MODERN SLAVERY/LABOUR EXPLOITATION

A paper by Claire Darwin for the Matrix Seminar on 14 May 2018

1. This paper focuses on the following:

   (1) The reporting obligations under the Modern Slavery Act 2015 (paras 2-8);

   (2) Potential claims by victims of labour exploitation against public bodies (paras 9-15);

   (3) Potential claims by victims of labour exploitation in the civil courts and the Employment Tribunal against employers (paras 16-42).

1: TRANSPARENCY IN SUPPLY CHAINS

2. Part 6 of the Modern Slavery Act 2015 concerns transparency in supply chains. In particular, section 54 obliges commercial organisations with a turnover over a prescribed threshold to prepare a slavery and human trafficking statement for each financial year.[1] The current prescribed turnover threshold is £36 million (see Regulation 2 of The Modern Slavery Act 2015 (Transparency in Supply Chains) Regulations 2015, SI 2015/1833). The section 54 reporting duty applies to financial years ending after 31 March 2016 (see the Modern Slavery Act 2015 (Commencement No 3 and Transitional Provision) Regulations 2015).

3. A slavery and human trafficking statement is defined at s.54(4) of the 2015 Act as a statement of the steps the organisation has taken during the during the financial year

[1] The state of California has enacted similar legislation: The California Transparency in Supply Chains Act 2010.

to ensure that slavery and human trafficking is not taking place— (a) (i) in any of its supply chains, and (ii) in any part of its own business, or (b) a statement that the organisation has taken no such steps. It would be a brave organisation to make a slavery and trafficking statement under s.54(4)(b), and in practice organisations are likely to either make a statement under s.54(4)(a) or not make one at all.

4. The government has produced detailed guidance on the s.54 reporting obligation, and the latest guidance released in October 2017 is available here. Crucially, a statement under s.54(4)(a) does not have to stipulate whether there is modern slavery or human trafficking within the business or any of its supply chains.

5. Like other reporting obligations, such as gender-pay gap reporting, there is no penalty or sanction for non-compliance. This may well explain why, according to the website TISCReport.org, less than 50% of companies caught by the s.54 reporting obligation have published slavery and human trafficking statements.[2]

6. Indeed, a recent report by the Public Accounts Committee[3] on the response of government to modern slavery found that:

   (1) The Home Office's approach to businesses' compliance with the transparency in supply chain duty is too hands-off.

   (2) There is no monitoring of compliance with this duty and the department does not even know how many qualifying firms have actually completed the required statement.

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[2] https://tiscreport.org

[3] Reducing Modern Slavery, HC 886, 2 May 2018, see https://publications.parliament.uk/pa/cm201719/cmselect/cmpubacc/886/88602.htm

(3) The Home Office should consider publishing a list of companies who have and have not complied with the legislation, rather than relying on NGOs to monitor compliance.

(4) Furthermore, the department should actively administer and monitor compliance to ensure the duty of transparency is met.

7. Whilst the s.54 reporting obligation is enforceable by the Secretary of State bringing civil proceedings in the High Court for an injunction (see s.54(11) of the Modern Slavery Act 2015), there is no evidence that the Secretary of State has in fact brought any civil proceedings to date. Further, according to media reports the government is not actively taking steps to use its enforcement powers but intends to rely on soft enforcement in the court of public opinion.[4] As the Public Accounts Committee found, the government has not taken steps to identify companies not complying with s.54 of the Modern Slavery Act 2015 but has relied on NGOs to do so. This is, in contrast to for example, its 'name and shame' policy in relation to National Minimum Wage infringement.

