ADDLESHAW GODDARD

TRANSCRIPTION

GENERAL COUNSEL UPDATE (SESSION 3)

THE A-G OF EMPLOYMENT IN 2021

Jonathan Davey

Okay I think we should make a start. Welcome everybody. As those of you who have come along to our GC updates in previous years will know this has historically been a full day's session face to face where we've sought to give GC's and in-house lawyers a brief update on all of those topics that matter to in-house lawyers in one shot. Obviously because of Covid we've changed to a different plan this year and we've got four slots, dividing what would otherwise be a full day up into bite size pieces and we're on the third of those today and at the end of this session you will see a slide that gives you details of the fourth session which has a focus on health and safety, insurance and Covid.

I'm your Chairman for today. I'm a commercial partner at Addleshaw Goddard but I'm a bit of an imposter today because as you can see we have three partners here from our Employment & Tax teams and they're going to cover what we've called the A-G of Employment. So without further ado I'm going to hand you over to David, who's going to cover A, B & part of C. David?

David Hughes

Thank you Jonathan. Good morning everyone. Well the first topic I'm going to speak about today is work frustrators and in particular I'm going to focus on the recent judgment of the Supreme Court in *Aslam v Uber*. This is a very significant case not just for Uber but for all employers in the big economy or indeed any employer that engages what we called atypical workers.

So the first thing probably to talk about is what is an atypical worker and for one of our purposes we essentially deal with three categories of people. We have the employees those who work under a contract of employment and who benefit from all nearly all aspects of employment law. At the other end of the spectrum we have the self-employed individuals who carry out business on their own account and who have very limited protections in employment law, hardly anything at all. Then we have this category in the middle the atypical workers, they're defined in the legislation as "workers" and they are technically self-employed but they provide personal services for the benefit of another person's business and work within an interesting category. Although being on the face of it self-employed they do have important but limited rights under employment legislation. Typically we tend to see cases in relation to national minimum wage and holiday pay but they have other rights in addition to that for example protection in relation to whistle-blowing.

The issues of the *Uber v Aslam* case had at its heart the employment of worker status of Uber's drivers. This case started some time ago in the Employment Tribunal and has been through two levels of appeal, in the Employment Appeal Tribunal and the Court of Appeal before finally reaching the Supreme Court. At each of the previous levels it had been found that the drivers were not truly self-employed as argued by Uber but were in fact workers. I'm going to look at the facts of the case very briefly. The contract the driver entered into was with Uber's Dutch parent company, Uber BV, not with the UK business. Under that contract it was stated that Uber was just a platform that drivers called customers in the contract could use to connect with passengers. The bookings were then managed by Uber London but there was no written contract between Uber London and the drivers. The Supreme Court looked at various ways in which Uber controlled how the drivers provided their service. This included importantly setting the fees that would be charged, allocation of trips, setting routes, restricting contact between

drivers and passengers and drivers also had to accept a minimum percentage of trips when they had their app switched on. Now this significant degree of control was central to the Supreme Court's finding that Uber drivers had the status of workers and were accordingly entitled among other things to the national minimum wage when they had their app switched on in the area covered by their licence. This case is important for employers because its sets out how courts should determine workers' status.

Could we move to the second slide please?

Uber argued that if a contract characterised workers as self-employed then the court should only deviate from the wording of the contract if the contract didn't represent the true agreement of the parties. The Supreme Court disagreed. It said you have to start by considering who this legislation is intended to protect or confer worker status upon, not the written terms of the contract and the reason for that is obvious, the contract is drafted by and will therefore favour the employer and so arguably is not a true reflection of the nature of the relationship between the parties and the Supreme Court said that the Court should take a purposive view of the legislation we should see what the legislation is for and construe this and apply it accordingly. The Court should also look at all the facts of the case of course including the contract but also critically the conduct of the parties and then decide whether a person is a worker or not. Now this approach of looking through the contract and beyond the contract of the true nature of the relationship isn't necessarily new in itself but it is an important underlying principle and this comes from the Supreme Court, we can see how it will be adopted by Tribunals and Courts.

So the key question for the Supreme Court is whether the person is subordinate and dependent upon the business. If thy are they are a worker regardless of how they're classified by the contract. It is also worth noting in this case that the Supreme Court found that the employer in this case was not Uber BV the Dutch parent company with whom the drivers had the direct contractual relationship, but in fact was Uber London even though there was no written contract between the drivers and Uber London so the Courts can and will look through complex contractual arrangements in order to identify the true employer. Can we have the next slide please.

So some final thoughts. The consequences of the Judgement are potentially huge, for Uber certainly but for other businesses as well potentially. If we think about the costs that could be associated with the finding of worker status firstly HMRC can take enforcement action against Uber if it concludes that workers have not been paid the minimum wage and again that's the time when they have their app switched on within their licensed area, not just for the time they're actually carrying out the activities. HRMC can issue a notice of under payment and impose penalties of up to £20,000 per worker and if you consider that Uber has around 60,000 drivers in the UK you can see the sort of liabilities that they theoretically could incur.

Workers are also entitled to be paid holiday pay for the statutory 5.6 annual holiday under the Working Time Regulations and that equates to about 12.07% on top of the wage bill. There are other possible tax liabilities and pension liabilities and in particular it is possible that workers could meet the relevant criteria to be entitled to qualify for auto-enrolment pensions subject to relevant age and earnings criteria and the Pensions Regulator can impose interest and penalties for non-compliance. There is likely to be a lot of other litigation that will now be generated as a consequence of the Uber decision. There are a number of cases, thousands in fact, stayed currently in the UK Employment Tribunal awaiting this decision and they will now be brought back into the Employment Tribunal, mainly claims for holiday pay and national minimum wage and of course the floodgates may now be open for many more claims from individuals who will be claiming that they have worker status in relation to other employers.

There are some unanswered questions still. The Judgment didn't answer the question of whether a person can be classified as a worker or for whom if they had more than one app switched on at a time, if somebody who is running a business as an Uber driver and a Deliveroo driver at the same time, who are they working for? It is difficult to say. There's also questions still about substitution clauses. The legislation says that workers must perform work personally. In 2018 the High Court held that Deliveroo riders were not workers as they can literally send substitutes to do their work for them and it was a right

that not only was it available in terms of the contract but was one that had actually been exercised by Deliveroo drivers with some degree of regularity.

Substitution wasn't an issue in the Uber case but following the Supreme Court's decision it is a question as to whether claims might not be able to be argued that substitution clauses should be disregarded if the main purpose is to exclude them from worker status and certainly if substitution clauses are to be used for worker status cases it will have to be genuine and it will have to be used.

There may be some new legislation on employment status coming. In 2017 the Taylor Review recommended that the government set out detailed tests for employment status and legislation to provide more clarity and also proposed a new definition of "Dependent Contractor". The test for whether a person was a worker would focus on the control exercised over them by a business. Some groups have disagreed with the principle of creating a statutory test, arguing that setting out a test will limit a court's flexibility to address new situations and of course it would provide businesses with a template to follow if they wanted to avoid worker status from being inferred.

The government consulted on this issue in 2018 but is yet to publish any legislation.

