THOMPSONS SOLICITORS

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EMPTY JUSTICE

A recent report by the charity Citizens Advice, called *Empty Justice*, says that being awarded compensation by an employment tribunal can end up as a hollow victory for workers.

Many awards are simply not paid because employment tribunals in England and Wales have no power to enforce them.

In 2003-4, 13,000 employment tribunal claims were successful, many involving unfair dismissal and unpaid wages. But if the employer fails to pay up, the claimant then has to go to court, a costly and time-consuming process.

For instance, you can register an unpaid award with a county court at a cost of £30, or you can ask the court to issue a warrant of execution or a third party debt order. But it is an expensive process – an application for a third party order requires a fee of £50 – and some employers still find a way to wriggle out of paying.

Empty Justice is available at *www.citizensadvice.org.uk*

MORE FAMILY FRIENDLY POLICIES

Patricia Hewitt, Secretary of State for Trade and Industry, suggested recently in an interview with the *Financial Times* that more family friendly policies may be on their way if the labour party wins the next election.

She says she wants to see:

- An increase in statutory paternity pay (currently £102.80) to 90 per cent of average earnings
- An increase in the period of paid maternity leave, which is currently six months
- An extension of the right to request flexible work for carers of elderly and disabled relatives

A GUIDE TO RACE EQUALITY

The Commission for Racial Equality (CRE) has published a Race Equality Impact Assessment guide.

The idea behind it is to help policy makers, particularly in the public sector, think about how a particular policy or legislative proposal might affect people from different racial groups.

To access the guide, go to: *www.cre.gov.uk/duty/reia/index.html*

NEW TRADE UNION LAW

The Employment Relations Act has now received royal assent. Its new measures will come into force between now and April 2005. Below is a summary of the main provisions:

Statutory recognition – disagreements about the appropriate bargaining unit will be referred to the Central Arbitration Committee, which has to consider the bargaining unit suggested by the union

Industrial action ballots – unions have to ensure that the notice lists the categories of employees affected, where they work and the numbers affected. Any accidental oversights on the part of the union should be disregarded

Industrial action dismissals – protection from dismissal for taking part in official action extended from 8 to 12 weeks

Union membership – employers cannot now offer inducements to employees not to join a union, or to persuade them to give up their right to be represented collectively by the union

Modernisation fund – resources are now available for unions to modernise their operations

WORKING TIME AMENDMENTS

The European Commission has proposed a number of amendments to the Working Time Directive. It suggests that:

- Opt outs should only be applied if expressly allowed under a collective agreement, with the consent of the individual worker
- Workers should not be asked to give their consent to opt out when they sign their contract or during a probation period
- Consent must be given in writing and be valid for a maximum of a year
- No one should work more than 65 hours a week, unless a collective agreement provides otherwise
- New categories of 'on-call time' (when workers must be available to work, if required to do so) and 'inactive part of on-call time' (when workers are on call, but not carrying out their duties) should be introduced, additional to 'working time' and 'rest time'.

Go here for the full text of the proposal:

http://europa.eu.int/comm/employment_social/news/2004/sep/working_time_directive_proposal_en.htm

Time of transfer

Yet another case has been decided stemming out of the so-called 'Preston' cases (see LELR 87, page 11). These concerned thousands of part-time women workers who brought equal pay claims (some of them a decade ago), complaining they had been unlawfully excluded from membership of a number of occupational pension schemes because they worked part-time.

In Powerhouse Retails Ltd & ors -v- Burroughs & ors, the Court of Appeal has said that when employees are transferred from one employer to another under the TUPE regulations, their pension rights are removed from the contract that the transferee inherits.

This overturns the decision of the employment appeal tribunal, which had held that when a worker transferred under the TUPE regulations, the time limit for bringing a claim against the transferor did not start running until the date that the worker left the employment of the transferee.