8. Whilst in the US there have been some high profile civil suits against corporations that benefit financially from modern slavery/labour exploitation, no such litigation has been brought in the UK as yet.[5]

2. ARTICLE 4 CLAIMS

9. As s.1(2) of the Modern Slavery Act 2015 recognises, holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are caught

[4] https://www.theguardian.com/global-development/2017/oct/04/illegal-behaviour-uk-accused-of-failing-to-press-home-anti-slavery-law

[5] See Laura Ezell, Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations, 69 VAND. L. REV, 499 (2016).

by Article 4 of the European Convention on Human Rights ("ECHR"). Article 4 ECHR imposes positive obligations on the UK government to *inter alia* (i) put in place an appropriate legislative and administrative framework, (ii) take operational measure to protect victims or potential victims and (iii) to investigate when there is a credible suspicion that an individual's rights under Article 4 have been violated.

10. In *OOO & Ors v Commissioner of Police for the Metropolis* [2011] EWHC 1246 (QB) five young Nigerian women brought claims for declarations and damages in respect of the infringement of their rights under Articles 3 and 4 by the police. The women in question had been made to work for no pay in households in and around London. Wyn Williams J upheld their claims and awarded each of the women £5,000 to reflect the anxiety and frustration they had experienced during the period of 12-15 months whilst the police had failed to investigate credible allegations of wrongdoing. The damages were not compensation for the harm caused by the acts of trafficking and labour exploitation.

11. In relation to the police's duties under Article 4 ECHR, Wyn Williams J held at [163] that the investigative duty under Article 4 was triggered once the police received a credible allegation that Article 4 had been infringed, however that information came to their attention. Further, he held at [164] that the absence of an identified victim did not as a matter of principle preclude the duty to investigate from arising.

12. In *R (Atemewan) v Secretary of State for the Home Department* [2014] 1 WLR 1959 a victim of trafficking brought proceedings alleging that the Secretary of State for the Home Office had been in breach of her positive obligations under Article 4 to instigate investigation by the police into credible allegations made concerning

trafficking and other ill-treatment contrary to Article 4. Aikens LJ and Silber J held at [90] that the UK Border Agency was under a duty to initiate or trigger an effective investigation by the police into offences that were committed against the claimant in respect of her trafficking to and in the UK. The UK Border Agency had done nothing. The claimant was awarded a declaration that her Article 4 EHRC rights had been breached, but no damages.

13. The Supreme Court recently considered the extent to which the Article 3 positive obligations required the police to effective investigate crimes perpetrated by private individuals (John Worboys) in *Commissioner of Police of the Metropolis v DSD and Anor* [2018] UKSC 11. The Supreme Court held that the positive obligations under Article 3 applied to both systemic and operational failures, and that failures of either kind would suffice to establish a claim. This is very likely to apply to the positive obligations under Article 4 also.

14. *Galdikas & Ors v DJ Houghton Catching Services Ltd & Gangmasters Licensing Authority* [2016] EWHC 1376 (QB) is a further claim for damages under the Human Rights Act 1998, save that in *Galdikas* six Lithuanian victims of trafficking brought claims both against their former gangmaster (described by the Gangmasters Licensing Authority as "the worst UK gangmaster ever") and against the Gangmasters Licensing Authority ("GLA") (now the Gangmasters and Labour Abuse Authority or GLAA), the statutory regulatory body responsible for the licensing of gangmasters. According to the judgment of the claimants' summary judgment application and online reports, the claims against the GLA were both for negligence and under Article 4 ECHR. I understand that the Article 4 ECHR claims are based on a failure to investigate by the GLA after they were put on notice of

credible allegations of interference with the claimants' Article 4 rights. Those claims have not yet been listed for trial. Their claims against their former employer, discussed further below, were reportedly settled for over £1 million pounds.[6]

15. Many commentators have heralded the *Galdikas* case as significant because the former gangmaster was held accountable by the courts. However, I think the more interesting aspects of the claim are the Article 4 claims against GLA. I think we are likely to see more cases against government bodies and agencies responsible for regulating the labour market over the coming years, pursued as either judicial review claims or as civil claims for damages.

3: CIVIL CLAIMS AGAINST EMPLOYERS & ORS

16. One of the main criticisms made of the Modern Slavery Act 2015 is that it focuses on prosecuting modern slavery offences and does not make adequate provision to compensate victims of those offences.[7] This is in contrast to the approach taken in other jurisdictions, for example the US, where the Trafficking Victims Protection Reauthorisation Act 2003 makes provision for civil causes of action enabling victims to sue corporations engaging in forced labour for damages.