So what do you do now if you think that the Uber decision on worker status may impact on your business? The emphasis on giving effect to the purpose of employment legislation when assessing worker status is a clear indication that in such cases the courts will look to protect workers in spite of the contractual documentation they signed, so the answer here isn't changing your contracts.

Would employers use complicated arrangements to disguise the true nature of a working relationship? The Courts will most likely look through those arrangements and the true nature of the working relationship so employers who do engage contractors are not advised to audit the arrangements that they have in place with contractors to determine the potential exposure to worker status claims and then they can start to look at ways in which these can be mitigated. Next slide please.

I'm going to talk very briefly about Brexit and what it means for employment law because actually the answer is so far not a great deal. So the immediate impact of Brexit on employment law was really to preserve everything and then to preserve the status quo. The Withdrawal Act of 2018 outlined what would be retained following the transition period which of course finished on 1st January 2021. Any retained EU-derived domestic legislation remains in full force and effect. A good example of that is the Working Time Regulations which of course are derived from the EU Directive on Working Time. There is also retained direct EU legislation that is EU legislation that is operative and is of direct effect in the UK. A good example of that is the General Data Protection Regulations which are now the UK General Data Protection Regulations. There are various other retained rights, powers, liabilities, obligations, restrictions, remedies and procedures etc that were recognised and available in domestic law through the European Communities Act 1972 principally for example on discrimination and grounds of nationality Article 18 of the Treaty on the Functioning of the European Union and the right to equal pay Article 157 of the TFEU.

Then finally we have retained EU case law so principles that have been set out by the decisions of the Court of Justice of the European Union relating to the retained direct EU legislation and EU derived legislation will continue to have effect in the UK following the transition period and Brexit itself.

In terms of whether there will be any immediate changes to employment law post-Brexit it was thought at one stage that the government might take the opportunity to make some changes to things such as Working Time Regulations which in some respects is crying out for some degree of reform, I'm not going into the detail of that because Mike is going to cover that a little bit later on but it's in relation to holiday pay, but there certainly were some areas that might have been changed. So far very little has been done, some very specific changes in relation to drivers hours and tachograph requirements under Working Time Regulations but certainly very little else.

As far as the status of the Court of Justice and the European Union post-Brexit is concerned, UK Courts will not be bound by decisions of the Court that follow the 1st January 2021 and the UK Court cannot

now make references to the Court of Justice of the European Union. The Courts in the UK may however have regard to new judgments of the Court of Justice of the European Union so far as its relevant to any matter before the Court so whether we continue to see decisions of the Court of Justice of the European Union for example in relation to TUPE or interpretation of the Working Time Regulations, UK Courts can have regard to these but won't be required or bound to follow them, so it will be interesting to see what sort of approach is taken to these decisions, particularly at the lower levels of the Employment Tribunal and Employment Appeal Tribunal.

Down the line there may be of course changes proposed by our government but any potential changes must not breach the non-regression clause of the Trade & Co-operation Agreements of the EU in order to retain this level playing field of the EU.

So I won't say anymore about Brexit, we'll move on now to talk about the other hot topic, Covid 19, could we have the next slide please Emma? Thanks.

So there's a few areas here that I'm going to scratch over, some in a little more detail than others. The first question that we're asked sometimes by employers is "can you insist that employees are vaccinated as a condition of now being employed?" and the subsidiary question "can you insist that employees are vaccinated from Covid as a condition of them returning to the workplace?" These are difficult questions and I'm afraid an easy answer to either. Every case is going to be extremely fact sensitive so what will work in one case won't apply in another. It's going to be very difficult for employers to legally require that existing employees take vaccines as a condition of employment and I think that the circumstances for that to be legitimate would be extremely rare indeed and that would really only arise where being vaccinated was a necessary requirement of employment. It is difficult to think of circumstances that wold easily fit into that category. If you do seek to impose a requirement that employees are vaccinated there are likely to be challenges brought by employees, some may argue that it amounts to potential indirect discrimination for example if an individual has particular health issues related to taking the vaccine and of course pregnant women have been recommended not to take the vaccine for the time being. There is some very helpful ACAS guidance in relation to this that advises employers on how to deal with the difficult issue of vaccination against Covid.

The key thing I think from the ACAS guidance is communication and they do recommend a fairly comprehensive communication process with employees and with employer representatives. If this is something that you are tackling just now I would strongly recommend that you look at the ACAS guidance and I don't need to go through it in too much detail just now because it is there and its readily available but critically I think employers need to make sure that the information that they have is accurate and the information they're giving to their employees is accurate so getting up to date information for example the government's latest vaccine health information is really, really important and then considering what to do if staff take the vaccine and perhaps require time off to be vaccinated or require some time off afterwards, some people do of course have an adverse reaction to the vaccine for a day or two at least. You need to consider whether you're going to allow that time off and whether you're going to pay for it. Critically also you will have to think about whether you're going to retain information about whether employees have been vaccinated or not but of course that is going to be covered by the General Data Protection Regulations and you do need to ensure that any records that you keep in relation to vaccinations that will be health records are maintained and kept properly. It's a good idea to have a policy in relation to vaccination and to set out very clearly what the principles and rules are that are to apply in relation to this but do bear in mind there will never be a "one size fits all" solution and it will be important in every case to speak to and engage with your employees to find out what their particular circumstances are that have led them to take the decisions that they've taken perhaps not to be vaccinated.

As far as data protection is concerned it's a bit of a topic on its own so I'm going to say very little about that other than that the Information Commissioner's office has made it clear that employers should only retain information about employee vaccination if they have clear and compelling reasons for doing so and if you are going to retain this information you need to make sure that employees understand why

you need to collect the information, there has to be a reason for doing so, you need to explain what you're going to use the information for, you need to explain how long you're going to keep it and there may be little justification for most business actually retaining that sort of information.

Workplace testing is a difficult area as well. The cases requiring employees to participate in the workplace testing scheme will be stronger in some industries than others. Particularly where staff cannot work from home it will be important and particularly in relation to the food sector, manufacturing, energy, retail and some public sector functions. Employers might be able to take disciplinary measures against employees who refuse workplace testing in the right circumstances but you should always explore the employee's reasons for refusing the test in the first place. Employers who have signed up to the workplace testing programme are already see a much lower level of absence which is an interesting fact. ACAS guidance in relation to testing again is a very helpful resource and something I would recommend strongly that you do look for. The sorts of things ACAS are suggesting we think about are let's say you've had this testing programme and somebody does test positive and are then required to self-isolate, are you going to pay them? If you're not going to pay them and they know you're not going to pay them that may disincentivise some employees from engaging in the testing programme. There are things to think about there and also if an employee does need to take time off work to self-isolate is that absence going to count towards HR credit points before they start taking action in relation to the employee absence?

