scheme, employers will not be required to contribute towards wages and will only be asked to cover NICS and pension contributions.

Businesses will only be eligible to claim the grant while they are subject to restrictions and employees must be off work for a minimum of seven consecutive days.

The scheme began on 1 November and will be available for six months, with a review point in January. In line with the rest of the JSS, payments to businesses will be made in arrears, via a HMRC claims service that will be available from early

December. Employees of firms that have been legally closed in the period before 1 November are eligible for the CJRS.

The scheme is UK wide and the UK Government will work with the devolved administrations to ensure the scheme operates effectively across all four nations.

Expanded JSS – for those businesses FORCED to close

- Starts on 1 November 2020 to 30 April 2021 (Review in January 2021)
- Employer must be legally **REQUIRED** to close due to a national or local lockdown - Employer **CAN'T** just decide to shut
- Will **NOT** apply where a business is required to close by a local PHA because of a specific workplace outbreak
- Only for Employees who **CANNOT** work because of COVID restrictions and the employee **MUST** have ceased to work in order to claim
- Government will pay 2/3 of the normal pay of each eligible employee (up to a cap of £2,100 per month) - whole of grant must go to employee
- Grant will be paid monthly in arrears with first payments due December 2020
- Employees **CANNOT** be made redundant or put on notice of redundancy when on EJSS but **CAN** remove employee from EJSS and make redundant
- Once permitted to reopen, **CAN'T** use EJSS but may use JSS

At the time of writing no detailed guidance on the JSS scheme had been published.

Covid/Coronavirus – Typical Q and A

This section is derived from the Legal Island "First Tuesday" Q and A resource – Acknowledgement to Johanna Cunningham from Arthur Cox

What Can We Do About Employees Who Are Afraid to Come to Work Because of Coronavirus?

The Corona Virus/Covid-19 pandemic is beginning to cause increased worry for employers, particularly as the first case has been diagnosed in Northern Ireland.

It is envisaged that employers will see a rise in other employees wanting to work from home for fear of coming into contact with the virus, particularly if they have a respiratory condition such as asthma or young kids with underlying health conditions.

It is difficult to provide a definitive answer because this will turn on the individual facts. However, as a general tip, it is prudent for employers to encourage an open dialogue with employees where concerns can be voiced. This will help enable employers to work with employees and to assess if their concerns are genuine and reasonable.

Employers should exercise particular caution in relation to high risk employees, such as those who are pregnant or have underlying conditions. In such circumstances, employers should meet with the employee and discuss possible flexible working arrangements such as working from home.

If employee concerns are not justifiable and employees are unreasonably refusing to attend work, this could constitute an unauthorised absence which may be dealt with via disciplinary action. Furthermore, employees have a duty to comply with their employers' reasonable instructions and a refusal to comply could amount to a breach of contract.

Employers should also keep up to date with guidance from the Public Health Agency, Labour Relations Agency ("**LRA**") and the government as the situation continues to develop.

Can annual leave be taken during furlough?

The Coronavirus Job Retention Scheme ("**CJRS**") guidance, as updated on 17 April 2020, confirms that workers can take annual leave during furlough. However, annual leave taken during furlough leave should be paid at the worker's "normal" rate of remuneration i.e. not the reduced 80% rate under the CJRS.

Some employers may want their employees to take annual leave during furlough to reduce the amount of annual leave that employees may wish to take when lockdown ends, and normality begins to return. It is permissible for employers to ask employees to take annual leave provided that employees are given at least twice as many days' notice as the amount of leave that they are being asked to take. For example, if an employer plans to close for five days and asks its workforce to use annual leave during this period, the workforce must be given 10 days' notice.

In contrast, employers can also request their employees to defer taking annual leave. This may arise in situations where employers are not topping up the 80% furlough pay. As stated above, employees would be entitled to receive their usual holiday pay based on their normal remuneration, not the 80% under the CJRS, and employers may not want to pay the additional amount in the present climate.

It is also important to note that on 24 April 2020, the Working Time (Coronavirus) (Amendment) Regulations (Northern Ireland) 2020 came into force and amend the Working Time Regulations (Northern Ireland) 2016 to permit annual leave that could not be taken as a result of Coronavirus to be carried into the following two leave years. However, please note that carry over is limited to the 20-day entitlement (pro-rated for part time workers) under the Working Time Directive.

As the CJRS guidance has been amended several times along with new COVID-19 legislation being introduced, it may be prudent to obtain specific legal advice if you have a query about carry-over of annual leave or taking holiday during furlough leave.

<u>If an employee has been advised to self-isolate (e.g. through the test and trace system) are we entitled to ask for evidence to verify this</u>?

Northern Ireland has its own test and trace system in place via the Public Health Agency ("**PHA**"). The PHA contact tracing system identifies individuals who have been in close contact (for example, being less than 2 metres apart for more than 15 minutes) with someone who has tested positive for COVID-19. The PHA will then inform the individuals of this and provide them with advice on self-isolating and obtaining a COVID-19 test.

Whilst employers will welcome the test and trace system as it will hopefully help reduce the spread of COVID-19, it could lead to higher levels of absence in the workplace, especially as individuals may be contacted multiple times by the PHA.

Employers can ask for evidence from employees to prove that they are required to self-isolate, particularly if they have reason to believe an employee is not being truthful. Furthermore, some employers may require evidence for statutory sick pay ("**SSP**") purposes. This is due to the Coronavirus SSP Rebate Scheme whereby employers with under 250 employees (as at 28 February 2020) can reclaim SSP for the first 14 days of COVID-19 related absence. In order to make a rebate claim, employers will need to provide a copy of the formal notification that an employee receives from the PHA.

<u>Can we keep in contact with employees who are furloughed?</u>

The employer guidance on the Coronavirus Job Retention Scheme ("**CJRS**") states that an employee must not carry out any work for their employer while they are on furlough leave. The guidance stipulates that an employee must not make money for or provide services to the employer's organisation (or any associated or linked organisation).

However, the CJRS guidance does not state that an employer cannot keep in touch with furloughed employees. In fact, many employers will wish to keep some form of contact with their employees to ensure that communication channels prevail for the duration of the furlough leave. It is possible that the furlough agreement/letter issued to employees will state that employees will be kept informed and updated throughout their furlough leave.

Therefore, there is nothing in the guidance that prevents furloughed employees from:

(a) Assisting in HR matters such as providing evidence in disciplinary or grievance proceedings;
(b) Being kept up-to-date with any workplace developments including those related to COVID-19; and/or
(c) Participating in any "virtual" social events.

<u>What factors do employers need to consider in relation to testing employees for Covid-19?</u>

The below answer is for guidance purposes only and specific legal advice should be sought if your organisation is considering implementing Covid-19 testing.

There are various factors for employers to consider in relation to making employees take a Covid-19 test, for example:

- Data protection implications;
- Employee relations; and
- Health and safety concerns.

Generally, employers will not be able to compel employees to undergo a Covid-19 test and it is unlikely that there would be a contractual basis for carrying out the test. However, employers in sectors such as health and social care would likely find it easier to justify compulsory testing on health and safety grounds.

Employees may object to taking a Covid-19 test (especially if they are not showing any symptoms and do not believe they have been at risk of contracting Covid-19) on the basis that it is an invasion of their privacy, particularly as the test can be quite uncomfortable involving a nasal and throat swab.

However, employers could try and stipulate that the requirement to be tested for Covid-19 amounts to a reasonable management instruction on health and safety grounds. If employees refused to be tested, employers may deem the refusal a breach of the implied term to follow reasonable management instruction and treat the refusal as an act of misconduct via disciplinary proceedings. This could prove difficult to justify given the intrusive nature of the test and also if the test is un-related to employees' duties. In these circumstances, employers may wish to include testing within a Covid-19 related policy or perhaps amend employment contracts to include compulsory testing.

From an employee-relations perspective, employers may wish to meet with employees to try and understand their reasons for refusing the test and see if a

compromise can be reached. This is a challenging time for both employers and employees and good communication is paramount.

The ICO has confirmed that there is nothing preventing employers from testing employees from a data protection perspective, provided that there is a good reason for doing so, e.g. keeping employees or the public safe.

However, employers should be aware that as the data obtained from the tests will relate to employees' health, it will constitute special category/sensitive personal data under the GDPR. This means that employers need to have a lawful basis under both Article 6 and Article 9 of the GDPR in order to lawfully use the data. The ICO guidance states that employers may rely on the legitimate interests basis (Art 6(1)(f), GDPR) and the additional employment basis i.e. health and safety of workforce (Art 9(2)(b), GDPR).