The appeal court's decision is bad news for workers. It means that any claim for equal pay in relation to pension rights must be based on the contract with the transferor. The time limit for making an equal pay claim therefore begins to run from the date of the transfer.

We will be looking at this decision in more detail in a later issue of LELR.

Time limits

The employment appeal tribunal has decided in Marks and Spencer -v- Williams Ryan **that the tribunal was right to extend the time limit for the complainant's unfair dismissal claim.**

It said that it was important to take into account Ms Williams Ryan's state of mind, and the extent to which she understood her position. The tribunal had made a clear finding that, as a result of the CAB advice, she thought she had to wait for the outcome of the internal appeal before making a tribunal claim. It was right, therefore, to exercise its discretion in these circumstances.

Note that the new statutory procedures for dismissals allow for the time limit for bringing a claim to be extended by three months.

Claiming for injury

The House of Lords has decided in Eastwood & anor -v- Magnox Electric plc **and** McCabe -v- Cornwall County Council & ors **that employees can claim for damages for psychiatric injury caused by events leading up to their dismissal.**

Both cases concerned employees who claimed that their employers had not only breached the implied, contractual term of mutual trust and confidence, but that their negligence had resulted in their psychiatric injury, prior to being dismissed.

The cases were important because in *Johnson -v- Unisys Ltd*, the House of Lords had held that employees could not rely on a breach of the implied term of mutual trust and confidence to claim damages for psychiatric injury if the injury was caused by the way in which they had been dismissed.

One of the key issues in these conjoined cases was, therefore, to ascertain the degree to which breaches leading up to a dismissal are caught by the limitations laid down in *Johnson -v- Unisys Ltd*. The House of Lords has now made clear that because the events on which the men relied took place before and independently of their dismissal, they were entitled to pursue claims for damages.

Maternity pay explained

Most employers don't have a clue how to administer statutory maternity pay. So it's little wonder that so many pregnant women complain about employers discriminating against them.

It's about time, then, that someone wrote a book in plain English, explaining what employers have to do and when they have to do it. LELR editor Alison Clarke's new book, *Maternity Pay And Leave – A Guide For Employers*, (£5) does just that.

It spells out the employee's rights in question and answer format from the moment she tells her employer that she's pregnant until her rights are exhausted at the end of her maternity leave.

There is also a step-by-step guide, so that employers have no excuse for getting it wrong! Perfect for union reps who want to keep employers on their toes. To order copies of the book, go to *www.maternity-pay.co.uk*, or ring 0845 456 9420.

CONFIDENTIALITY CONFIRMED

In unfair dismissal cases, employers do not have to prove that an employee is guilty. They just have to show that it was reasonable to have believed they were, and that they carried out a fair and proper investigation.

But what happens when an employer dismisses an employee, relying on confidential witness statements they obtained as part of that investigation, which they then refuse to disclose?

In Asda Stores Ltd -v- Thompson & ors (2004, IRLR 598), the employer convinced the appeal tribunal that they should be able to make changes to the statements to hide the identity of the witnesses before handing them over.

The employees' case was taken by Thompsons, with the support of their union.

WHAT WERE THE BASIC FACTS?

Three Asda managers complained of unfair dismissal to a tribunal, after an allegation that they had used illegal drugs at company events. In the course of the investigation, Asda obtained witness statements from 13 people, which it then refused to disclose to the managers. All three were dismissed.

The employees argued that the statements should be disclosed, not least because Asda had relied heavily on them when coming to their decision to dismiss them. Asda said that it could not break the promise of confidentiality that it had made to the witnesses, who had said they feared repercussions from the managers if their identities became known.

The employment tribunal agreed with the dismissed managers and ordered that the statements should be disclosed in their entirety. However, Asda successfully appealed against that decision and the case was remitted to the tribunal, with the instruction that it should look again at the documents.

In particular, the employment appeal tribunal (EAT) directed the tribunal to ensure that none of the witnesses could be identified from the statements and, if necessary, to exclude some statements altogether.