Turning to future work is that a thorny issue? Well there are lots of thorny issues just, another one that employers have to tackle. I think it's clear that for a lot of businesses the future is going to be different the past, it's going to be a future of hybrid working or flexible working. When you're thinking about hybrid working its worthwhile thinking about what that actually is going to mean for your organisation, there can be very different solutions depending on the type of business that you operate. It's important that a business actually explains to its employees what its policy is going to be in relation to hybrid working, is there going to be a blanket ban, is it going to be allowed widely or probably for most people there's going to be a mixture of the two. You need to determine which of your employees can actively effectively work hybridly if that's not an unusual expression, who can work from home essentially if that's what we're thinking about here. There will of course be some who simply can't do their job from home and they need to get back into the workplace in order to become productive again but there are many who have worked from home now for perhaps up to year. Personally it is coming up to literally one anniversary since I last set foot in the office which is a scary thought but there are lots of businesses where they have been working quite successfully with employees working from home and arguments against that are looking rather thin these days.

You have also got to consider if employees are going to be working from home what the health and safety implications of that may be. An employer's responsibility for home workers remains and there is guidance from the Health and Safety Executive in relation to what you should and shouldn't do in relation to home workers. You need to think about things like will you be providing office equipment for example? Desks, chairs, screens and so. Will you be actually conducting any form of assessment that an individual is working in and employees will want to know whether you are going to meet some of their costs for using their home as a workplace, heating, lighting, broadband costs and the like. If you are preparing a policy in relation to this it is very important that you set clear aims, objectives and expectations of your managers making the decisions and of your employees. I think it will be important to ensure that you will safeguard against bias for example managers who are biased against homeworking, for leases that perhaps aren't relevant any longer.

Can we move to the next slide please Emma?

In relation to the end of furlough I don't want to say a great deal more than is on the slide. The slide is there and you can see what's going to happen with the furlough through to the end of September. As far as we know furlough grants will end at the end of September but of course there have been various end dates prior to now and the scheme has been extended. A couple of important points to think about though. As we start to reach the end of furlough support, businesses are going to take decisions on

whether they can retain their existing furloughed workforce or whether redundancies will be required. If you're thinking of redundancies, please do bear in mind that if there are more than 100 redundancies contemplated then you will need a 45-day consultation period factored into your timeline for that. If there is between 20 and 99 redundancies, then it's a 30-day consultation period. Please also bear in mind that once you serve notice of termination of employment you can no longer claim a grant under the Coronavirus Job Retention Scheme and all of the employment costs will have to be borne by the employer during the notice period.

Next slide please Emma.

The last thing I want to talk about are some contract changes which the government have been consulting on. The first of these is in relation to non-compete clauses. These are clauses used in employment contracts to restrict an individual's ability to work for a competing business or to establish a competing business for a defined period after termination of their employment. Typically six months or 12 months is the actual limit. Views have been sought by government on the enforceability of non-compete clauses and whether they should only be enforceable when the employer actually pays the employee during the restricted period and the suggestion is that the employer should pay between 60% and 100% of the employee's average weekly earnings. Consideration should be given as to whether there should be greater transparency in relation to these clauses and from my perspective it's obvious that a clause like this is in a contract but they're not the easiest things in the world to read and to understand and I can easily understand how many employees might not appreciate the significance of the restrictive covenant when they're signing up to a contract of employment.

There may also be restrictions on the maximum time that you can actually impose a non-compete clause, for example 3 months and generally government is consulting in considering whether these clauses should simply be outlawed. Consultation closed on the 27th February, the results are being analysed and we just need to wait and see what's going to happen in relation to that.

There was consideration also to low paid workers and whether the contracts for low paid workers should not have exclusivity clauses, that's for workers who are currently earning less than £120 per week. There's a ban of these exclusivity clauses already and zero hour contracts and it wouldn't be a huge extension to include low paid workers in relation to that.

Then finally non-disclosure agreements. I don't want to say too much about these. Legislation has been considered by government for some time about whether to ban non-disclosure agreements in the employment sphere. I don't think that's going to happen. What has already happened is that the Law Society and the Solicitors Regulation Authority have already imposed quite strict requirements on solicitors who are drafting non-disclosure agreements in the employment sphere to make sure that these don't go further than they ought to, in particular to ensure that they don't prevent employees from reporting criminal conduct and from making reports that would be protected disclosures, so probably what we will find is that government legislation if they do legislate will enshrine those practice rules in legislation. It will probably also include a requirement that employees can only validly sign up to a non-disclosure agreement in the employment sphere once they have taken legal advice, so similar to the requirements that apply in relation to settlement agreements.

So that's a bit of a quick run through everything but we have limited time this morning and I'm sure you're all desperate to hear from other speakers so Ill hand back to Jonathan just now, thanks very much.

Jonathan Davey

Thanks David that was really lucid and really useful and practical and thank you also for sticking to time. Just before I ask you a question or two, something I should have said at the outset is today's session is being recorded and it will be accessible to you after the session with both slides and the video and so it will be there both for you to refer back to and to pas onto colleagues if you wish to do so.

David, the first question we have for you is I'm sure one that's been on the mind of a lot of people listening to your presentation. After the *Uber* case is there anything we can do as employers to

demonstrate that contractors genuinely are self-employed or is it effectively inevitable now that they'll always have worker status?

David Young

Thanks Jonathan. It's not an inevitability and every case will depend on its own facts and circumstances, typical lawyer's answer of course. It would be wrong to think that it's an issue that can be solved by contractual wording however and it's clear that the courts are going to look at the reality of the working relationship in determining worker status cases. I think the important fact as we've seen. the degree of control exercised by the business over the contractor will be critically important and also the genuineness of any right of substitution so those will be the two key factors and if you want to give yourself a reasonable chance of arguing against worker status these are the areas I think to focus on.

Jonathan Davey

So effectively if I understand that you actually have to change the nuts and bolts of the relationship, it's not a matter of words or theoretical rights?

David Young

Absolutely right. The courts will be very, very happy to say "I don't care what your contract says, that's not what actually happens in practice, what happens in practice is X, Y, Z" and then worker status will be established, and that's exactly what's happened in the *Uber* case and conversely it's what happened in the *Deliveroo* case the other way around. Deliveroo changed their contractual relationships and changed the way in which they actually operated their business and that's why they were successful in the High Court.

Jonathan Davey

Great. And just a brief one if we may because time is running on. The next question we've had is about where you finished which is restrictive covenants. If restrictive covenants on senior employees are made unlawful what alternative business protection strategies might we consider?

David Young

There are a number. The first thing to bear in mind is that we're talking about non-compete clauses here not non-solicitation clauses so these will remain enforceable and you should still have the usual suite of restrictive covenants perhaps accepting non-compete restrictions if these are outlawed. Always ensure that they're drafted, if you ask for too much you will get nothing that's the general rule and you can use other provisions such as notice periods, particularly garden leave provisions, you can use confidentiality clauses that are carefully and appropriately drafted. You can use intellectual property provisions and also I think the most important thing is to actually monitor exiting employees' activities before and after they leave so that you can identify where problems are likely to arise and you can then take advice on the appropriate steps to take in order to protect the business when its required. That's a very quick answer to a very long topic but no time left.

Jonathan Davey

Thank you, that's really useful David. We'll move on now. Mike is going to take the next bit of the alphabet from C for calculating holiday pay all the way up to Gender. So over to you Mike.