It is also prudent for employers to carry out a data protection impact assessment (DPIA) to assess whether the testing is necessary and proportionate and to mitigate any risks associated with the testing. For example, employers whose workplace makes it difficult to implement social distancing or where employees are working with vulnerable individuals may find it easier to justify testing employees.

Employers must ensure that decision to carry out Covid-19 tests is applied consistently to the workforce in order to mitigate any risk of discrimination.

<u>When Are Employees Entitled To SSP?</u>

The Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations (Northern Ireland) 2020 which came into force on 28 March 2020 provide that an employee is only entitled to SSP if:

- they have a symptom of Covid-19; or
- some-one in their household has a symptom of Covid-19 and they are isolating as a precautionary measure.

This amends the previous, wider position whereby employees who were isolating on the advice of the Public Health Agency were "deemed incapable of work" for SSP purpose.

Therefore, an employee who is self-isolating would now only be entitled to SSP if they have a symptom of Covid-19 or someone in their household has a symptom.

<u>Can We Ask an Employee Who Has a Family Member Who Has Been Diagnosed With, or Is Suspected to Have, Covid-19 Not to Come in to Work?</u>

If the employee has been in close contact with the family member, for example, lives with them, it would be a reasonable request for an employer to ask the employee to self-isolate. However, it is likely in such a scenario, the employee would wish to self-isolate anyway.

In contrast, if an employer simply asks an employee to stay at home because of the relationship between the employee and sick relative, without any reasonable evidence of contact between them, this is unlikely to be an appropriate course of action.

Furthermore, this could lead to possible claims for disability discrimination on the basis of the employee's association to a person with a disability and/or claims for breach of the implied term of mutual trust and confidence.

This scenario highlights the importance of clear communication with the workforce and also to ensure a consistency in approach to help reduce any claims of alleged discrimination or breach of contract.

Do Employers Have to Pay Employees who are Self-Isolating after returning from an affected area?

Firstly, if employees are self-isolating as a precautionary measure, depending on the nature of their role, they may be able to continue working from home. In such instances, employees would continue to be paid because they are still fulfilling their duties to their employer.

If employees who are self-isolating develop symptoms and become unwell, they will usually be entitled to sick pay. Employers should check their policies to see if company sick pay is payable or if the employee will just receive statutory sick pay, subject to the eligibility requirements being satisfied.

There is no automatic right for employees who are self-isolating and cannot work from home to receive sick pay, if they are not actually sick. However, LRA guidance states that employers should "follow best practice" and treat it as sick leave or to agree that the time off will be taken as annual leave.

Strictly speaking there is no legal right for employees who cannot attend work to be paid because they will not be fulfilling their contractual duties. However, if the employee is returning from one of the areas where government guidance has recommended self-isolation, employers should consider the practical implications of refusing to pay employees who are in quarantine. For example, it may encourage employees to come into the workplace and risk spreading the virus.

There would be an even more persuasive argument for employees to receive full pay if they have been advised to self-isolate after returning from work-related travel to an affected area.

Can an employer withdraw offers of employment or delay start dates for new recruits in light of Covid-19?

Withdrawing offers of employment
As a starting point, an employer would need to consider if a contract of employment has been signed by the new recruits (although, technically, a contract can be formed without it being written down). This is because once the offer of employment has

been made and accepted by the employee, the contract of employment is formed. A written contract is more easily enforceable.

Therefore, if the new recruits have agreed an offer of employment and/or an employment contract, the employer will need to serve them with notice in order to terminate the contract before they commence employment. In practice, this will often involve making the new recruits a payment in lieu of notice. Failure to do so could give rise to claims for breach of contract.

If the new recruits have not signed any offers of employment, or the offer of employment was conditional upon certain conditions being met, it will probably be more straightforward, and they can be informed that the offers of employment are being withdrawn, without the need for notice to be given, assuming notice terms have not been agreed orally or in some other way e.g. an exchange of emails.

Changing the start dates
If there is a binding contract in force between the parties (oral or in writing), delaying the start date of employment would amount to a change in contractual terms. In order to make the contractual change, an employer would need to check if it has a contractual right to do so. If not, it would need to obtain the new recruits' express consent.

If there is no binding contract in force, the position may be simpler and the new start date may be communicated to the recruit (preferably in writing for completeness and record-keeping purposes). Keep in mind that, in this second scenario, you still hope that the employee will join you, all be at a later date than expected, and the employer would be advised to work with the employee-to-be regarding a suitable start date.

These are just a sample of the multitude of FAQ's and Q and A's now associated with Covid/Coronavirus and as with the virus itself they will inevitably grow and multiply in order to provide context examples of approaches to take as practitioners face quirks and nuances alike over the coming months as we approach the end of the calendar year

GB Developments

Meanwhile in **GB April 2020** (**meaning GB only**) other changes came into effect that did not apply to NI effectively increasing the number of differences between the two jurisdictions significantly including –

6 April 2020	The Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018 (*SI 2018/1378*) came into force – 52 week holiday pay reference calculation period, right for all workers to get written statement of employment particulars from day 1. https://www.legislation.gov.uk/uksi/2018/1378/made
6 April 2020	The "Swedish derogation" in the Agency Workers Regulations 2010 (which allowed employment businesses to avoid pay parity between agency workers and direct employees if certain conditions are met) was removed by the Agency Workers (Amendment) Regulations 2019. https://www.legislation.gov.uk/uksi/2019/724/made
6 April 2020	Temporary work agencies must provide agency work-seekers with a Key Information document, including information on the type of contract, the minimum expected rate of pay, how they will be paid and by whom under the Conduct of Employment Agencies and Employment Businesses (Amendment) Regulations 2019 (*SI 2019/725*). https://www.legislation.gov.uk/uksi/2019/725/made
6 April 2020	This was the enacting vehicle for all workers to be given the right to a written statement of terms under the Employment Rights (Miscellaneous Amendments) Regulations 2019 – applies to "workers" not just employees and has several more headings than the standard SWP found in the ERA 1996 https://www.legislation.gov.uk/uksi/2019/731/made
6 April 2020	The threshold to request an information and consultation agreement under the ICE Regulations was lowered by the Employment Rights (Miscellaneous Amendments) Regulations 2019 (*SI 2019/731*) 3% down from 10% https://www.legislation.gov.uk/uksi/2019/731/made
6 April 2020	The Parental Bereavement (Leave and Pay) Act 2018 took effect (see NI currently working on policy and legislation on this to "mirror" GB) https://www.legislation.gov.uk/ukpga/2018/24 NI consultation https://www.economy-ni.gov.uk/consultations/parental-bereavement-leave-and-pay
6 April 2020	The government issued guidance on the treatment of salaried-hours work for NMW purposes, noting that the effect of the amendments to the National

	Minimum Wage Regulations 2015 (*SI 2015/621*) is to widen the range of pay arrangements that are compatible with workers being treated as performing salaried-hours work under the NMW rules. https://www.legislation.gov.uk/uksi/2020/339/pdfs/uksiem_20200339_en.pdf
30 April 2020	Temporary work agencies must provide agency workers whose existing contracts contain a Swedish derogation provision with a written statement advising that, with effect from 6 April 2020, those provisions no longer apply. https://www.legislation.gov.uk/uksi/2019/725/pdfs/uksiem_20190725_en.pdf

July 2020
The UK was required to implement the revised Posted Workers Directive, which all EU member states had to transpose into their national laws by July 2020. This gives additional rights to workers who are posted from one EU member state to another to carry out their work.

The UK government took the position that it was already compliant with the revised Directive, except in respect of an obligation on a hirer to inform a temporary work agency of the posting of an agency worker. The Posted Workers (Agency Workers) Regulations 2020 (SI 2020/384) were enacted to modify the Agency Workers Regulations 2010 in this respect. The Regulations came into force on 30 July 2020 and will automatically expire at the end of the transition period.
https://www.legislation.gov.uk/uksi/2020/384/made

Note in Northern Ireland –
The Department for the Economy is proposing to make a Statutory Rule, under powers conferred by section 2(2) of the European Communities Act 1972, and will be subject to negative resolution procedure before the Assembly.

The purpose of the Statutory Rule (SR) is to transpose the EU Posting of Workers Directive in Northern Ireland. The Posted Workers Directive establishes the employment rights and protections that apply to a worker when they are posted (sent temporarily) to another Member State of the EU.

This SR will modify the Agency Workers Regulations (Northern Ireland) 2011 (the 2011 Regulations), which gives Agency Workers the right to the same basic employment and working conditions as if they had been recruited directly, if/when they complete a qualifying period of 12 weeks in the same job.

The Order will require a hirer (a business supplied with an agency worker by an employment agency), which posts an agency worker to an EU Member State where the agency worker does not normally work, to notify the employment agency of the posting and the date at which the posting will commence.