WHAT HAPPENED NEXT?

Despite some initial confusion as to what should happen next, the tribunal ordered the employers to supply it with the witness statements in their original form. It said that it would examine them and do whatever was necessary to conceal the witnesses' identity. The revised statements would then be sent to both parties.

The employers were not happy with this approach and said they wanted to make the necessary changes before the tribunal disclosed them to the applicants. The tribunal rejected that suggestion and ordered the employers to disclose the witness statements in their original form or risk having their case struck out.

The employers then appealed against that order, and the employees cross appealed, arguing that the EAT's order requiring the tribunal to maintain the confidentiality of those making the statements was ambiguous or wrong.

WHAT DID THE EAT DECIDE?

The second EAT dismissed the cross appeal, saying that there was no ambiguity in the order made by the original EAT in the case. The appeal by Asda, however, was allowed.

The EAT said that the employment tribunal had been wrong not to allow the employers to make submissions as to how the confidential statements should be edited, before disclosing them to the other side.

It also said that the tribunal had not given enough weight to the sensitive nature of the confidential information being divulged. Although the tribunal should have the final say, it was not in a position to make as informed a judgment as the employers.

The employers should, therefore, disclose the original statements to the tribunal along with their suggestions for changes, on the understanding that they would not be shown to the applicants at that stage. Before the tribunal showed the amended statements to the applicants, the employers should be given a last opportunity to comment.

A DEPENDANT DISMISSAL

Although employees can take time off to attend to practical matters after the death of a dependant, they do not have the right to time off to deal with their grief.

At least that is what the employment appeal tribunal (EAT) has just decided in Forster -v- Cartwright Black Solicitors (IDS 765).

WHAT WERE THE BASIC FACTS?

Mrs Forster started work for Cartwright Black on 5 August 2002. She had three days' sick leave in October and twelve days' paid bereavement leave in January 2003, following the death of her father. In May she had two days' sick leave, as well as five days' bereavement leave when her mother died.

She then took a further week's sick leave, which was certified by her doctor as a 'bereavement reaction'. Mrs Forster sent in another sick note for two more weeks, giving the same reason, from 10 June 2003.

Her employers then asked her to attend a meeting, at which she was dismissed. This was followed up by a letter, dated 16 June, stating that the reason for her dismissal was generally because of her absence record, and specifically because of her latest period of absence.

Because she had been employed for less than a year, Mrs Forster could not claim ordinary unfair dismissal. Instead, she alleged that she had been unfairly dismissed because she had exercised her rights under section 57A(1)(c) of the Employment Rights Act 1996 (see box).

Unfortunately, the tribunal disagreed and said that the time she had taken off following her mother's death did not fall within the scope of the legislation. Mrs Forster appealed.

WHAT DID MRS FORSTER ARGUE?

Mrs Forster argued that "to take action which is necessary" should include medical advice not to work. She argued that the difference in the wording in the legislation was significant. Sub-paragraphs 1(a) and 1(b) talk about 'providing assistance' and 'making arrangements', whereas subsection 1(c) uses the words 'in consequence of'.

EMPLOYMENT RIGHTS ACT 1996, s57A

"(1) An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary –

(a) to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,

(b) to make arrangements for the provision of care for a dependant who is ill or injured,

(c) in consequence of the death of a dependant."

She said that the legislation should be interpreted broadly to give effect to its aims, and should not be restricted to the actual funeral arrangements, but should include time to come to terms with the emotions caused by the death of both her parents in the space of four months.

WHAT DID THE EAT DECIDE?

The EAT accepted that there was a difference in the wording in section 57A(1)(c) and the other subsections, in that the others were more specific, but said that was simply to reflect the greater range of arrangements that would be required after a bereavement.

It decided that did not mean that the subparagraph was restricted to the making of the actual funeral arrangements, but would include registering the death and, if there was a will, applying for probate and being interviewed by the Probate Office.