Michael Burns

Thanks Jonathan. Morning everybody. Starting with holiday pay who would have thought that in case law Working Time Regulations would create such chaos in terms of case law but here we are 2021 and we still have three cases that are going to the Supreme Court later this year. Just a brief recap to say well how have we got to this position? A very long time ago we implemented Working Time Regulations to develop into a law in our jurisdiction of Working Time Directive. The Directive talk about holiday pay calculations and said use normal pay. Unsurprisingly in the UK the people drafting the Working Time Regulations looked at domestic legislation and if you look at the Employment Rights Act is has within it

sections that set out how you calculate pay and if you are a fairly typical employee who's paid weekly or monthly a basic salary then that is the sum that used to calculate a week's pay. If your pay fluctuates because your hours change week to week then you calculate on an average basis but for a lot of people it was always the case that basic salary was used, so basic salary was used in the Working Time Regulations until we hit a run of cases several years ago now involving claimants who said well my basic pay doesn't represent in some instances more than 50% of what I earn on average a week and I say that the calculation should be done a different way. Now that was testing the courts and saying to the courts you really need to read the Working Time Regulations and almost ignore what is said in some instances in black and white and look at all Working Time Directives and use the Directive as a guide as to how you should interpret the Regulations. So the best illustration is probably the *British Gas* case brought by a man call Mr Lock. Mr Lock earned a basic salary who also earned commission and the commission was a contractual entitlement and it represented about 50% of his average weekly take home and that meant that if he went on holiday and stopped earning commission because he was on a break then in several weeks' time when he would have otherwise received commission payments for the work done during the holiday period his pay dropped considerably and when that case was heard and heard on appeal the decision was taken that actually the Working Time Regulations should be read in order to include the overtime because the overtime was something that under the Working Time Directive, represented normal pay.

There were other cases. A particular case called *Bear Scotland* that dealt with contractual overtime and that again confirmed that where there is regular overtime earned by an employee then if that is paid on a regular enough basis then that also should be included in normal pay.

What we have with the *Flowers* case is a question about voluntary overtime and the difference being that it's not something the employee is obliged to do. Now looking at basic principles that have been applied in this sort of run of cases what you have is an emphasis on not particularly what the contract says but what the employee does and if an employee works overtime even if its voluntary overtime on a regular basis then that should be included in normal pay. Now that was something that the Court of Appeal said was the case but the *Flowers* case is going on appeal to the Supreme Court in my view is they're likely to agree with the Court of Appeal that voluntary overtime is likely to be something you should include in payment holiday pay and I think a lot of people are already doing that. The case that sits just to the right of it is the *Chief Constable of Northern Ireland v Agnew* case. Something that *Bear Scotland* said that was very helpful to employers was that when you make a claim for unpaid holiday pay you make that claim on the Employment Rights Act and you're actually claiming for unlawful deduction from wages and salary and you're entitlement in that respect is to claim for monies that haven't been paid to you but you must bring the claim within 3 months and if the claim was in respect of the a series of the same deducting again and again you can go back further than 3 months but if there is a break of 3 months at any point where no deduction is made then you're not entitled to pursue that claim and the 3 month rule became very important in terms of planning for risk and how people were looking at their exposure in respect of holiday pay, because if a person didn't go on holiday for 3 months then you wouldn't be paying them holiday pay so you wouldn't be getting the calculation wrong but that could create a break and as a consequence employees wouldn't be entitled to bring a claim for historical holiday pay deduction. The case here is a case that comes out of the Court of Appeal in Northern Ireland and what the Court of Appeal in Northern Ireland have to say which is what the Supreme Courts are going to consider is in terms "no that's not right if there is a 3 month gap, that 3 month gap doesn't necessarily prevent claims being made going back beyond that date" so that case actually involves about 3,000 police officers and 200-300 civilian workers and there's approximately £30M at stake which probably explains why they're going to the Supreme Court. It will be very interesting to see what the Supreme Court does in the case because at the moment you've got *Bear Scotland* that comes from the Employment Appeal Tribunal where the break was used and approved and obviously you've got the Court of Appeal in Northern Ireland saying exactly the opposite so in terms of where that might go there isn't really at the moment any clear indication as to who's likely to succeed but that could be quite a significant issue for employers, remembering however that in terms of when all these cases started

coming out it was predicted as being something that would cost an enormous sum of money. The government has introduced legislation which means you can't go back further than 2 years in any event and this point is really whether you get the additional protection of the three month break or not.

Okay, the last one. The *Harper Trust v Brazil* case is a case that you need to be interested in if you pay part time workers on a pro rata basis in respect of holiday entitlement. So what happens quite often in education and in other areas actually where you have workers who aren't working a regular number of hours per week is that you sometimes have to budget a little bit when you calculate holiday pay and a common function that has been used for years and is approved by ACAS actually it's in their guidance, is that if someone works for a period where you're not sure how many hours per week they're going to work, so in this case Mrs Brazil was a term time teacher, at the end of each term they carried out a calculation where the calculation is done by basically a fraction. The number of weeks you're entitled to under the Working Time Regulations 5.6 over the remaining number of months in the year up to 6.4 which gives you 12.07% and you just multiply everything you pay that person in the term by 12.07% and that's how you calculate the holiday pay. That is different from what most people who don't work in those sectors do where you would just do a look back calculation over 12 or 52 weeks, previously most people use 12 legislation came in last year to say that you should do a 52 week look back and for a part time worker or anybody you should carry out a calculation based upon the earnings during that pervious 52 or 12-week period. That maths fans, and I've been working this out and I had to read it, apparently is the equivalent of 17. something per cent of your basis pay and as a consequence of that calculation is more generous. If you read the Working Time Regulations there is nothing in there about how you pro rata for part timers, it has all been done on the basis of sensible guesswork often approved over the years by ACAS. So at the moment there are two different calculations in common use and the Supreme Court needs to tell us which one to use. If they use the second one the 17% calculation that will actually give part time workers slightly more by way of holiday pay than the full time equivalent but we're awaiting a decision on that.

As I say if you're not in education and you're not paying people what sometimes is called "rolled up holiday pay" then it's not a case of particular interest.

Next slide please.

Okay now I'm going to look at some discrimination issues that have arisen over the last few months. Again this is all case law rather than legislatively driven. Looking at the question of justification this is in particular in respect of a claim for age discrimination. Look at the use of interim relief which if you're lucky you'll never come across but it is available in Employment Tribunals at the moment and claims for whistle blowing or if you are dismissed your trade union activity and also look at where we are in terms of religious belief, discrimination and whether or not we're seeing the protection provided widening generally.

So next slide please. We'll just look at those two points.

The first issue is a bit of a sort of guilty employment point that you don't really need to take any notice of unless you are involved in a claim involving discrimination in respect of age and if you are then it's a very, very important point. The facts of this case are really useful actually to illustrate exactly what has happened here. Mr Heskett was a probation worker and brought a claim against the Secretary of State for Justice and what had happened to him and everybody else within the probation service is in 2010 because of the recession a decision was taken to start to limit pay increases and the way that was done was that something that Mr Heskett would receive any year which was called "Progression Pay" was limited in its effect so for many years probationary workers received Progression Pay usually at the rate of 3 points per annum and that was reduced to 1 point per annum and it was done to save money. Now the point that Mr Heskett had made was that he was in his 30's and his pay would therefore not rise particularly quickly whereas somebody who had been employed in the same role who was say in their 50's had sort of gone through the progression pay table and would be doing better and that, although not deliberately targeted at him and also not actually deliberately targeted at his age, amounted to indirect age discrimination because they're applying there a legislation provision criteria in practice to

everybody that had a disproportionate effect on a particular group and in this case people of Mr Heskett's age and him so he was entitled to bring a claim and that is indirect age discrimination.