It also modifies the 2011 Regulations to enable a temporary work agency to bring a claim to an Employment Tribunal against the hirer to recover any losses the employment agency may suffer as a result of an EU penalty for failure to comply with the provisions of the Directives relating to Posted Workers.

The proposed Order is required to ensure that legislation in Northern Ireland is compliant with EU law during the transition period, as required under the terms of the Withdrawal Agreement, but any amendments in the SR will expire at the end of the Implementation Period (IP) (31st December 2020).

The EU required this Directive to be transposed into national laws by 30th July 2020. While this deadline has passed, it is still important to bring this legislation into Northern Ireland law prior to IP Day. This is necessary to protect employment agencies and agency workers posted prior to 31st December 2020.

Due to this, the Department does not propose to carry out a formal consultation, but would welcome any views on the proposal by return. It is hoped, subject to views of stakeholders, to proceed to make amending Order in October 2020.

In GB we know that the following are pending (but with no indicative timetable due to Covid) –

A new Employment Bill for GB yet to be revealed but allegedly containing

- **A single enforcement body.**
- A single labour market enforcement agency (to better ensure that vulnerable workers are aware of and can exercise their rights and which supports business compliance) was proposed as part of the Good Work Plan.

- **Tips to go to workers in full.**
- In the Queen's Speech, in October 2019, the government proposed legislation to require employers to pass on all tips and service charges to workers and, supported by a statutory Code of Practice, to ensure that tips would be distributed on a fair and transparent basis.

- **The right to request a more predictable contract.**
- The government previously indicated its intention to legislate to introduce a right for all workers to request a more predictable and stable contract after 26 weeks' service as part of the Good Work Plan.

- **Pregnancy and maternity discrimination: extending redundancy protection.**
- The government previously announced its intention to extend the period of redundancy protection from the point an employee notifies their employer of their pregnancy (whether orally or in writing) until six months after the end of their maternity leave.

- **Leave for neonatal care.**
- The government consultation on a new right to neonatal leave and pay, to support parents of premature or sick babies closed on 11 October 2019.

- **A week's leave for unpaid carers.** This proposal was made in the Conservative party's election manifesto.

- **Making flexible working the default.**
- As set out in the Conservative party's election manifesto, the government intends, subject to consultation, to make flexible working the default position unless an employer has a good reason.

Whether any, none or all of these proposals make it onto the statute books in Northern Ireland remains to be seen.

Notes on on-going cases

All the while case law in 2020 continued apace with appeals of "old favourite" cases being the order of the day –

Uber, as I mentioned earlier has been the highlight of employment law anoraks summer with the case livestreamed in July at the Supreme Court and a decision is pending in 2021.

We await an imminent decision on the **Mencap** case – asleep at work – working or available for work for NMW purposes?

We await final judgement to clarify the interpretation of an inducement to a trade union as a result of the pending appeal in the **Kostal** case.

We await a hearing date for the much debated **Harpur Trust** case on zero hours part year worker holiday pay calculation (immediate preceding 12 weeks regardless if it goes above 12.07%).

A case with a different twist is **National Association of Foster carers v Certification Officer** – revolving around the classification of "workers".

The **Jhuti** case where the Supreme Court held that an employer was liable for automatically unfair dismissal as a result of protected disclosures even though the real reason for dismissal (the making of protected disclosures) had been hidden from the decision-maker behind an invented reason (allegations of poor performance).

The **Debenhams** case whereupon the court of appeal upheld the High Court's decision that the administrators would be deemed to adopt the contract of employment of a furloughed worker when they either applied for a grant under the Coronavirus Job Retention Scheme in respect of that worker or paid wages to that worker.

In **Econ Engineering** the EAT held that that a profitability bonus was not part of a week's pay for a worker with normal working hours under section 221(2) of the Employment Rights Act 1996, and therefore not part of holiday pay under regulation 13A of the Working Time Regulations 1998

The **Robinson** case where the EAT said the contract was "tainted" and that an employee could not enforce a contract when she had knowingly performed it illegally

by failing to pay income tax despite an express provision in her contract that she was responsible for doing so.

The **Williams** case where the EAT said where there is conduct by an employer which amounts to a fundamental breach of contract, a constructive dismissal claim can succeed even if there has been more recent conduct by the employer which does not in itself contribute to a breach of the implied term of trust and confidence but which is what "tips" the employee into resigning. Perhaps a modern twist on the final straw doctrine.

These cases all sit outside my Top 10 cases which I will address in Part 2.

Conclusion Part 1

What a year that was! There are many reasons for confining 2020 to the memory dustbin and all of them relate to the global pandemic.

What started out as a normal employment year took a sharp divergent turn that meant all bets were off and that uncertainty and taking one day at a time became what has been coined “the new normal”.

All the while Brexit bubbled in the background with employment rights in the mix of the negotiations between the UK and the EU and complete uncertainty about what would be protected and what would not. The amended Northern Ireland Protocol further blurred the picture by effectively ring-fencing EU equality derived rights for NI but not the rest of the UK.

One again the shadow of Noel Edmonds looms large with the words “deal or no deal” emblazoned everywhere as one way or the other there will be lots of tentative guesswork about the impact of Brexit on employment rights.

Meanwhile the shadow of Covid hangs over us and we are now left with questions such as –

Q. Has working from home become implied custom and practice?

Q. Can Article 8 of the Human Rights Act protect my privacy when I am working from home?

Q. Will employers rely on “Polkey” arguments not to consult over redundancies?

Q. Can an employer argue that my contract of employment has been frustrated rather than making me redundant?

Q. How effective is whistleblowing protection in the context of Covid 19?

Q. How the Coronavirus Job Retention Scheme (‘CJRS’) applies to the many pregnant women sent home on sick leave by their employers and paid Statutory Sick

Pay (‘SSP’) in the mistaken belief by employers that they were required to self-isolate.

Q. What is meant by the term “viable job” under the new Job Support Scheme (JSS)?

Q. Will the JSS make it more sensible for employers to re-structure and consolidate part-time jobs into full-time jobs thereby indirectly discriminating against women and young people?

Q. Can an employer claim the Job Retention Bonus for any employees who TUPE transfers to it after the CJRS closes on 31 October 2020?

It is highly unusual for me, or anyone for that matter, to conclude with so many unanswered questions but this is symptomatic of the year that was and the answers to these questions and the many more that are sure to follow will eventually come to light as we work our way through 2021.

Mark McAllister (November 2020)

Annual Review of Employment Law Northern Ireland

2020

Mark McAllister

Part 2

Contents

Part 2

Introduction

This year I have changed things slightly by moving the entire Top 10 cases into Part 2 of the Annual Review. There are a variety of reasons for this but primarily because I am not keen to get bogged down in the futility that is second guessing Brexit outcomes and the subsequent impact on employment rights.

Even before we get to Brexit and before it begins to bite down we will invariably see case decisions and policy moves on everything from potentially freezing the national minimum wage through to the decision in the much vaunted "Agnew" holiday pay case before the Supreme Court which has sparked a great deal of debate in GB especially around their two-year back-stop legislation.

What I have retained though is a sense of case decisions (normally at EAT) that have greater value for practitioners in terms of the lessons and take-aways we can draw from them. Learning lessons from the mistakes of others in the employment law arena should never be undervalued or underplayed and let's be clear this is no lesson in schadenfreude but rather to review from the safety of your armchair the potential pitfalls that any practitioner could fall into at any given time.

Despite courts and tribunals having to halt face-to-face hearings early in the year there was still a rich vein of case material available. The backlog of cases that now exists due to the pandemic has meant eye-watering delays for hearings and I suspect case decisions about employer liability for Covid related matters will not be available under the 2025 Legal Island Annual Review.

It never ceases to amaze me how many jurisdictions keep popping up with only slight variations on well-worn themes and how many times health trusts appear before the EAT and the Court of Appeal. I am not suggesting that there is anything inherently remarkable in this but it does speak to the employment relations culture in the UK Health Sector as a whole.

This year we have a wide variety of topics with some old perennials thrown in for good measure, including – internal appeal hearings, contributory fault of the employee, philosophical belief, health and safety dismissal, detriment, employers reputational risk, employee status and lest we forget TUPE and vicarious liability.

Again as with previous years I have gotten into hot water with Scott Alexander regarding my choice and so I have had to placate my Scottish brother by including cases that almost made the top 10 but just fell short but still a well worth a read.

10. Jesudason v Alder Hey Children's NHS Foundation Trust

Reputational risk is probably near the top of most organisations corporate risk register. But employers need to know the limitations of using the potential risk to reputation of being brought into disrepute as a flag of disciplinary convenience. In addition the scope of the term "detriment" has always been broad as "Shamoon" has taught us in the past.