Section 57A(1) provides for dependant leave necessary to deal with an emergency. In relation to section 57A(1)(c) the trigger is that the time off should be taken in order to take necessary action in consequence of the death.

The EAT concluded that although "*the death of a dependant will produce sadness, bereavement and unhappiness, the section was not intended to introduce the right to compassionate leave as a result of a bereavement*". It therefore dismissed Mrs Forster's appeal.

a brief overview of

A TESTING TIME

Employers have no right to compel their employees to take a drugs test unless there is a clause in the contract that lets them. If there isn't and they force someone to undergo a test, that would constitute a criminal offence. They could also be sued in the civil courts for damages.

Richard Arthur, a solicitor from Thompsons' Employment Rights Unit in London, looks at the law relating to drug and alcohol testing and answers some commonly asked questions.

THE LAW

Drug and alcohol testing in the workplace is governed by a mass of domestic and European law. For instance:

- The European Convention on Human Rights
- The Data Protection Act 1998 and two European directives
- The Information Commissioner's draft code of practice on information about workers' health
- The Disability Discrimination Act 1995.

WHAT DOES THE CONVENTION SAY?

Drug and alcohol testing are protected by Article 8 of the European Convention on Human Rights – the right to privacy. Any infringement of that right must be:

- in accordance with the law
- in pursuance of a relevant legitimate aim, and
- necessary in a democratic society

This test of 'proportionality' involves balancing the potential infringement of the individual's rights against the specific objectives of the employer.

WHAT ABOUT THE DATA PROTECTION ACT?

Under the Act, the term 'processing' includes 'obtaining, recording, holding, using or disclosing' data. Data which reveals information about criminal conduct or health, as drug and alcohol testing is likely to do, can only be processed in accordance with the principles contained in the Act.

That means they must be fair to the employee, specific as to why the employer is keeping the information, relevant, accurate, not kept longer than necessary, kept secure and processed and transferred in accordance with the Act.

The results of drugs tests may disclose that an employee is taking prescribed drugs and is disabled for the purpose of the Disability Discrimination Act 1995. Subjecting that person to a detriment on the ground of disability would amount to discrimination under that Act.

WHAT ABOUT THE CODE OF PRACTICE?

Part 4 of the Information Commissioner's code of practice (which is still in draft form) deals with information about workers' health. This is crucial to the interpretation of human rights and data protection principles. A full copy of the draft code of practice, which is expected to be finalised soon, is available at *www.informationcommissioner.gov.uk*

WHAT SHOULD EMPLOYERS DO BEFORE TESTING?

Before undertaking drug or alcohol testing, employers should ensure that the benefits justify any adverse impact:

- the collection of information through drug and alcohol testing is unlikely to be justified unless it is for health and safety reasons
- given the intrusive nature of testing, employers would be well advised to undertake and document an impact assessment.

WHAT ABOUT PERSONAL INFORMATION OBTAINED?

The amount of personal information obtained through drug and alcohol testing should be minimised:

- employers should use the least intrusive methods possible to deliver the benefit to the business that the testing is intended to bring
- any testing should be based on reliable scientific evidence of the effect of particular substances on workers
- testing should be limited

IN THE WORKPLACE

to those substances and the extent of exposure that will have a significant bearing on the purpose(s) for which the testing is conducted

workers should be told what drugs they are being tested for.

WHAT CRITERIA SHOULD EMPLOYERS USE?

Employers should ensure that the criteria used for selecting workers for testing are justified, properly documented, adhered to and are communicated to the workers.

The code says that it is unfair and deceptive to lead workers to believe that testing is being carried out randomly if, in fact, other criteria are being used. If random testing is to be used, employers should ensure that it is carried out in a genuinely random way.

If other criteria are used to trigger testing, for example the suspicion that a worker's performance is impaired as a result of drug or alcohol use, the employer should ensure the worker is aware of the true criteria that are being used.