Now, once you've got a claim established for indirect age discrimination you are entitled as an employer to try and justify that if you can demonstrate that what you did was because you had a legitimate aim and for a number of years now in respect of age discrimination, there has been an argument that comes out of European cases that says that you cannot justify age discriminatory acts if they relate only to cost and this is a principle that's come out of Europe but it's not one that is a particular favourite with the UK courts which is you know frankly quite helpful for employers and what the UK courts have said is that as long as you can find something in addition to cost then you can often justify the discrimination and it's called "The Cost Plus Rule". Now the Cost Plus Rule has previously been used to try and help employers who've made a decision to do something that's had an impact on people of a particular age and when they faced a claim for age discrimination they've said "well there was a cost consequence but there was something else as well" and this principle in in the Heskett case has really been extended because what the Court of Appeal have said is you can have costs alone if the cost saving is something that you were compelled to introduce rather than something that you did on the basis it was desirable which is if you're an employer really a step in the right direction. Essentially they were saying that when the Secretary of State introduced these new rules it did say because it was facing costs savings it had to achieve and as a consequence that gave it enough to justify the discriminatory act in that case. As I say if you'll never have an age discrimination case that's not really something you need to worry about.

The next thing mighty be something that is of a concern to many of use. At the moment they are rare but if I am a whistle-blowing employee and I think that I've been dismissed because I'm a whistle-blower and I think that I am likely to win at hearing and (there's a lot of "ands" in this) I can get an application into an Employment Tribunal within 7 days of issuing my claim, then I am entitled to apply for what's called interim relief and Interim Relief is very straightforward and very powerful. You have to pay me until the final hearing so essentially if I'm dismissed and I can establish that I'm likely to win on a claim as a whistle-blower then in those circumstances you have to pay me full salary until the final hearing and those of you who are dealing with Employment Tribunal claims will know that a final hearing can be many months off at the moment.

Now the *Steer* case really interesting because what somebody has done is brought a claim for discrimination and victimisation and then said "I am not allowed to bring a claim for Interim Relief and that's not [♦00.00.43 – *tape 2 - recording cuts out*] and I think because I'm not allowed to bring a claim for Interim Relief in connection with the discrimination claim that's a breach under the European Convention on Human Rights". Now the European Convention on Human Rights survives the Brexit exit where a signatory to that is separate from anything that ceased on 31st December so this is still a valid point and the case went to ET and EAT Employment Appeal Tribunal and both courts said "well this is all very interesting but we can't do anything about it" so the case is now on appeal to the Court of Appeal. Now the Court of Appeal is entitled if it wishes, because it has the power, to declare that the lack of Interim Relief as a remedy in a discrimination claim is incompatible with the European Convention on Human Rights, right to a fair trial, right to permit prohibition on discrimination. Now if that declaration is made then the government will be compelled to extend Interim Relief protection to discrimination claims. Now this could be a really big issue for employers because if the Employment Tribunal system has got the capacity to hear those claims then that would become an extremely powerful weapon for claimants who are bringing a discrimination claim and felt that the claim had sufficient merit to argue that it was one that is likely to be won and as you're probably no doubt aware we see many, many more claims for discrimination than we've even seen for whistleblowing so the sheer number of claims where that type of relief could be applied for would increase significantly so this is really something where you know we'll have to watch this space.

Okay next slide please.

Okay so discrimination on the grounds of religion is actually religion and discrimination on the grounds of philosophical belief and that is something where case law and decisions of the Employment Tribunals

and Higher Courts can extend the type of beliefs that you can rely upon to bring this type of claim. So what we've got there would be more fun if we were doing this live because I could ask people to put their hands up, but what amounts to a belief so far as the court's concerned. It has to be something that is upheld on a genuine basis, it has got be a belief not an opinion and it has to be weighty and substantial. To try and keep extremist views away from this as an area of protection it has to be worded in respect of a democratic society and can include political doctrines and beliefs so on the far left there, Scottish Independence, can that be a belief? Yes it can and we have case law on that. You might have seen a few months ago now a case pursued by somebody that's reported in the mainstream press, that person claims they were protected because they weren't an ethical vegan and they were, they'd lived their whole life by that creed, it wasn't really only a diet thing, it was the way they behaved, it was the things they did, it was the way they travelled, they made a complaint about the company pension scheme investing in non-ethical investments and in that instance they were found to be protected. Vegetarianism is not, that is something that is treated differently, it was the seriousness of the individual's views in respect of veganism that really created the protection there. Very much a case by case analysis because it would really be a sliding scale as to whether somebody was sufficiently invested in a particular belief that they would go on a protection.

The last category is really up in the air at the moment is gender, biologically useable in other words is your sexual gender set at birth and something that can't be changed. At the moment we have one appeal decision and one first instance decision that says that "no you don't get protection" and another decision where protection is found for somebody who withheld that belief. These cases usually come up because there's a clash with people who have other beliefs at work and the employer is then faced with the difficult task of trying to work things out between two people who often are entirely reasonable but take a different position on these issues. As things stand at the moment we are desperately in need of an appeal case on that which we're unlikely to have in the near future, although one of these cases is supposed to be on appeal but we haven't had anything listed as yet in terms of a hearing. If you're dealing with anything like that I would work on the assumption that protection is provided, it doesn't mean you can't take action against somebody but it means you have to acknowledge that they have a right and you then balance that right against the rights of others.

Next slide please.

Very quickly, David has already picked up on a few of these points. We're still waiting for somebody to make progress with the Employment Bill. There are a number of things that are up in the air at the moment that may become law in the future. We don't have any doubts and we don't have any clear progress being made by the government at the moment. At the moment if you are employed on a zero's hour contract then you cannot be subject to [♦06.46 – *tape 2 – recording clipped*] an exclusivity obligation there's work going on about trying to extend those rights so it would accrue naturally after a 26 week period, ask your employer for more predictable terms. We have legislation that they want to introduce so that SIPs in the retail industry will go through to workers in full. There is a thought that we should have a new general enforcement body so at the moment for example if you've got a national minimum wage problem that's helped with by HMRC there is no government body that say deals with holiday pay claims they are to go to Employment Tribunals on an individual basis, even if they are sort of corralled together by a trade union or similar so they're talking about trying to introduce an organisation that deals with enforcement of those types of rights on behalf of groups of workers. They want in terms of family friendly rights to introduce obligations that protect employees whilst they are pregnant and following their return to work in respect of being selected for redundancy. That protection exists at the moment but only if you're actually on maternity leave. That could potentially be extended from the point that you tell your employer you're pregnant and for six months after you return to work and it basically gives you the right to alternative employment if there is some available at the head of the queue as against fellow employees who are also at risk of redundancy.

They want to extend neonatal care so if you have a baby and the baby is premature you get an extension to your maternity leave which for obvious reasons makes sense and they want to introduce up to one

week's leave for carers and at the moment there are no rights in that respect, although there's an emergency time off for dependents.