The seriousness or severity of the detriment is not the issue at hand but rather the existence of the disadvantage as caused in context.

In this case the employer, seeking to defend its reputation, subjected an employee to an unlawful detriment in the manner in which it publicly denied his whistleblowing allegations but he failed to show that the employer's actions were on the grounds that he had made a protected disclosure.

A worker has the right not to be subjected to any detriment by any act, or deliberate failure to act, by his or her employer on the ground that the worker has made a protected disclosure (s. 47B of the Employment Rights Act 1996) (that is Section 70B of the Employment Rights NI Order 1996).

Mr Jesudason, a consultant surgeon, made various allegations against the trust which employed him. They centred on failings in how his department was run. After his resignation, he continued to allege malpractice by the trust via various publications and by contacting the Public Accounts Committee of the House of Commons.

Some, but not all, of his allegations were upheld by an independent report. The trust responded to his allegations by writing to internal and external third parties stating that all Mr Jesudason's allegations had been thoroughly investigated and found to be false.

He lodged a tribunal complaint under s. 47B stating that the trust's correspondence amounted to a detriment because it had incorrectly stated that all his allegations were false. The tribunal, upheld by the EAT, held that the trust's correspondence did not constitute a detriment – it was merely the trust seeking to refute Mr Jesudason's allegations. He appealed.

The Court of Appeal reversed the tribunal finding that there was no detriment but went on to dismiss the appeal because the detriment was not done on the ground of Mr Jesudason's protected disclosures – rather the trust's motivation was to minimise damage from the unprotected disclosures Mr Jesudason had made to the media.

Rejecting the trust's argument that an attempt to defend itself in public could not amount to a detriment, the Court of Appeal held that while it was entitled to respond robustly to Mr Jesudason's communications, it had failed to fairly or accurately reveal that some of his complaints were justified. The inference from this was that

Mr Jesudason had made specious and unsubstantiated allegations with possibly a suggestion of bad faith.

Anyone could reasonably treat this as damaging their reputation and integrity. The Court of Appeal also held that the tribunal was incorrect to hold that because the trust's purpose in describing the allegations was 'to put the record straight' it could not therefore be a detriment.

A detrimental observation about a whistleblower doesn't cease to be a detriment because of the employer's purpose or motive. The trust therefore had subjected Mr Jesudason to a detriment, but their motive became relevant in relation to whether this was done on the grounds that Mr Jesudason made had a protected disclosure, which they had not.

Link to judgment: https://www.bailii.org/ew/cases/EWCA/Civ/2020/73.html

9. Lafferty v Nuffield Health

In another case centred around reputational risk, the Employment Appeal Tribunal (EAT) upheld a tribunal's decision that an employee was fairly dismissed for 'some other substantial reason' given the potential reputational risk to his employer, a registered not-for-profit charity, when he was charged with a criminal offence.

Such pre-emptive and external factor cases are inherently risky in terms of the "head of dismissal" reason underpinning it, and whilst a tribunal will not substitute its own view for that of the employer, many employers take solace from the fact that the band of reasonable responses test has been stretched beyond breaking point and that almost any half-justified reason can be deemed reasonable (allegedly!).

Mr Lafferty was a hospital theatre porter with 20 years' unblemished service who was charged with assault with intent to rape (which had no connection to his work).

Nuffield Health felt it could not leave Mr Lafferty in his role moving anaesthetised patients in and out of operating theatres as it felt there would be a genuine risk to its reputation should Mr Lafferty be convicted. Objectively, one can suppose that patients and/or relatives may have valid concerns about being alone and unconscious with someone convicted of sexual assault.

The tribunal in the case heard that Nuffield Health had considered whether paid suspension could be implemented but given the uncertainty surrounding how long the case would take to get to Court it was justified in its concerns over the use of the charity's funds.

The tribunal found that the charity did have legitimate concerns about the impact on its reputation of the case and Mr Lafferty's association with the organisation coming to the public fore. The decision to dismiss, given the potential for serious reputational damage if he was convicted, was fair and the EAT agreed with the tribunal's original decision.

It is worth noting that Mr Lafferty was dismissed *with notice* as he was not guilty of any misconduct or gross misconduct in connection with his employment. Had the Nuffield relied on gross misconduct rather than 'some other substantial reason', the case would probably gone in Mr Lafferty's favour.

Link to judgement:
https://assets.publishing.service.gov.uk/media/5e4403c8e5274a6d38dd7adb/Mr_Allan_Lafferty_v_Nuffield_Health__UKEATS_0006_19_SS.pdf

8. Wheeley v University Hospitals Birmingham NHS Trust

Sometimes an employee can be a part-author in the tale of their misfortune and the causal effect is quantified accordingly. But the underpinning reasoning for the quantifiable sum needs to be clearly set out in the tribunal decision based on the facts presented.

The Claimant, who had been employed by the Respondent for nearly 20 years, was unhappy when she was notified of a proposed restructure. She responded inappropriately to the Respondent and to colleagues, and an investigation concluded that she was guilty of gross misconduct; however, it transpired during the investigation that the Claimant was suffering from bipolar disorder.

On the Claimant's claims before the ET of unfair dismissal and disability discrimination, the ET found that the Claimant was unfairly dismissed, her dismissal amounted to disability discrimination, and she had contributed 25% to her dismissal.

The Claimant appealed on grounds including that (1) she was not given a proper opportunity to comment on the issue of contributory conduct, and (2) the ET erred in law in finding that she was guilty of contributory conduct on the basis that she would not have responded inappropriately, even if she had not suffered from bipolar disorder.

The EAT held that the ET had erred in law in failing to identify the individual aspects of conduct said to have contributed to the dismissal, and thereafter objectively to assess blameworthiness as required by Steen v ASP Packaging Ltd. Accordingly, the matter would be remitted to the same ET.

Link to judgement: http://www.bailii.org/uk/cases/UKEAT/2019/0259_18_0309.html

7. Phoenix Academy Trust v Kilroy

We are all familiar with the concept of the "vanishing" or "disappearing" dismissal (i.e.) if an internal appeal against dismissal overturns the dismissal, then in law it's as if there was no dismissal – even if the employee makes it clear when appealing that they have no intention of returning to their job whatever the outcome of the appeal.

Mr Kilroy was summarily dismissed by his employer, just before it received his resignation letter alleging constructive dismissal. He invoked the internal, contractual appeal procedure. Before it was convened, Mr Kilroy's solicitor wrote to his employers stating that, whatever the outcome, he wouldn't be returning to work.

This was closely followed by Mr Kilroy lodging a tribunal claim for unfair dismissal based on his summary dismissal. The appeal was heard and upheld, with Mr Kilroy being reinstated subject to a final warning. He was asked to return to work but refused and continued with his unfair constructive dismissal claim. A tribunal held that he hadn't affirmed his contract (by invoking the appeal) and that he had been unfairly (constructively) dismissed. His employer appealed.

The appeal was allowed.

The tribunal's conclusion about the effect of Mr Kilroy's adoption of the contractual appeal process could not stand in light of the Court of Appeal decisions in Kaur v Leeds Teachings Hospitals NHS Trust and Patel v Folkestone Nursing Home Ltd – to which the tribunal had not been referred.

Where an employee is dismissed and then brings an internal appeal against that dismissal, if that appeal overturns the dismissal then in law it is as if no dismissal has 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. By invoking the appeal process, the employee is necessarily treating the contractual relationship as continuing to exist.

If, however, 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 EAT sent the case back to the tribunal to consider the complaints raised by Mr Kilroy about his employer's conduct while the appeal was being conducted.

This serves as a useful reminder to employers about the effect of upholding an appeal and how they can restore an employee to employment – provided they have behaved reasonably and fairly during the process, then the employee has not been dismissed and cannot successfully claim unfair dismissal. Equally employees who do not want to return will have to balance up the chance of a successful appeal with a reduction in compensation under the Employment (NI) Order 2003 Art 17(2) (c) (ii) https://www.legislation.gov.uk/nisi/2003/2902/article/17

Link to judgment: https://www.bailii.org/uk/cases/UKEAT/2020/0264_19_0602.html

6. Gallacher v Abellio Scotrail Ltd

There seems to be an inherent discomfort around cases which involve essentially an SOSR based reason relating to a fundamental breakdown in working relationships. Concerns centre around issues such as evidential audit trails of deteriorating relations, remedial actions to prevent breakdown, outright futility of due process and so on. However, on the facts of this case where there has been an irretrievable breakdown in a working relationship, a complete lack of any procedure may not render a subsequent dismissal unfair.