17. Accordingly, victims of labour exploitation have had to fall back on existing legal remedies. The private law claims brought by victims of labour exploitation will vary hugely according to the circumstances of the case, but may include tortious claims for assault and battery, false imprisonment and intimidation; claims under the

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[6] https://www.theguardian.com/uk-news/2016/dec/20/gangmasters-agree-1m-payout-to-settle-modern-slavery-claim

[7] While the Crown Court and some Magistrates Courts have jurisdiction under s.8 of the 2015 Act to make a slavery and trafficking reparation order i.e. an order requiring the person against whom it is made to pay compensation to the victim of a relevant offence for any harm resulting from that offence, such orders are dependent on a criminal conviction for either of the offences under ss.1 and 2 of the 2015 Act. In some cases, prosecutions or convictions will not be possible.

Protection from Harassment Act 1997; contractual claims for unpaid wages and other monies owed by the employer; compensation claims for failure to comply with statutory entitlements such as the failure to provide payslips (soon to apply to workers too); statutory claims for unpaid wages and holiday pay; and race or sex discrimination claims under the Equality Act 2010.

Procedural Hurdles

18. Pursuing such claims in either the Employment Tribunal ("ET") or the ordinary courts is not straightforward however, and putative claimants may come up against *inter alia* the following procedural hurdles:

(1) The need for any civil proceedings to be stayed pending the outcome of linked criminal proceedings;

(2) Complying with time limits without prejudicing any criminal proceedings;

(3) The fact that some claims e.g. discrimination claims can only be pursued in the Employment Tribunal, and others e.g. self-standing personal injury claims can only be pursued in the ordinary courts;

(4) The ordinary courts are not at all user-friendly, and lack expertise and insight into industrial relations and (non-legal) workplaces;

(5) The ETs are not terribly user-friendly, particularly not at the moment as they are overwhelmed by the surge in claims post-*Unison;*

(6) Deposit Orders – although see *Hemdan v Ishmail and another* [2017] ICR 486 where the EAT set aside a deposit order made against a victim of trafficking, recognising that the fact that the claimant was a victim of trafficking was an

important consideration when considering the proportionality of the deposit order.

(7) The significant difficulties enforcing any ET awards, such that a significant proportion of ET awards remain unpaid.

(8) Delays and complications with enforcing awards: thus, a victim of trafficking awarded £266,536.14 by an ET was unable to enforce her award, because Central London County Court delayed in dealing with her application for an interim charging order against her former employers, and they dissipated their asset before a charge could be obtained over them. She later recovered £35,702.80 but was left with nothing after the Legal Aid Agency exercised its statutory charge. [8]

Substantive Hurdles

19. Perhaps the most surprising substantive hurdle is that all domestic workers are exempt from the National Minimum Wage pursuant to Regulation 57 of the National Minimum Wage Regulations 2015.

20. Regulation 57 provides as follows:

> **Work does not include work relating to family household**
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> 57 (1) In these Regulations, "work" does not include any work done by a worker in relation to an employer's family household if the requirements in paragraphs (2) or (3) are met.
>
> (2) The requirements are all of the following—
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> (a) the worker is a member of the employer's family;
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> (b) the worker resides in the family home of the employer;
>
> (c) the worker shares in the tasks and activities of the family.
>
> (3) The requirements are all of the following—

[8] See *R (on the application of Tirkey) v Director of Legal Aid Casework* [2017] EWHC 3403.

(a)the worker resides in the family home of the worker's employer;

(b)the worker is not a member of that family, but is treated as such, in particular as regards to the provision of living accommodation and meals and the sharing of tasks and leisure activities;

(c)the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, as respects the provision of the living accommodation or meals;

(d)if the work had been done by a member of the employer's family, it would not be treated as work or as performed under a worker's contract because the requirements in paragraph (2) would be met.