WHO SHOULD BE TESTED?

Testing should be confined to those workers whose activities actually have a significant impact on the health and safety of others. Even in safety-critical businesses such as public transport or heavy industry, workers in different jobs will pose different safety risks.

Testing all workers in a business will not be justified if in fact it is only workers engaged in particular activities who pose a risk.

WHAT SHOULD TESTING BE USED FOR?

Testing should only be used to detect impairment at work rather than illegal use of substances in a worker's private life. Testing to detect illegal use may be justified, but only if the use of the drug would breach the worker's conditions of employment and cause substantial damage to the employer's business.

SHOULD WORKERS KNOW THEY ARE BEING TESTED?

Employers should ensure that workers are fully aware that drug or alcohol testing is taking place, and of the possible consequences of being tested:

- drug and alcohol policies should be set out in a staff handbook
- the consequences for workers for breaching the policy should be explained
- employers should ensure that workers are aware of the blood alcohol level at which they may be disciplined when being tested for alcohol
- employers should not conduct testing on samples collected without the worker's knowledge

Employers should also ensure that drug and alcohol testing is:

- of sufficient technical quality to support any decisions or opinions that arrive from it
- subject to rigorous integrity and quality control procedures
- conducted under the direction of, and positive test result interpreted by, a person who is suitably qualified and competent in the field of drug and alcohol testing.

HOW ARE CASES LIKELY TO DEVELOP?

Up until now, tribunals were likely to have approached a dismissal for drug or alcohol use as potential gross misconduct, applying the test of 'band of reasonable responses'. That test gives considerable latitude to employers to justify dismissals on subjective grounds, but things may be changing.

The employment appeal tribunal has now acknowledged that the reasonableness of a dismissal is subject to compliance with a worker's rights under the European Convention on Human Rights – for example, *X -v- Y (2003, IRLR 561)* and *Pay -v- Lancashire Probation Service (2004, IRLR 129)*.

In negotiation of drug and alcohol testing policies, employers should be referred to the standards set out by the Information Commissioner. Those standards can also be referred to in court and tribunal proceedings.

A BEAST OF A BURDEN

In claims of sex discrimination, once the woman has shown that her treatment was, on the face of it discriminatory, it is then up to the employer to prove that there was some other reason for it.

In Cunningham -v- Quedos Ltd and John Wyeth & Brother Ltd, the employment appeal tribunal (EAT) has said that even if the evidence seems neutral, the burden of proof still passes to employers to prove that they did not discriminate.

WHAT WERE THE BASIC FACTS?

Wyeth, a drugs manufacturer, had a contract with Quedos to promote its products. Ms Cunningham was a sales representative with Quedos, and put her name forward to work on a contract for Wyeth.

She was told on 13 December that she would be interviewed, but after telling her employer on 19 December that she was pregnant, she was then informed in early January that her application would not be taken any further. After protesting about the decision, she was offered an interview by Wyeth on the day that she was dismissed by Quedos. She was not successful at her interview.

Ms Cunningham brought a number of complaints against both companies, some of which were subsequently settled. The remaining issue for the tribunal to decide was her claim of sex discrimination against Wyeth.

WHAT DID THE TRIBUNAL DECIDE?

After some debate about the nature of her claim, Ms Cunningham alleged that Wyeth had discriminated against her by not appointing her to the job because she was pregnant.

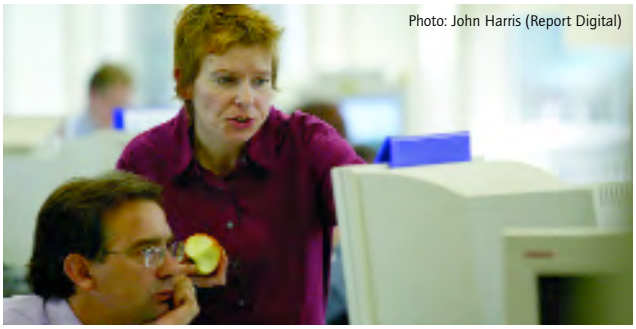

Photo: John Harris (Report Digital)

However, as Wyeth was not her employer, she had to rely on section 42 of the Sex Discrimination Act which refers to 'aiding unlawful acts.' She claimed that the company had knowingly assisted Quedos to commit an unlawful act by instructing Quedos not to continue to employ her.