Looking at flexible working at the moment you can make a flexible working request if you've been employed for 26 weeks. CIPB amongst others are calling for that to become a day 1 right.

Next slide please.

Looking finally at Gender Pay Gap Reporting, this has been in since 2017. It was paused in 2020 because of the Pandemic and you have to comply this year although you don't have to report until 5 October, normally you would report by 5 April. There has been a very minor decrease in gender pay gap on a national basis in reports that have been filed. This is an area I think that because of the Pandemic we're going to see increasing pressure to boost this legislation. At the moment the minimum requirement is 250 employees. There was a Private Members Bill that was looking at dropping that to 100 employees and that had cross party support but at the moment that isn't law. The Women's Equality Commission have called in a report of last month actually for extension of pay gap reporting to do with ethnicity and disability. That is something that has been in the wings for a while and I think it is almost inevitably going to be introduced. There will probably be a longer lead in time for that because a lot of employers wouldn't even hold the necessary data to undertake that sort of analysis at the moment and stating the obvious, people hold data in terms of gender, in terms of ethnicity people tend to hold data about that in respect of the entire workforce rather than relating it to individual employees so there might need to be a longer run in period there to allow employers to get up to speed with the information they need to gather from the workforce to produce the report. Most of you will have seen data that came out during the Pandemic, we were 1.8 x more likely to be made redundant if you were female and 47%-48% more likely to have your hours of pay affected by the Pandemic if you are female so I think that there will be greater or more pressure on the government to look at gender pay gap reporting and use it as a way of trying to drive behavioural change in terms of employers. At the moment it doesn't really have any teeth, you have to report and if you don't nothing can be done by way of fine to sort of punish employers that don't report. There is a planned review after 5 years where the government will look at how effective gender pay gap reporting has been. That will take place in a couple of years' time and I think then it's likely we could see additions to obligations under the existing regime.

I think I'm just about on time there Jonathan so Ill finish there.

Jonathan Davey

Thank a like Mike. Just time for one quick question and this may be signed hopeful, but the question is whether once we have the decision in the three Supreme Court cases on holiday pay that's it and things will settle down or do you foresee that there are other battlegrounds still to be fought?

Michael Burns

Yeah I think as David mentioned the government might do something about holiday pay calculations, Working Time Regulations are one of the pieces of legislation that is often mentioned in terms of post-Brexit changes so they could take steps via legislation. In terms of case law there are still a couple of things that are outstanding there, we're not absolutely sure what you should do. Regular, so quarterly or annual bonuses for example, it is still quite difficult to decide whether they should be in scope to be regarded as normal pay and included or whether they should be excluded so there are a couple of outstanding things that might cause change to occur in the future.

Jonathan Davey

Thanks that's really useful again, very lucid. You got through a lot of material in a short time there so many thanks. We're moving on now, just on time to Martin who's going to complete our A to G of employment law and deal with the very topical subject of IR35 although he's cunningly called that "Getting Ready for Changes to IR35" so over to you Martin.

Martin Griffiths

Thank you Jonathan and good morning everyone. As Jonathan said this is now imminent so its 20 days and counting I think so although that might mean there's not much time until D-Day, at the moment we're seeing an awful lot of activity from clients who are asking lots of questions and of course even if your house isn't quite in order for the 6th April, there will still be an ongoing tale of this as we kind of see how these rules are implemented in practice by the Revenue, so it's never too late. So can we just scroll into the main slide please.

So I'm not going to go too much into the background of hoping that the majority of you are reasonably familiar with what we're talking, we're talking about IR35 and the name of this session is to be a bit more practical in terms of thinking about what sort of things should you be thinking about, what might impact your business and what decisions can you still make now to get ready. So a very brief reminder. As you know the idea of the IR35 rules is to capture off-payroll workers and the quintessential question is "if I'm being provided a worker via a third party are they performing the role of an employee or not?". If they are then in the Revenue's view they should be taxed as if they are an employee so subject to deduction of PAYE and importantly employer NICs charged in addition.

Now where we are at the moment and until 6th April 2021 is that where you have that situation where you look at the arrangements you think "well yeah this person is performing the role of an employee" it's the intermediaries so usually the personal service company (PSC) which is obligated to apply payroll and NICs and there's no official recourse against the host employer or the end client, the one who's benefitting from the labour, other than in the case of public sector companies where the rules were changed back in 2017. For the vast majority there is no ability to go against the end clients. Now for the Revenue for obvious reasons that created a number of problems. Firstly compliance in this area is notoriously poor so the personal service companies often simply aren't applying payroll when they should be and that is a bit of a compliance headache for the Revenue because, you know if you take a simple example of a business which engages say 20 workers through this sort of structure that's 20 individual PSC's which the Revenue have to enforce against versus you know if they can enforce against one single end client that is simply going to make their life a lot easier. So you can see the attractions from the Revenue's perspective and so post-5th April, so from the 6th of next month, were IR35 applies it will be the part which pays the PSC which may or not be the end client and we'll come on to discuss that in a couple of minutes, it will be that party, the party which pays the PSC which will be responsible for applying PAYE and employer's NICs. As I've put on this slide the really key thing here, in a sense the PAYE is not really the important thing although there is a slight cash flow detriment to the individual in terms that they're receiving their fees less deduction, the really important thing for businesses is that where these rules apply the likelihood is that you're adding in an additional 13.8% of employer's NICs that simply wasn't there before and therefore if this is a big problem, so if you've got a lot of workers in this space, you may need to think about you know adjusting your cost base and the terms on which people are engaged.

Can we move onto the next slide please and the one after that as well.

So when will IR35 apply? Again I don't want to go into too much detail about this but really to say in my opinion there are a couple of key threshold entry requirements where if you don't have these at all then you know IR35 is simply not on the table and the two important ones from my perspective are firstly one of the key requirements for IR35 is that there has to be a level of personal service in other words you have to be being provided with the labour of a specified named individual and the way the Revenue looks at this is that where you have what are referred to as "outsourced service agreements" those are outside the scope of IR35 and a typical example might be for example if you're receiving supplied let's say catering services, although within the scope of that supply you might be receiving the supply of you know a chef or chefs multiple, overall you're receiving the supply of catering services in general and therefore in principle its outside the scope of IR35. Now we'll come back onto that on the next slide because there are some quite tricky questions as to what that really means in practice.