Ms Gallacher was a senior manager at Abellio Scotrail (AS) working as Head of Customer Experience and Standards. Her direct manager was Ms Taggart. Ms

Gallacher was off work sick for a period between November 2016 and January 2017. Ms Taggart said that the pair's relationship had deteriorated, at a critical time for the business, due to issues over pay, on-call work and the appointment of staff within Ms Gallacher's team.

Issues came to a head during a performance review meeting at which Ms Gallacher was dismissed. There had been no warnings or other procedure followed or right of appeal given. Among the claims which Ms Gallacher brought was one for unfair dismissal. The tribunal found that her dismissal was within the band of reasonable responses open to her employer. There had been an irretrievable breakdown in trust and confidence, a fact acknowledged by both Ms Gallacher and Ms Taggart. Any procedure would not have served a useful purpose 'and if anything, it would have worsened the situation'. Ms Gallacher appealed.

The appeal was dismissed.

The fact that no procedure is followed prior to dismissal would in many cases give rise to the conclusion that the dismissal was outside the band of reasonable responses and unfair. Such procedures, including giving the employee an opportunity to make representations before dismissal and to appeal against any dismissal, are fundamental to notions of natural justice and fairness and it would be an unusual and rare case where an employer would be acting within the band of reasonable responses in dispensing with such procedures altogether.

However, there are rare cases where procedures may be dispensed with because they would be futile – a fact acknowledged in the seminal *Polkey* case on fairness.

The EAT said that this was a case involving two senior managers who needed to be able work together effectively in order to deliver what the business required at a critical juncture. The tribunal considered that Ms Gallacher was not interested in retrieving the relationship.

That conclusion was supported by, amongst other matters, the findings that neither individual had trust and confidence in the other; that Ms Gallacher had been 'truculent' towards Ms Taggart in relation to a recruitment issue; that Ms Gallacher had been unable to put matters behind her and move on; that longstanding issues between them remained unresolved; and that Ms Taggart genuinely believed that there was an irretrievable breakdown in relations.

While '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', here the EAT was satisfied that the tribunal had come to the right conclusion based on the evidence before it.

This is one of those cases that would suggest that the band of reasonable responses test is well and truly past it 40 year old sell-by date (You were right all along Brenda and its time your gauntlet was picked up). Despite this being a fact sensitive case and stating that this is one of those the "exception rather than the rule" cases, at the

very least before dismissing for irretrievable breakdown the employer should meet with the employee to talk to them about the situation.

Link to judgment: https://www.bailii.org/uk/cases/UKEAT/2020/0027_19_0402.html

5. Forstater v CGD Europe

This case is steeped in social media folklore already and the social waves are continuing to impact as a very heated debate amongst celebrities and non-celebrities alike continues to rage. In essence this case, albeit a lowly ET case involved a refusal to accept that trans women are women is not a protected 'philosophical belief' under the Equality Act 2010 in GB.

Ms Forstater worked as a researcher and writer for a public policy think tank CGD under a consultancy agreement. She had become interested in the gender recognition issues, specifically the law allowing people to self-identify their gender. She was also active on social media. She believes that sex is biologically immutable, i.e. there are only two genders, male and female, and that there is no possibility of any sex in between the two (or that it is possible ever to change sex).

She does not accept in any circumstances that a trans woman is, in reality, a woman or that a trans man is a man. Some of CGD's staff raised concerns that about Ms Forstater's comments on this issue on social media. Following the end of her contract in 2018, CGD refused to engage her further.

She claims that this refusal to re-engage was because of her gender-critical opinions and was therefore directly discriminatory, i.e. she was refused employment because of a protected characteristic. Before any substantive hearing of her case, she had to show that the belief she holds is protected by the Equality Act and this was the issue addressed by the tribunal in a preliminary hearing.

To qualify as a 'philosophical belief' the belief must satisfy the five criteria set out in *Grainger v Nicholson*:

1. the belief must be genuinely held
2. it must be a belief and not an opinion or viewpoint based on the present state of information available
3. it must be a belief as to a weighty and substantial aspect of human life and behaviour
4. it must attain a certain level of cogency, seriousness, cohesion and importance, and
5. it must be worthy of respect in a democratic society, not be incompatible with human dignity and not conflict with the fundamental rights of others.

The tribunal applied these criteria and held that Ms Forstater's belief met the first four of them but did not meet the last. Her belief, specifically its absolutist nature, was not worthy of respect in a democratic society because it was incompatible with human dignity and conflicted with the fundamental rights of others. Accordingly, her belief could not be a protected belief under the Equality Act.

In legal terms this case has “Gay Cake v2” written all over it and while this is only a tribunal decision and looks set to be appealed, it does highlight the limits of what amounts to a ‘philosophical belief’ and strikes that difficult balance between ‘freedom of speech’ on one hand and views which others may find offensive and incompatible with human right dignity, on the other. Whilst some snigger at the beliefs of ethical vegans and Jedi’s there is little doubt that these cases raise fundamental issues. The Employment Judge noted ‘Even paying due regard to the qualified right to freedom of expression, people cannot expect to be protected if their core belief involves violating others dignity and/or creating an intimidating, hostile, degrading, humiliating or offensive environment for them’.

Link to judgment: https://www.bailii.org/uk/cases/UKET/2019/2200909_2019.html

4. Glasgow City Council v Johnstone and Another

No Annual Review of Employment Law would be complete without reference to a “worker status” case. However, I may, in years gone by, have over-egged the whole Uber (see earlier notes in Part 1), and Deliveroo, Pimlico Plumbers, City Sprint, Hermes, Addison Lee thing. So rather than look at delivery logistics or taxi services I thought why not look at something completely different, namely foster carers.

I accept that there are fact sensitivities involved here and certain unique contractual provisions (a gold-plating on the statutory obligations) but when all was said and done it was the good old 19th Century derived Control test that took centre stage in the decision to classify these foster parents as workers.

The claimants (a husband and wife) decided to become foster parents. They undertook the training and signed a document under the Looked After Children (Scotland) Regulations 2009. This document provided that the claimants would be paid a fee (c. £30,000 p/a) and would be entitled to four weeks’ holiday.

The claimants sought to bring a number of claims against the Council, yet the preliminary issue of their employment status had to be determined first. The Payment Policy outlined that the foster carers were to be ‘self-employed’ and the general position taken by the Council was that the relationship was a statutory one rather than a contractual one so they should not be regarded as employees.

To determine the employment status of the foster carers, the EAT examined the terms and nature of the written document. Many elements such as the procedure for handling complaints were regarded as being non-contractual but actually required by statute as argued by the Council. Other terms in the agreement went beyond a mere duplication of the obligations required by statute such as the control that can be exerted by the Council and the financial arrangements.

This was important as the EAT outlined that there are instances where the duplication of statutory obligations could be regarded as providing information rather than having a contractual basis. As the terms went further than this, even though the statute did outline that the written agreement was to outline any financial arrangement, it was held that the relationship was contractual in nature.

Having determined that the relationship was contractual rather than merely statutory, the second issue was the nature of that contract and if it created an employment relationship.

The EAT compared it to ordinary foster care and it differentiated on the basis that the claimants were paid a substantial fee rather than expenses. There was also a degree of control in the relationship that existed such as the Council requiring the claimants to report daily and requiring them to give up other employment. The nature of the relationship seemed, on the face of it, to meet the tests that had been set out in finding an employee-employer relationship rather than one of an independent contractor.

One of the difficulties faced by the EAT was that there had been a number of other decisions made in England stating that the relationship between foster carers and councils was one based upon statute rather than contract. However, the Scottish EAT here stated that those cases are not binding and could in fact be distinguished as they were fact specific.

This was clear from the leading case of W v Essex County Council (1998) where there was no package of conditions and limited control exercised when compared to the index case. For this reason, there was an application of the ordinary tests looking at control and mutuality of obligations and it was held that the claimants were employees.

Link to judgement https://www.bailii.org/uk/cases/UKEAT/2019/0011_18_2310.html

3. Ferguson v Astrea Asset Management Ltd

This is a case submitted with due deference to Dr John McMullen (Mr TUPE himself) as a fine specimen of pre-transfer shenanigans whereupon employees improved their contractual benefits in view of a pending TUPE transfer whereupon it was held that these variations were void. This case focuses on the almost taboo issue of contractual variations that work in the employees favour in a TUPE context as opposed to an unfavourable variation which it is assumed (wrongly) are the only type of variations that TUPE can guard against.

Regulation 4(4) of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) provides that a variation of contract will be void if the sole or principal reason is 'the transfer'. This wording is relatively recent, having come into force in GB in January 2014 in respect of transfers occurring on or after that date.