The tribunal referred to the approach approved by the House of Lords in *Glasgow City Council -v- Zafar* – that it can infer discrimination if the employer cannot adequately explain why one employee has been treated differently to another. In this case, however, the tribunal decided there had been no difference in treatment and that it did not therefore need to draw an inference of discrimination.

WHAT DID THE EAT DECIDE?

Ms Cunningham appealed on the basis that the tribunal had not directed itself properly about the issue of the burden of proof, and that it had not made a finding on the principal basis of her claim. That is, that Wyeth had knowingly assisted Quedos to commit an unlawful act.

The EAT upheld her claim in respect of the burden of proof, but dismissed her complaint about the lack of a finding. This was because she had relied on two grounds to support her claim of sex discrimination – the first that she was not appointed because Wyeth knew she was pregnant; and secondly that the interview was a sham.

Both related to the conduct of the interview, not that there had been collusion between Wyeth and Quedos. The tribunal was right to concentrate on the interview as that was the essence of her complaint. It could not make a finding about issues that were not put before it.

However, the EAT did agree that the tribunal had not directed itself properly on the proper approach to the burden of proof. It agreed that, once Ms Cunningham had proven she had been treated less favourably, the burden then passed to Wyeth to prove that the reason for that treatment was nothing to do with her pregnancy.

She maintained it would not have been able to do that, pointing to the change of mind about interviewing her and the timing of all the events.

A WARNNG SHOT

Under the Sex Discrimination Act, workers have the right not to be treated less favourably by their employer if they bring a claim under the Equal Pay Act.

In St Helens MBC -v- Derbyshire & 38 ors (IDS 766), a case which involved a class action for equal pay, the employment appeal tribunal (EAT) has said that the council victimised the women by sending warning letters to them.

The employees were supported by the GMB throughout, and their claims were backed by Thompsons.

WHY DID THE WOMEN CLAIM VICTIMISATION?

The 39 applicants were among 510 catering staff who made equal pay claims in 1998. The majority of the claims were settled out of court, but 39 of the women did not accept the borough council's offer of a lump sum. Their claims were ultimately successful.

Two months before the hearing, however, the women received two letters from a senior council officer. The first was addressed only to the applicants, warning that the council could not absorb the cost of their claims and asking them not to continue; and the second to all catering staff (including the 39 applicants) warning that children might be deprived of school meals and that everyone's job would be at risk if the claims were successful.

The letters caused great distress to Mrs Derbyshire and her colleagues, who said they amounted to victimisation, and an attempt to intimidate them into abandoning their case.

The tribunal dismissed their claim, but the EAT allowed their appeal and remitted the case to a different tribunal to be heard again.

The second tribunal agreed with the catering staff that the letters did amount to victimisation because they contained *'what was effectively a threat'*. It said that they *'amounted to an attempt to induce the acquiescence of individuals .... It was more than a matter-of-fact reminder of what might happen if they went on with a complaint'*.

The council appealed against that decision.

WHAT DID THE PARTIES ARGUE?

The council argued that any distress that the letters may have caused the women did not amount to 'less favourable treatment', because that had to involve something more than just writing a letter.

Instead, the letters would had to have contained threats levelled directly against the individual women to constitute less favourable treatment – for example, that if they continued with their claims they would be fired or demoted.

It said that telling the women that the council would go bankrupt could not constitute less favourable treatment. To decide otherwise would mean that employers could be sued just for commenting or communicating with their staff, if they subsequently alleged that their feelings had been hurt.