The second important requirement is that there has to be an intermediary involved so as I've said on a number of occasions already, usually this will be a PSC. If you're dealing directly with an individual who is providing purportedly consultancy services, technically that's not an IR35 risk, yes there's still a tax risk because obviously on general principles you have to consider whether they're an employee or not, but it's not something that falls within the umbrella of IR35. So the legislation is quite mechanical around this and it cites carious examples of when you do have an intermediary which triggers IR35 to apply so the obvious one is a personal service company which basically means a company in which an individual holds more than 5%/. Also less commonly it involves where your labour is provided via a partnership in which their work with a partner is pretty unusual but the really important one is that a small I suppose level of detail has almost sneaked in the legislation when it was deferred last year and it was that they changed the definition of "Intermediary" where the intermediary providing the services is a company and previously all you needed was that threshold of 5% so if you didn't have a 5% holding or the worker didn't have 5% holding you weren't within the scope of IR35 and the Revenue or should I say the government changed this such that the legislation referred to basically any scenarios where there were chain payments so therefore where the end client pays an intermediary which in turn paid the worker and that caused understandably a large amount of consternation because in principle they would have caught umbrella companies which as we'll come on to see are quite a common strategy for dealing with IR35. The government listened to this and at the start of the year they made noises saying you know of course this wasn't what we intended, we didn't intend to cover umbrella companies and then finally in the Budget there was an official statement that the legislation would be changed which it now has been or the Bill has been published anyway, the Finance Bill was published at the start of this week which applies the new definition. So the threshold requirement is that any holding in the Intermediary at all is what is required to trigger IR35 so if you or your connected persons don't hold any interest in the Intermediary whatsoever then in principle IR35 cannot apply. We'll come back onto that in a second when we look at structures like umbrella companies and scenarios in which you might be outside the scope of IR35 so the safe harbours if you will.

Really briefly the other organisations which are excluded are if the end client is a small company which is by reference to those conditions on the slide there, turnover balance sheet and employees where if 2 out of those 3 are satisfied you're small and won't be within the scope of IR35.

Next slide please.

So the next slide should refer to outsourced service arrangements and as I say this is one scenario that in theory falls outside the scope of IR35. The difficulty that I personally have with this is that the government and HMRC have effectively put a kind of gold badge saying "if you're in an outsourced service arrangement you are not outside the scope of IR35" but nowhere in the legislation do you see the defined term about the sort of services and therefore it's kind of banded almost as if it's a turn of art and I think that in most cases you know all of us kind of know and feel what an outsource service looks like so in most cases you'll have very obvious situations where you do have an outsourced service agreement but there is clearly quite a grey area in the middle for example where you're receiving services but you are provided with a number of named individuals in the course of that supply agreement so a typical example might be something like an IT contract where you're provided with a new software and you have a level of support that's provided by the supplier which might include for example provision of workers actually coming into your workplace and spending time supporting your team. So the question is you know is that outsource service or is that supply of a personal service of those named workers or is it both? The way I look at it is that I think where you have a potential issue so where your outsourced service agreement might trip the line of actually falling within the scope of IR35 is clearly if you have named individuals and that is a scenario in which the agreement may go just beyond general services to include the supply of personal service so if you have named individuals and fees are referable to the number of hours that they perform then that I think is a potential issue, particularly if those individuals are individuals who your businesses can look at and say "I'm not sure actually that that individual fits with our business ethos or culture or is an appropriate fit therefore could you supply someone else?" because in that scenario it starts to look like really what is happening is the specific

provision of a named worker. In contrast if you keep something pretty general so the supplier ultimately has a view as to who they can provide, in my opinion even if they have to tell you who they're providing if you don't have an ability to kind of reject or vet those individuals then I think you've got a pretty good case for saying that actually this is a genuine outsourced service agreement and therefore it should not be within the scope of IR35 but clearly there is a bit of subjective judgment that needs to be applied and different cases will turn on different facts.

The other thing to bear in mind is that where you do have an outsourced service agreement in principle what that means is that your business that's receiving the outsourced service is not the end client and therefore it doesn't need to make this determination of status or potentially be liable for PAYE and NICs, instead it's the supplier who is effectively the end client, as they're the one who are benefitting from the personal services of the worker which enable them to discharge their duties under their service agreements so in that scenario in principle its incumbent upon the supplier to be the one who is making the status determination and they may take the view it may be the case that the supplier is small for example and therefore outside the scope of the IR35 rules. I think the only thing to say about this is just to be a little bit careful in particular in you're in one of those grey areas where you think you may be outsourced or you think you may be personal service, if you try to rely on the position that "well you know supply is small therefore it doesn't bite" that could be a risky position to take and therefore generally might undertake the more cautious view of saying "well we don't think its personal service and therefore covered by IR35 but we'll make a status determination anyway and therefore try to pass the buck of responsibility onto the supplier".

Next slide please, and onto the next one please.

So briefly how the rules work in practice. So the way that the new rules envisaged should work is that when you're within the scope its incumbent on the end client and what we mean by that is the business that ultimately benefits from the personal service of the workers, its incumbent on that end client to make a status determination then it has to pass that determination onto the next party in the chain so that could be an agent another agent in the chain or it could be a PSC itself and also you have to notify the worker in order to discharge your obligations. The next party in the chain has the ability to appeal that decision and the rules specify that the end client should have a procedure in place for an appeal and then that next party in the chain should pass the determination onto the next party until they eventually get to the PSC. Assuming there is no further appeal then the PSC and the worker is bound by that determination and if that determination is one of employment then it's the party that pays the Intermediary who has to apply PAYE and NICs.

Can we roll onto the next slide please.

So in a really, really simple scenario where all you're doing as a business is contracting directly with someone's personal service company, clearly you're just passing that determination onto the PSC, you are the fee payer and therefore all the risk is on you, there's no one else really you could pass that risk onto per se, albeit you'll likely have indemnities in place with your agreement with PSC.

And the next slide.

So a slightly more complicated supply chain where there are multiple parties between the end client and the fee payer. So in this scenario the end clients make their determination passes it onto the agency who then passes it onto the umbrella and then to the PSC. In that scenario in this specific example it's the umbrella company which is the fee payer and therefore in principle it's the fee payer which would have to apply PAYE and NICs and I say "in principle" because the important thing with the determination process is in order for the end client to pass the tax risk onto the next party in the chain firstly they have to have made the determination and past it both to the next party and to the worker but in addition they have to be shown to have exercised reasonable care in making that determination and if they don't exercise reasonable care then in theory that risk can bounce back up the chain until it ultimately comes back to the end client so it is generally important that you do go through that process.

Onto the next slide please.

So when we say making a status determination what we mean by that, and I'm not going to spend too much time on this, principally here we don't have the time in this session but also because those of you who are familiar with this area, I know David has touched on employment status for employment law purposes earlier in the session, there is a huge amount of case law as to how you go about determining whether someone is an employee under tax purposes and generally so this is a complicated area. There are a number of very difficult and complicated factors which you have to take into account. What I would say is there are three which are referred to as the "irreducible minimum" and in theory what this means is that if one of these three is not present there cannot be an employment relationship for tax purposes so you kind of have to tick that box first before you go on to consider the other factors and those are there has to be a level of personal service, in theory that box is going to be ticked anyway because as I said earlier in the piece you're not going to be within the scope of IR35 unless there is personal service. The one thing I will say about this is that historically people put a lot of reliance on things like substitution clauses in contracts where effectively if the PSC said "right well if my worker can't attend for whatever reason I have the ability to appoint a substitute and therefore there's not the level of personal service because somebody else will be providing the services" and in principle that is true, but I think there is quite an important distinction to make between the contract and the reality in the sense that if you have a clause in a contract which provides for substitution but it is never used and never would be in reality used, then I think there's not really an awful lot of weight that gets placed upon it and so there is a note of caution there.