Mr Ferguson and three of his colleagues were all senior employees of L, a property management firm looking after a substantial portfolio in Mayfair on behalf of BSE. In September 2016 BSE gave notice to terminate L's management agreement, with AAM taking over the management of BSE's portfolio from the end of September 2017 (a change of service provision to which TUPE applied).

In July 2017, Mr Ferguson and his colleagues varied their employment contracts which gave them new rights to guaranteed bonuses of 50% of salary, new

entitlement to termination payments of a month's salary for each year worked, and enhanced notice periods. These varied contracts were supplied to AAM as part of the employee liability information.

The transfer went ahead and AAM dismissed all four employees on or soon after the transfer for gross misconduct. They brought various tribunal claims including for termination payments based on the varied contracts.

The tribunal made various findings about the fairness of the dismissals and/or whether all four had transferred but the real point of interest was the contractual changes pre-transfer – were they valid? No held the tribunal – they were void by virtue of reg. 4(4). Mr Ferguson and his colleagues appealed. They argued that reg. 4(4) only applies to changes adverse to an employee.

The appeal was dismissed.

Regulation 4(4) applies to *any* contractual change and not just those adverse to employees. The EAT's reasons for holding thus were:

Such an interpretation was consistent with the Acquired Rights Directive (on which TUPE is based) whose aim is to *safeguard* employees' rights – (i.e.) the prevention of something negative or undesirable rather than improving something or making it better. In addition it was consistent with case law – the EAT distinguished this case from that of Regent Security Services Ltd v Power on the basis that there the contractual variation occurred after the transfer, reg. 4(4) wasn't in force at that time, and nothing said by the Court of Appeal suggested that advantageous changes cannot be deemed void. Such an interpretation of reg. 4(4) avoids difficult questions which would otherwise potentially arise as to whether a (purported) variation is or is not adverse to the employee – and also doesn't prevent the employee enjoying other protections under TUPE.

It is important to note that the 2014 TUPE reforms did not apply to NI however, this case would still have an impact in NI as the relevant changes did not turn on the 2014 reforms.

Link to judgment: https://www.bailii.org/uk/cases/UKEAT/2020/0139_19_1505.html

2. Castano v London General Transport Services Ltd

I have chosen this case as it seems topical if viewed through a Covid 19 lens. Central to this case is health and safety related roles and duties, in that, for an employee to have been 'designated' by their employer to carry out health and safety activities, he or she must have been selected by the employer to carry out specific activities in connection with preventing or reducing risks to health and safety at work, over and above their ordinary job duties.

The law affords employees with health and safety roles in the workplace various protections. Among them is the right not to be subjected to any detriment or to be dismissed on the ground that he or she carried out (or proposed to carry out) any health and safety activities for which he or she is designated by their employer

(s. 44) (this is Article 68 of the Employment Rights NI Order 1996). No qualifying service is needed to benefit from this and a dismissal for such a reason is automatically unfair (s. 100) (this is Article 132 of the Employment Rights NI Order 1996).

Mr Castano worked as a bus driver. He'd been employed for less than two years when he was dismissed. He brought various tribunal claims, including that he was subjected to detriment and/or had been dismissed for health and safety reasons (H&S), contrary to s. 44 and s. 100. In particular, he alleged that he'd raised H&S concerns with managers and made complaints about a specific controller.

He claimed protection under s. 44 and s. 100 because he had general health and safety duties towards his passengers (because he held a PCV licence) and because he was in effect the H&S rep for his workplace (that being, he argued, the bus route he was required to drive). A tribunal struck out these claims as having no reasonable prospect of success and Mr Castano appealed.

The appeal was dismissed.

While Mr Castano's contract did contain various H&S provisions, these simply imposed general H&S obligations in relation to the workplace – they did not designate an employee working to those conditions as carrying out activities in connection with preventing or reducing risks to H&S. Additionally, Mr Castano's place of work was clearly the depot at which he was based and not the route which he drove.

The fact that bus drivers also had some H&S obligations as part of their duties didn't mean they'd been designated to carry out a specific role. If Mr Castano's argument was correct it would mean that all the employer's drivers would have been designated for the purposes of s. 44 – which they plainly were not.

The protections in the statute are directed towards a situation in which an employee has been designated, over and above their ordinary job duties, to carry out specific activities in connection with preventing or reducing risks to H&S – essentially a H&S officer's function. An employee doing a job in which he or she must exercise some responsibility to care of their own H&S – and that of others – is not the same thing. When viewed through the lens of employee responsibilities regarding Covid related H&S one begins to wonder if things like – mask enforcement, crowd capacity management, enforcing social distancing rules, requiring hand sanitation compliance etc would the courts infer a de facto health and safety role for all "affected workers"?

Link to judgment: https://www.bailii.org/uk/cases/UKEAT/2019/0150_19_2910.html

1. WM Morrisons Supermarket plc v Various Claimants

I have been talking about this case for years now and so a Supreme Court judgement is more than welcome to my top 10 to put the matter to rest. Many of you will say – common sense prevailed and normal service has been restored and that employers have for too long been subject to tenuous liability claims steeped in social justice rather than the prevailing case law. (Return to "Lister" I hear you sing!).

Control, control mechanisms and how they are reasonably exercised will be the order of the day from here on in along with a sprinkling of case sensitivities, a dose of reality and a sprig of relevant case law.

By way of simple synopsis - the employer was not vicariously liable for the actions of one of its employees who, to damage his employer, leaked personal staff data on a file-sharing website.

By way of background and the risk of repeating myself, in 2014, Mr Skelton, an internal auditor at Morrisons with a grudge against the supermarket (stemming from a previous disciplinary issue), leaked employee information online and to various media outlets. This involved the payroll data of about 100,000 employees and comprised highly sensitive information such as the employees' bank sort codes, account numbers and NIC details.

He had copied the information onto a USB stick. He was arrested and subsequently convicted and sentenced to eight years for offences under the Computer Misuse Act 1990 and the Data Protection Act 1998 (DPA). Thousands of affected staff brought proceedings against Morrisons based on its alleged vicarious liability for Mr Skelton's actions.

The High Court and Court of Appeal, relying on a 2016 Supreme Court decision *Mohamud v WM Morrison Supermarkets*, held that Mr Skelton had been acting in the course of his employment because his role at Morrisons was sufficiently closely connected to his unlawful acts to make Morrisons vicariously liable for them. Morrisons appealed.

The Supreme Court unanimously allowed Morrison's appeal.

Essentially the Supreme Court said that the lower court decisions in this case involved a misreading/misinterpretation of its 2016 decision in *Mohamud* also concerning vicarious liability.

'Motive is irrelevant' must not be taken out of context. Whether the employee is acting on the employer's business or for personal reasons is indeed important for the purpose of establishing vicarious liability.

The 'close connection' test is this – if the wrongful conduct was so closely connected with acts the employee was authorised to do that for the purposes of the liability of the employer to third parties, it may fairly and properly be regarded as done by the employee while acting in the ordinary course of his employment.

The Court of Appeal was wrong to believe that all that was involved in determining an employer's vicarious liability was whether there was a 'temporal or causal connection' between the employment and the wrongdoing. It is not temporal or causal connection between the various events, but towards the capacity in which the employee was acting when those events took place.

Mr Skelton was authorised to transmit the payroll data to the auditors. His wrongful disclosure of the data was not so closely connected with that task that it can fairly and properly be regarded as made by him while acting in the ordinary course of his employment. Mr Skelton's motive was crucial in establishing liability - that his employment gave him the opportunity to carry out his rogue act was not in itself enough to establish vicarious liability.

An employer is not normally vicariously liable where the employee was not engaged in furthering his employer's business, but rather was pursuing a personal vendetta. It is not enough to establish vicarious liability that the employee's act arose from a task 'closely related to what he was tasked to do'. There *is* vicarious liability where 'the employee is engaged, however misguidedly, in furthering his employer's business'. There *is no* vicarious liability where an employee is 'on a frolic of his own'.

Sound familiar? The judiciary returned to some old tenets having ironically gone on a frolic of their own.