The women, on the other hand, argued that victimisation does not have to consist of direct threats to workers to find that they were treated less favourably within the meaning of the Act. They accused the council of trying to give the phrase an unjustifiably narrow interpretation.

WHAT DID THE EAT DECIDE?

The EAT dismissed the appeal. It said that the primary purpose of the victimisation legislation was to ensure that individuals are not penalised because they have exercised their statutory rights, or intended to do so.

The legislation simply requires a comparison between 'the treatment afforded to the complainant who has done a protected act and the treatment that was or would be afforded to other employees who have not done the protected act.'

Interestingly, the appeal tribunal recognised the particular sensitivity that can arise in public sector equal pay claims and the far reaching effects successful claims can have on pay structures or grading systems. It also recognised the potential vulnerability in the workplace of women pursuing such claims, particularly their relationships with workplace colleagues.

Fixing the regs

In October 2002, legislation was introduced giving specific protection to fixed term workers. As a result, employers were no longer allowed to treat them less favourably than comparable, permanent employees unless they could justify the difference.

In Coutts & Co plc and Royal Bank of Scotland -v- Mr Paul Cure and Mr Peter Fraser, the employment appeal tribunal (EAT) decided that employers are still bound by the regulations, even if they announced their intention to discriminate before they came into force. It also said that it was irrelevant if the difference in treatment applied to other categories of staff, as well as those on fixed term contracts.

WHAT WERE THE BASIC FACTS?

Following the acquisition of NatWest by the Royal Bank of Scotland, the bank announced in April 2001 that all permanent staff would be given a 5% bonus once integration had been completed.

The chief executive then confirmed on 13 November 2002 that integration had been achieved, and that the bonus would therefore be paid to all permanent staff who were employed on both 13 November 2002 and the December payment date.

Fixed terms workers were specifically excluded, however, with the result that although both Mr Cure and Mr Fraser were employed on the relevant dates, neither of them received the bonus.

They claimed that they had been treated less favourably than permanent staff under the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002, which came into effect at the beginning of October 2002.

The tribunal decided that the regulations applied. The bank appealed on two grounds – first of all, that the applicants were out of time to make a claim; and secondly, that they were not treated less favourably than permanent employees.

WHAT DID THE TWO SIDES ARGUE ON APPEAL?

The bank argued that the only issue to be decided was whether the regulations were in force 'when the act complained of took place.' It said that the decision to make a one-off payment to permanent staff was taken in March or April 2001. This was long before the regulations came into effect.

According to the bank, no importance should be attached to 13 November 2002, as this was simply the date for a meeting to discuss the mechanics of making the payment.

It went on to argue that even if the date of 'less favourable treatment' was moved forward to when each of the applicants was engaged as a fixed term employee (29 October 2001 and 14 February 2002 respectively), those dates also preceded the introduction of the regulations.

It also argued that Mr Cure and Mr Fraser were not treated less favourably because they were fixed term employees, but simply because they were not permanent employees.

The bank pointed out that of its 100,000 employees, 6000 were not permanent staff, of whom 3000 were fixed term employees. The status of the applicants may have been a contributory cause to their exclusion from the bonus, it said, but it was not the only one.

The applicants, on the other hand, argued that irrespective of what happened in 2001, it did not affect their right to complain when the intended act took place in November 2002.

WHAT DID THE EAT DECIDE?

The EAT decided in favour of the applicants. It said that the tribunal was right to take 13 November as the date when the bank provided much greater detail about the scale and application of the bonus, compared to the conditional announcement in 2001 (when the applicants were not employed).

It also rejected the bank's argument that the less favourable treatment was not because the applicants were on fixed term contracts. The fact that the bank also excluded other non-permanent groups of workers was irrelevant.

'The applicants argued that what happened in 2001 did not affect their right to complain when the intended act took place in November 2002'

Older but no wiser

The law clearly states that employees over the age of 65 do not have the right to claim unfair dismissal or redundancy pay. Five years ago, however, John Rutherford and Samuel Bentley decided to challenge these provisions on the basis that they indirectly discriminated against men.