21. In *Nambalat v Taher; Udin v Chamsi-Pasha* [2012] EWCA Civ 1249, the Court of Appeal considered the predecessor provision in the 1999 Regulations. The Court held that the exemption *did* apply to the workers' cases, but that when applying the exemption ETs '*must keep in mind that it is for the employer to establish that the conditions in [Reg. 57] are satisfied and that onerous duties may be inconsistent with treatment as a member of the family. Tribunals will need to be astute when assessing whether an exemption designed for the mutual benefit of employer and worker is, or is not, being used as a device for obtaining cheap domestic labour'*.

22. Following *Nambalat,* an ET in *Tirkey v Chandok* (ET 3400174/13, 17 September 2015) held that the Regulation 57 exemption did not apply to a domestic worker from East India who worked seven days a week and 18 hours a day. The ET held that she ate alone, had no privacy as regards sleeping accommodation, was required to sleep on the floor rather than in a bed and was 'in no way treated as a member of the family'. Accordingly, she was entitled to the national minimum wage throughout her employment and was awarded compensation of over £183,000.

23. In a recent case, *Ayaji v Abu* [2017] EWHC 1946 (QB) Master McCloud held that in circumstances in which a domestic worker was 'kept in economic servitude', 'prevented from having friends, prevented from having a wage sufficient to give her

basic freedoms, and was subject to constraints on contact with her brother' and her circumstances in the household were 'oppressive servitude' and 'fell short of the standards which the law of the land requires as a basic minimum for the dignity of the worker and their remuneration', the Regulation 57 defence failed and should be struck out.

24. The lawfulness of Regulation 57 of the 2015 Regulations was raised in a case recently considered by the EAT: *Puthenveettil v Alexander & George & Secretary of State for Business, Energy and Industrial Strategy* UKEAT/0165/17/DM and UKEAT/0166/17/DM. In that case, ATLEU argued in the ET that Regulation 57 was unlawful under EU law and should be disapplied, because it unlawfully indirectly discriminates against women, putting them at a particular disadvantage, and cannot be objectively justified. Unfortunately, the ET failed to properly consider such arguments. Accordingly, the EAT, Simler P presiding, remitted the matter to the ET. That remitted hearing has not yet taken place.

Other hurdles

25. Other hurdles include:

    (1) The common law defence of illegality which can be a bar to both tortious and contractual claims. For a recent consideration of the illegality defence, as reformulated by the Supreme Court in *Patel v Mirza* [2016] UKSC 42, see *Okedina v Chikale* UKEAT/0152/17/RN and UKEAT/0153/17/RN.

    (2) The need to establish employee or worker status in order to pursue certain types of claims and/or certain types of claims in the ET e.g. The Employment Tribunals Extension of Jurisdiction Order 1994 only allows employees to

bring contractual claims in the ET, and not workers, even if the worker has a perfectly good breach of contract claim;

(3) Regulation 19 of the Working Time Regulations 1998 provides that key working time protections, including the maximum weekly working time, 'do not apply in relation to a worker employed as a domestic servant in a private household.'

(4) Section 51 of the Health and Safety at Work etc Act 1974 excludes domestic servants working in private households.

(5) The Deduction from Wages (Limitation) Regulations 2014 which imposes a two-year cap on all wages claims brought on or after 1st July 2015. Prior to this, it had been more advantageous to bring a claim for the national minimum wage as a wages claim, since such claims can be pursued by both employees and workers, and because there was no financial limit on the amount of wages that an ET could order an employer to pay. Nor was there any temporal limit on how far back such claims could go (*Coletta v Bath Hill Court* (Bournemouth) & Property Management Ltd UKEAT/0200/17/RN).

(6) The cap of £25,000 on the ET's jurisdiction to consider contractual claims, and the possibility of an employer pursuing a counter-claim under the Employment Tribunals Extension of Jurisdiction Order 1994.

4: WAGES CLAIMS

26. Notwithstanding the above difficulties, there have been some recent high-profile examples of victims bringing claims for unpaid wages in the ordinary courts.