Link to judgment: https://www.bailii.org/uk/cases/UKSC/2020/12.html

Close, but not Top 10

Technically a 2018 case related to age and pensions the "McCloud" pension reform which raised eyebrows throughout the public sector across the UK at the time and by way of a 2020 update - The government launched a wide-ranging consultation regarding the removal of unlawful age discrimination in public sector pension schemes following the Court of Appeal's decision in Lord Chancellor and another v McCloud and others; Secretary of State for the Home Department and others v Sargeant and others [2018] EWCA Civ 2844 for the period between 1 April 2015 to 31 March 2022.Responses were to be submitted by 11 October 2020

Some of the cases I recommend that you also look up which fell just short of the Top 10 in 2020 include the following –

Revenue and Customs v Ant Marketing (NMW case)
https://assets.publishing.service.gov.uk/media/5efc50273a6f4023d0493467/Commissioners_for_HM_Revenue_and_Customs_UKEAT_0051_19_OO.pdf

O'Neill v Jaeger Retail Ltd (Extending time limit for claim)
http://www.bailii.org/uk/cases/UKEAT/2019/0026_19_0111.html

Stott v Leadec (Capacity to litigate)
https://assets.publishing.service.gov.uk/media/5ec4fbeae90e071e2cbea344/Mr_P_Stott_v_Leadec_Ltd_UKEAT_0263_19_LA.pdf

Chelmsford Unisex hair salon Ltd v Grunwell (Employer no-show at Tribunal)
https://assets.publishing.service.gov.uk/media/5e983157e90e071a0ff02908/Chelmsford_Unisex_Hair_Salon_Ltd_v_Miss_Kaomi_Grunwell_UKEAT_0135_19_JOJ.pdf

Leclerc v AMTAC Certification Ltd (Whistle-blowing detriments) https://assets.publishing.service.gov.uk/media/5e61153686650c5140f17a39/Mrs_Gina_Leclerc_v_Amtac_Certification_LTD_UKEAT_0244_19_RN_Revised.pdf

Tough v Revenue and Customs (How long the employee has been disabled) https://assets.publishing.service.gov.uk/media/5ef1a0a2e90e0741eef6ba13/Mr_Matthew_Tough_v_Commissioners_for_HM_Revenue_and_Customs_UKEAT_0255_19_VP.pdf

Pertemps Medical Group Ltd v Ladak (Injunction, settlement, protection from harassment) https://www.bailii.org/ew/cases/EWHC/QB/2020/163.html

GB 2021

We saw in Part 1 of the Annual Review to proposed contents of a draft Employment Bill, which no doubt will also need to contain some reference to post January 2021 employment rights matters in the brave new world outside of the European Union. To recap:

A new Employment Bill for GB yet to be revealed but allegedly containing, inter alia -

- **A single enforcement body.**
- A single labour market enforcement agency (to better ensure that vulnerable workers are aware of and can exercise their rights and which supports business compliance) was proposed as part of the Good Work Plan.

- **Tips to go to workers in full.**
- In the Queen's Speech, in October 2019, the government proposed legislation to require employers to pass on all tips and service charges to workers and, supported by a statutory Code of Practice, to ensure that tips would be distributed on a fair and transparent basis.

- **The right to request a more predictable contract.**
- The government previously indicated its intention to legislate to introduce a right for all workers to request a more predictable and stable contract after 26 weeks' service as part of the Good Work Plan.

- **Pregnancy and maternity discrimination: extending redundancy protection.**
- The government previously announced its intention to extend the period of redundancy protection from the point an employee notifies their employer of their pregnancy (whether orally or in writing) until six months after the end of their maternity leave.

- **Leave for neonatal care.**
- The government consultation on a new right to neonatal leave and pay, to support parents of premature or sick babies closed on 11 October 2019.

- **A week's leave for unpaid carers.** This proposal was made in the Conservative party's election manifesto.

- **Making flexible working the default.**
- As set out in the Conservative party's election manifesto, the government intends, subject to consultation, to make flexible working the default position unless an employer has a good reason.

In relation to **other GB reforms** that are pending –

On 16 September 2020, new regulations to amend the GB **Employment Tribunal Rules** were laid before parliament. The regulations alter tribunal and early conciliation procedure to reduce bureaucracy and increase the tribunal's capacity to deal with claims.

The changes to tribunal procedure will come into effect from 8 October 2020 and the changes to early conciliation procedure will come into force on 1 December 2020. It remains to be seen if these measures will be replicated in NI.

The much debated, and delayed, **IR35 Rules** come into effect a year later than planned in April 2021.(i.e. extended to large and medium-sized companies in the private sector from 6/4/21).

One of the key consultation documents arising from the Taylor Review was on the topic of **employment status** which is looking to be superseded by the Uber decision in 2021 and reforms to tax law. The Taylor Review of Modern Working Practices sought to address, among other things, whether the law on employment status was fit for the modern economy. The government's response to the employment status consultation is still awaited.

The government intends to legislate to extend the gap required to break **continuity of employment from one week to four weeks**. This will enable more employees to gain access to employment rights with a minimum service requirement. The timescale for this development is not known.

The consultation on **workplace sexual harassment** closed on 2 October 2019. The response to consultation was expected in Spring 2020 but nothing has been published yet.

Draft legislation to introduce the government's commitments in its response to the consultation on Non-Disclosure Agreements, which closed on 29 April 2019 is awaited. A further consultation on introducing a minimum reference requirement is also awaited.

In regard to the much debated **civil courts reform and single employment court proposals** – A partial government response to the Law Commission's report on employment law hearing structures is expected by the end of October 2020 and a full response by the end of April 2021.

Although strictly speaking it is a tax law reform the government has published draft legislation amending the current formula for **post-employment notice pay (PENP)** to avoid unfair outcomes if an employee's pay period is defined in months, but the contractual notice period is expressed in weeks. The draft legislation also introduces

changes to ensure non-residents who receive PENP are taxed fairly. Legislation will be introduced in the Finance Bill 2020-21 to amend section 402D of the Income Tax (Earnings and Pensions) Act 2003 (ITEPA), section 402D, ITEPA and Chapter 5 of Part 2, section 27, ITEPA 2003.

The changes will have effect from 6 April 2021 and will apply to those individuals who have their employment terminated, and where the termination payment is received, on or after 6 April 2021.

BEIS in GB published Good Work Plan: one-sided flexibility consultation, seeking views on proposals put forward by the Low Pay Commission (LPC) in December 2018 to tackle the problem of "**one-sided flexibility**" identified in the Taylor Review, where some workers have unpredictable working hours and insecure income.

These include introducing new rights for workers to be given reasonable notice of their working hours and to be compensated where their shifts are cancelled or curtailed without reasonable notice. However, the Government response to the consultation has been awaited upon for over a year now.

The Government Equalities Office is due to publish a response to the proposed **extension of the three-month time limit for bringing pregnancy and maternity discrimination claims** in due course.

As is often the case NI was ahead of the curve in terms of intention, if not execution, when **ethnicity pay gap reporting** was contained within the Employment Act (NI) 2016 Article 19 (6) (f), https://www.legislation.gov.uk/nia/2016/15/crossheading/gender-pay-and-disclosure-of-information but was not implemented and its fate still hangs in the balance. Whereas now in GB the government's consultation on mandatory ethnicity pay gap reporting closed on 11 January 2019. Parliament is set to debate the issue but yet again we have no idea when.

A subject of heated debate some years back was that of **public sector exit payments**. The government response to its consultation on regulations to implement the £95,000 cap was published on 21 July 2020. There was some confusion over jurisdictional applicability but it would appear that the regulations are UK wide and come into operation in November 2020 https://www.legislation.gov.uk/uksi/2020/1122/made

The consultation on proposals to reform exit payment terms for local government workers is due to close next week on 9 November 2020.

On 26 April 2017, the European Commission put forward a proposal for a **Directive** of the European Parliament and Council on **work-life balance for parents and carers** to replace the revised Parental Leave Directive. Member states have until 1 August 2022 to transpose the Directive into national law. As the transposition date falls after the end of the transition period (assuming that the transition period is not extended), the UK will not be required to implement the Directive.

We are still very much in the dark about the future of other things such as – Grandparental leave, Unpaid Carers leave (proposal to provide a week of unpaid leave each year for carer, workplace modifications on health (not disability) grounds, E-Balloting and industrial action, minimum service agreement to alleviate rail strike impacts and adopting aspects on the new EU whistle-blowing Directive (even though it falls outside that of the Brexit transition period. On the subject of Brexit -

Brexit

I am loathe to get drawn into more of the same speculation about the impact of Brexit on employment law as UK/EU negotiations on a withdrawal deal are still live. The UK left the EU on 31 January 2020 (exit day), following ratification by the UK and the EU of the withdrawal agreement. Under the UK-EU withdrawal agreement, a transition period will end on 31 December 2020 during which time the UK will be treated for most purposes as if it were still an EU member state, and most EU law (including as amended or supplemented) will continue to apply to the UK.

A significant proportion of the UK's employment law comes from the EU, including discrimination rights, collective consultation obligations, transfer of undertakings regulations, family leave, working time regulations and duties to agency workers (albeit all of these have had NI tweaks to suit the jurisdiction as devolved matters).

In fact, some EU employment laws merely subsumed protections that were already provided by UK law. For example, UK equal pay, race and disability discrimination laws preceded EU anti-discrimination obligations. Similarly, there was a UK right of return from maternity leave before EU maternity leave rights were implemented.