The Court of Appeal has just heard their claim – Rutherford & anor -v- Secretary of State for Trade & Industry (IDS 765) – and decided that there was no disparate impact on men.

WHAT IS THE HISTORY TO THE CASE?

Mr Rutherford was dismissed by Harvest Town Circle Ltd (which subsequently went into insolvency) in September 1998 at the age of 67. He claimed unfair dismissal and redundancy pay. Mr Samuel Bentley was dismissed by Bodner Elem Ltd (also now insolvent) on 9 February 2001 at the age of 73, and claimed the right to redundancy pay.

Both men claimed that the upper age limit was indirectly discriminatory against men as more men than women continue to be employed after the age of 65. But because both their employers had become insolvent and any payment would be made from the National Insurance fund, the Secretary of State was joined as a party to the proceedings.

The employment tribunal decided that the age exclusion had a greater impact on men than women and that the exclusions were therefore indirectly discriminatory. It also said they could not be objectively justified. The tribunal set aside the statutory default age limits on claims for unfair dismissal and redundancy pay and held that it had jurisdiction to hear the claims.

This decision was, however, overturned by the employment appeal tribunal (EAT). The two men therefore appealed to the Court of Appeal, arguing that the employment tribunal had not made any error in law entitling the appeal tribunal to overturn its decision.

WHAT WERE THE CORRECT POOLS FOR COMPARISON?

The first question for the court to consider was the alleged disparate impact of the age limit on men as opposed to women. But who should be compared with whom?

The employment tribunal had compared employees between the ages of 55 and 74. In other words, people who are (or might be) disadvantaged by the upper age limit, for whom retirement at 65 had 'real meaning'. This showed that substantially more men than women were affected by the provisions.

The employment appeal tribunal, on the other hand, said that this approach was too narrow. It said that the correct group (or 'pool') should be the whole workforce – people employed between the ages of 16 and 79 – as the upper age limit applied to all of them. This showed that there was no real difference in the impact of the age provisions between men and women.

WHAT DID THE COURT OF APPEAL DECIDE?

The court decided that the EAT was correct. It followed therefore that the employment tribunal had used the wrong pool for comparison, because it failed to adopt the approach taken in the case of *R -v- Secretary of State for Employment ex parte Seymour-Smith*.

Rather than take a narrow approach, the court said that it should have taken the statistics for the entire workforce to which the age limit applied. It should then have compared the respective proportions of men and women who could satisfy that requirement. Those statistics showed that the difference in the working population between the proportion of men aged under 65 who can comply and the proportion of women aged under 65 who can comply is very small.

The court also rejected the men's argument that the burden of proof directive required the focus to be on the disadvantaged, rather than the advantaged, group in indirect discrimination cases.

COMMENT

This decision was probably influenced as much by policy considerations as the law. Its impact is limited, however, by the impending age discrimination regulations, which are due to be implemented by 2006. The main issue that they will have to address is the discriminatory impact of mandatory retirement ages.

THOMPSONS IS THE LARGEST SPECIALISED PERSONAL INJURY AND EMPLOYMENT RIGHTS LAW FIRM IN THE UK WITH AN UNRIVALLED NETWORK OF OFFICES AND FORMIDABLE RESOURCES

HEAD OFFICE
Congress House, Great Russell Street, LONDON
020 7290 0000

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028 9089 0400

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0121 2621 200

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0117 3042400

CARDIFF
029 2044 5300

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CONTRIBUTORS TO THIS EDITION **Richard Arthur**, **Jo Beill**, **Mark Berry**, **Nicola Dandridge**, **David Khan**, **Victoria Phillips**, **Sharon Wardale**

EDITOR **ALISON CLARKE**

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bdgallagher@eircom.net
www.bdgart.com