27. In *Galdikas*, referred to above, six Lithuanian victims of trafficking and labour exploitation brought claims against the company who had supplied them to chicken farms in the United Kingdom, and two Directors of that company. Their claims were for breach of contract, breach of the Agricultural Wages Act 1948, negligence, harassment and assault.

28. Until 2013 Agricultural Wages Orders made under the 1948 Act prescribed inter alia minimum hourly rates of pay, overtime rates and that a supplement be paid for night work. These rates for agricultural work – particularly the night rates – were higher than the National Minimum Wage.[9] Agricultural workers in England (but not in Wales) are now treated the same as any other workers who qualify for the National Minimum Wage.[10]

29. Mr Justice Supperstone concluded that the Defendants had no real prospect of successfully defending the claims that they had failed to pay the claimants properly for their work in accordance with the terms of the relevant Agricultural Wages Order, and other related unlawful deductions claims. Further, that the Defendants had no real prospect of defending the claim that there was a lack of facilities to wash, rest, eat and drink. The claims against the Defendants (but not the GLA) were settled for over £1million according to online reports.

30. *Galdikas* is one of an increasing number of wage claims brought in the ordinary courts rather than the Employment Tribunal. Workers, like the domestic worker in

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[9] Until 1 October 2013, agricultural workers in England and Wales may have been entitled to higher minimum rates of pay. These were set from time to time by the Agricultural Wages Board (AWB). However, the Enterprise and Regulatory Reform Act 2013 abolished the AWB in England and Wales (with effect from 25 June 2013) and revoked the Agricultural Wages (England and Wales) Order 2012 (with effect from 1 October 2013).

[10] As such, any claims in England would now be brought as NMW claims rather than under the 1948 Act.

Ajayi, have brought breach of contract claims based on ss.1, 17 and sometimes also s.18 of the National Minimum Wage Act 1998.

31. Section 1 of the National Minimum Wage Act 1998 provides that a person who qualifies for the national minimum wage shall be paid at least the minimum wage. Section 17 provides that if a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall at any time be taken to be entitled under his contract to be paid as additional remuneration in respect of that period. In circumstances in which no oral or written contract exists, section 18(3) of the National Minimum Wage Act 1998 provides that it should be assumed that such a contract did exist for the purposes of enabling the additional remuneration within s.17(1) to be recovered in civil proceedings on a claim in contract.

32. The courts have accepted that the effect of s.17 National Minimum Wage Act 1998 is that there is to be implied a term that wages are due at the rate of the national minimum wage into every contract of employment for relevant purposes (see for example LJ Singh in *Mruke v Khan* [2018] EWCA Civ 280 at [72]). As such, national minimum wages claims can be pursued in both the ordinary courts as breach of contract claims, and as either breach of contract claims or unlawful deduction of wages claims in the ET. An additional advantage of pursuing claims for the national minimum wage as contract claims is that workers may also be able to rely on the deliberate concealment exception at s.32(2) of the Limitation Act 1980, and therefore claims may go back further than 6 years (see *A* [2017] EWHC 3098 as reported on ATLEU's website).

33. It may be thought surprising that claims based on ss. 1 and 17 of the National Minimum Wage Act 1998 can be brought in the ordinary courts as pure contractual claims; however, to date there has been few objections by employers about this.[11] One potential difficulty might be s.205 of the Employment Rights Act 1996, which provides that deduction of wages claims should be litigated in the ET. Whilst in *Rickard v PB Glass Supplies Limited* [1990] ICR 150 it was held that s.205 did not prevent the ordinary courts from having jurisdiction, that was in the context of a common law claim for monies owed under an employment contract. The second potential difficulty might be whether it is an abuse of process to litigate such claims in the ordinary courts, given the ET's jurisdiction. Such arguments have been taken in relation to the pursuit of equal pay claims in the ordinary courts (see for example the observations in *Birmingham City Council v Abdulla and others* [2012] UKSC 47*)*.