This is not to say that there is a pre-emptive “gold-plating” argument to make here but rather there are consistent themes, variations and deviations therein and issues such as working time and TUPE are always hot topics.

Most EU-derived employment legislation will remain applicable in the UK immediately after exit day, but on a different constitutional basis, for an indefinite period, unless and until altered by the appropriate UK legislative body.

The House of Commons Library published a briefing paper on the implications for employment law arising from Brexit which includes a useful table listing various employment law rights along with their EU and UK law sources. It highlights that EU-related employment law is found in both primary and secondary legislation, as well as ECJ case law, and that, accordingly, different mechanisms will be required to preserve or amend the law emanating from these varying sources.

The Labour Relations Agency’s sister body in England and Wales Acas has also published guidance for employers and employees on the potential implications of Brexit on their workplace. https://www.acas.org.uk/employment-rights-after-brexit

Protection of workers' rights: regression or divergence from EU law - in the White Paper on the future UK-EU relationship, published on 12 July 2018, the government proposed maintaining current UK employment laws so that existing workers' rights are unchanged following exit day. It suggested that the UK and the EU commit to the non-regression of employment law standards and to uphold their obligations that derive from their International Labour Organization commitments.

The EU also proposed continued adherence to international standards and non-regression of current employment laws and regulations in the context of requiring a "level playing field"

On 6 March 2019, the government then published a Policy paper, Protecting and enhancing worker rights after the UK withdrawal from the European Union in which it committed to ensure that UK workers' rights remain aligned with EU employment protection even after the UK's withdrawal and proposed draft clauses to include in the WAB (Substantively similar provisions were included in the EU (Withdrawal Agreement) Bill addressing two scenarios:

- **Regression from workers' retained EU rights.** Where domestic primary legislation is introduced after the transition period, the minister in charge of a relevant Bill must, following consultation with unions and employers' organisations, make and publish one of the following statements before second reading:

    - a statement to the effect that in the minister's view the provisions of the Bill will not result in the law failing to confer any workers' retained EU rights as at the end of the transition period (a statement of non-regression); or
    - a statement that they are unable to give a statement of non-regression but confirming that the government would like to proceed with the Bill.

    "Workers' retained EU rights" are defined by reference to a list of EU legislation relating to workers' rights and health and safety at work protection.

- **Divergence from new EU workers' rights.** The government must report at regular intervals to Parliament on new EU legislation adopted and published in the Official Journal after the end of the transition period, which relates to employment rights or health and safety protections. Statements in the reports must indicate whether the new EU legislation diverges from UK protection, and if so, whether the government intends to take any action. The government must also make arrangements for the reports to be approved by each House of Parliament.

European Union (Withdrawal Agreement) Act 2020

The European Union (Withdrawal Agreement) Act 2020 (WAA), an Act to implement the EU-UK withdrawal agreement into UK law, received Royal Assent on 23 January 2020.

Key aspects:

- Enable most EU law to continue to apply in the UK during the transition period, by saving the effect of most of the ECA 1972 in modified form. The CJEU will continue to have jurisdiction in the UK, and most references to EU member states in EU law will include the UK.

- Enable EU-related terms in UK legislation to operate effectively during the transition period, by setting out rules about how various references (such as to the EU, the EEA or member state) are to be read.

- Ensure that certain EUWA provisions will take effect at the end of the transition period, instead of on exit day, such as the creation of the new body of retained EU law.

- Mimic the ECA 1972 mechanism through which rights and obligations arising under EU law currently flow into UK law. The intention is for the withdrawal agreement, and the provisions of EU law applied by the withdrawal agreement, to have the same legal effects in UK law that are currently attached to EU law while the UK is a member state. (This is separate from the ECA 1972 savings during the transition period.) The effects would continue after the end of the transition period, to the extent required by the withdrawal agreement.

Following the General Election on 12 December 2019, the European Union (Withdrawal Agreement) Bill was reintroduced into Parliament in an amended form that did not include the provisions on non-regression and non-divergence statements and they are also not included in the final Act. The government has said that it will introduce an Employment Bill but it is unknown whether this will include any specific provisions dealing with regression or divergence from EU standards.

Workers' rights are expected to feature in the EU/UK trade negotiations, with the EU seeking binding commitments on maintaining existing standards, and further details may emerge during the year.

Turning to the treatment of EU case law after the implementation period, UK courts and tribunals will not be bound by new European Court of Justice judgements after the implementation period. However, the extent to which judges will be bound by the existing large body of EU-related case law is less clear.

This case law has been instrumental in interpreting many UK employment rights which originate from EU legislation, such as working time, collective redundancies, TUPE and more. For example, CJEU judgments in relation to whether holiday pay accrues during sick leave and whether overtime pay forms part of holiday pay. The Government intends to legislate this year to permit some lower courts, not just the Supreme Court, to depart from retained EU case law after the implementation period.

During 2020 we saw a variety of issues being viewed through the Brexit lens including the Withdrawal Agreement Act, recognition of professional qualifications, the immigration points-based system, impact on European Works Councils update. Some commentators believe that in 2021 there will be a great repeal of "targeted"

legislation such as – the Working Time Regulations, TUPE, Agency Worker Regulations.

The current arrangements mean that the UK will not be required to implement three new key EU employment Directives (the Whistleblowing Directive, the Work-Life Balance Directive and the Transparent and Predictable Working Conditions Directive). The deadlines for implementing these Directives all fall beyond the end of the transition period.

From an NI perspective the new Northern Ireland protocol does not contain the often quoted (now abandoned) level-playing field commitment in respect of the UK as a whole. Instead, to protect the Good Friday Agreement, the new protocol commits Northern Ireland to continuing to abide by various EU Equal Treatment Directives (and interpret them in conformity with post-Brexit ECJ decisions) but this commitment does not extend to the rest of the UK.

Thus under the new Northern Ireland protocol, EU Equality Directives and related case law will remain binding even if no trade deal can be negotiated. This has the potential to result in further divergence between Northern Ireland and the rest of the UK, although there are already several differences between the two jurisdictions, this would serve to increase the amount of differences.

We are now in the realms of the intersection between politics and law and so State Aid, Fishing and Northern Ireland are the central issues of which employee rights form a very small part.

The Internal Markets Bill currently working its way through the House of Commons is marred in controversy regarding it being predicated on a "limited" breach of international law and with the EU instigating legal action on the back of this. On 30 September 2020, the Bill had its first reading in the House of Lords. The date for the second reading has not yet been announced.

Locally NIC ICTU have said, via their Northern Secretary Owen Reidy, – " *Having supported the development of the peace process in Northern Ireland over many years, we are particularly concerned at how this Bill will negatively impact on devolution in Northern Ireland and jeopardise the out-workings of the Belfast/Good Friday Agreement. The attempt to unilaterally override the Ireland/Northern Ireland Protocol through this Bill once again raises the unacceptable prospect of a hard border on the island of Ireland.*

"This Bill specifically threatens the Human Rights Act in breach of the Good Friday Agreement and the Protocol. For an Act which protects the fundamental rights of all our members to be undermined in this way by the UK Government is shocking. We fear this represents the beginning of a sustained attack on the Human Rights Act and the European Convention on Human Rights which we will strongly oppose.

"We are also concerned that the Bill could override Stormont's devolved powers over Employment legislation, threatening the rights of workers which are distinct, and we would argue, are better."

Therefore this year, as with last year and year before that leaves us only to see what happens in the negotiations rather than engage in endless speculation or scaremongering. Sufficed to say given the current circumstances a wholesale repeal of employment law in the UK in 2021 seems highly unlikely and so once again as we go down to the wire the best advice (and admittedly ultimate cop-out) is to wait and see.

What next? And conclusion

As I write this Annual Review narrative, new partial lock-down restrictions have been announced for late October, impacting primarily on the hospitality sector and detail on this is awaited.

This is timely if somewhat stark reminder of how fluid and rapidly evolving the health situation is and from here it is up to the practitioners to weave their way through the minefield of employment law ramifications**.**

Each year when it comes to conclude and peer into the year ahead at Legal Island Annual Reviews I tend to hide behind a pithy response normally involving a malfunctioning crystal ball or a platitude about - who knows what tomorrow brings - (thanks Jennifer Warnes).

However, for once I feel completely justified in doing so as only a fool would proffer an opinion as to a direction of travel or potential areas of reform at this uncertain juncture.

What is certain is that some - maps have been burned, policy proposals have been paused, commitments resiled from, promises fractured, bets welched on – all in the name of known unknowns.

Here endeth the predictions.

Mark McAllister (November 2020)