The other ones are this concept of mutuality of obligation and whether the worker can oblige the end client to provide them with work which the worker is obliged to do and then which the end client is obliged to pay for and then this unlimited control so typically in an employment type relationship the employer has this overarching control of how the work is carried out. Historically control is the area that we see most tension focused on in case law but again there is a note of caution because what amounts to the sort of control you would expect to see really may depend on the type of role you are talking about so for example a very senior consultant might not really be expected to be subject to an awful lot of control whereas somebody who is providing a much more junior service probably would be.

Then there's a whole host of other factors which I'm not going to go into particular detail but for example whether the worker takes financial risk so whether they have the ability to profit from the arrangement by effectively outsourcing for example parts of their services to a third party and therefore profiting. Whether they receive benefits such as pension, holiday pay, maternity rights etc etc and also things like whether they have the ability to work for other clients.

Now as you will probably appreciate this whole raft of factors can be quite intimidating so what can end clients do to lessen the burden? Well there is the check in employment status tool, for tax purposes the CEST tool which is provided by the Revenue. Can we roll onto the next slide please.

Now CEST effectively if you haven't used it is a set of questions, an exhaustive list of questions which should in theory be straightforward to answer and once you get to the end of the test it comes out with a determination of whether your worker is an employee or a non-employee for tax purposes and we're told that CEST is legally binding and in my opinion CEST is a lot better than it used to be, so historically there have been iterations of CEST which frankly were confusing and at best inconsistent and often it was found that the conclusions just simply weren't robust so the success rate was only something like 70-75% which is not really what you're looking for. So it's a lot better than it was but there are a few notes of caution with CEST in the sense that very importantly you know have you answered the questions correctly? The reason for saying that is a lot of these questions are really not very intuitive and it takes a level of kind of understanding of and the principles underlying this area of the law in order to answer some of them accurately and of course if the Revenue finds that you haven't answered accurately then effectively this kind of binding protection will fall away so there is a note of caution.

Secondly what I referred to earlier was this point of whether or not the contract really reflects the reality so the contract might present this perfect scenario that looks exactly like a self-employment scenario but if in reality it's not reflecting what's happening on the ground and you answer the questionnaire on

the basis of the contract not the real facts, again question to what extent you can't rely on the outcome of CEST.

Then finally of course lots of these questions whilst on the face of them look straightforward are, shall we say, less straightforward in that a lot of them are not simple black and white answers "yes" or "no", you have to apply a bit of subjective judgment just to "is the worker taking financial risk or not?".

So overall I'm a lot more positive about CEST than I used to be but there still is a bit of a note of caution to be applied.

The next slide please.

We have touched on this already and this is the concept of the ability for once you've made your status determination the matter is past down to the next party in the chain but the risk that where you haven't been shown to take reasonable care that risk can bounce back up the chain. The other scenario where in principle you could have an issue is where your Intermediary hasn't applied payroll in the right way despite you discharging your duties and that entity then for example becomes insolvent. In principle that risk may pass back up the chain to the end client and the Revenue have made some noises publicly that in that scenario they wouldn't go after an end client who has exercised reasonable care but I have to say until we start seeing how this is enforced in practice I would tend to take it with a pinch of salt which therefor means the important thing is really to be confident and happy with the covenant strength of the Intermediaries who you are using in your supply chain.

Onto the next slide please, and the next one as well.

So just moving onto the actual practical steps of what you might want to be doing and should be thinking about. Probably the kind of single most important thing that I say to clients is what we get an awful lot of is I'll get an email through from the client saying "here's the contract can you amend it to make it IR35 compliant and to minimise our risk?". Yes of course I can do that but I think there's a step before that which is you know what is our approach and our strategy to dealing with IR35 because simply just trying to amend the contract to portray a scenario of self-employment is not the be all and end all and secondly does it really deal with the risk if other parties in your supply chain are not able to fulfil indemnities under the contract. So the sort of things that we see people thinking about doing are this is too difficult and too cumbersome we're just going to engage all of these temporary worker as employees. That's a little unattractive generally, not least because of the additional costs and the employer NIC but also you're giving these workers employment rights and its quite important to note that generally where a worker has employment status rights for IR35 purposes they don't have employment status for employment law rights or employment law status so you're not giving them statutory employment rights whereas if you engage these employees you are.

The other approach which we see all the time is the use of other agencies and umbrella companies in the supply chain. So the concept is "well if we engage an umbrella company and that umbrella company will deal with payroll that gets us off the hook right?". Well in principle possibly subject to the covenant strength and subject to you ensuring that you discharge your obligations but what we see a lot of clients doing is in addition to that use of the umbrella company is putting a blanket ban on the use of personal service companies who are saying "right we're going to go via an umbrella who will pay the workers but there cannot be a personal service company in the chain" and that's quite a neat solution because it means that, going back to one of my slides at the very start they can't be within the scope of IR35. But then a few follow up questions in particular "how can you be sure and how can you monitor that?" That I think is a matter of the contract that you've got in place with your umbrella company.

To the next slide please.

I'll make this the last point because we're just about to come up to time. So clearly contract review is a very important thing to carry out but as I said I do think it comes after the initial phase of thinking about what your strategic approach should be. What should you have in your contracts? It's vital that you have a contractual right to withhold PAYE and that's because unlike a normal direct employment

relationship there is no statutory right to withhold PAYE and NICs so therefore if at a later point the Revenue says "well these workers are employees" you cannot withhold the income tax and NICs without the contractual right to do so. That's very important and of course it's vital to have indemnities in your supply agreements. There is a question mark as to the enforceability of employer NIC tax indemnities because there's a general prohibition on collecting employer NICs for the workers but there are ways of potentially getting around that for example by having the ability to amend the fee structure to effectively deduct employer NIC, so it is possible but there are some question marks as to the enforceability of that.

So we are running out of time so I think I'll stop there and take any questions that arise at this point.

Jonathan Davey

Thanks Martin and just one question for you I think. Somebody has asked about the advisability of using third party providers offering a packaged fee to make status determinations under IR35.

Martin Griffiths

Yeah I mean I think it's a good question and I think that last year and when the exchanges were first coming in we saw quite a lot of these businesses kind of cropping up saying you know "we can do a package deal of £100 per worker" or whatever the case may be and I tend to think unless you've got a reputable provider I think there is a degree of risk there because firstly you don't have the same ability to rely on the binding force of CEST for example and secondly you have to be very careful about the terms on which you engage with those parties so whatever these sorts of parties provide it's the quality of the terms and conditions and whether if they make a mistake to what extent can they be held liable for that. So covenant strength and the strength with the terms and conditions. For any clients who are facing 100's of workers I can accept that it can be a practical solution but it is just a note of caution to take care with those contractual positions.

Jonathan Davey

Thanks Martin and thanks again to all of our speakers. I hope you are going away from this session with at least one thing you can take back to your desk and use in practice. As I said at the start we've been recording this so you will receive a link to both the video and the slides and feel free to pass that on to colleagues if you think it will be useful to them and that also applies of course to the previous two PC update sessions.

The final thing to do is to thank you for coming along and to invite you if you found today useful to come along next Tuesday for our final GC Update Webinar on Health & Safety and Insurance so thank you again for attending, we're finishing bang on time, I hope the rest of your day goes well. Goodbye.