34. In theory, of course, workers could rely on HMRC to enforce their rights under the National Minimum Wage Act 1998. Since April 2009 HMRC has had various powers including the power to pursue payment on behalf of the underpaid worker in the civil courts or the ET. In practice however, although there have been a few appeals brought against notices of underpayment and related financial penalties (including *Daler-Rowney v HMRC* [2015] ICR 362 in which I was involved), there have not – as far as I am aware – been any proceedings in the ET instigated by HMRC in order to assist individuals recover the sums which they are due.

[11] In *Galdikas* this point was taken in written, but not oral, submissions, in relation to all of the employment claims, see [58].

Discrimination and Constructive Dismissal Claims

35. The failure to pay the National Minimum Wage has been relied on as a fundamental breach of the implied term of trust and confidence sufficient to found a claim for constructive unfair dismissal. In *Mruke*, Singh LJ (with whom LJJ Patten and Hickinbottom agreed) held that the ET erred in requiring the worker in question to have knowledge of her entitlement to be paid the national minimum wage. He held at [72] that the National Minimum Wage Act 1998 inserts an implied term into a contract of employment that the national minimum wage will be paid, and that this is an implication of law, not fact. He observed at [73] that:

> '*It is important that the purpose of such legislation should be given full effect in order to protect workers in this country. That was the will of Parliament. Parliament was well aware that there can be individual employees who are susceptible to exploitation precisely because they may be illiterate or have received very little if any education, particularly if they have been recruited from overseas. In my view, to rely upon that person's ignorance of her rights in accordance with the law of this country as meaning that she could not be considered to have resigned in response to what was otherwise found to be a fundamental and repudiatory breach of contract by her employer does amount to an error of law.'*

36. Another interesting development has been the reliance on a failure to pay the national minimum wage as an act of less favourable treatment for the purposes of race discrimination claims, see for example *Mruke* at [36] – [56].

5: DISCRIMINATION CLAIMS

37. In *Taiwo v Olaigbe; Onu v Akwiwu* [2016] UKSC 31, the Supreme Court held that discrimination because of, or on grounds of, immigration status does not amount to discrimination because of, or on grounds of, nationality. The Supreme Court accepted that the reason why the claimants were treated so badly was their particular vulnerability arising, at least in part, from their particular immigration status. However, the Supreme Court held that this had nothing to do with their nationality.

38. In *Mruke* the claimant relied on her Tanzanian nationality, rather than her immigration status, and argued that she had been treated less favourably than she would have been if she was not of Tanzanian nationality and/or national origins.

39. LJ Singh dismissed this part of her appeal and held that the question in *Taiwo* could be reformulated as:

> '*Whether the socio-economic circumstances of the Appellant are so closely associated with her nationality and/or national origins that they are indissociable for this purpose.'*

40. LJ Singh continued at [45]:

> *'When the question is formulated in that way, it seems to me that the answer is clear. The two are not indissociable. The fact is that the reason why the Respondent employed the Appellant was to do with the package of socio-economic characteristics which she had: in particular that she was uneducated, illiterate and very poor. It was that situation which compelled her no doubt to take up employment for a pittance and to put up with the working conditions which she did in the Respondent's home. However, that*

does not lead to the conclusion that there was discrimination on any of the groups which were proscribed by the 1976 Act, in particular the appellant's nationality and/or her national origins.'

41. As is clear from the above, *Taiwo* effectively prevents direct race discrimination claims based on the nationality of the worker in question from succeeding. This means that employees that are targeted in the workplace on the basis of their immigration status, or suspected immigration status, will not be able to make any claim under the Equality Act 2010.

42. However, other types of race discrimination claims may still succeed in the normal way, for example a claim relating to less favourable treatment because of colour. Further, indirect race and/or sex claims based on domestic and/or EU law may have more success (see above). Further, in appropriate cases, there may also be scope to rely on immigration status and/or particular socio-economic characteristics as a status for the purposes of Article 14 ECHR (in conjunction with another ECHR right such as Article 8 and/or Article 1 Protocol 1).

CLAIRE DARWIN

MATRIX

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