THOMPSONS SOLICITORS

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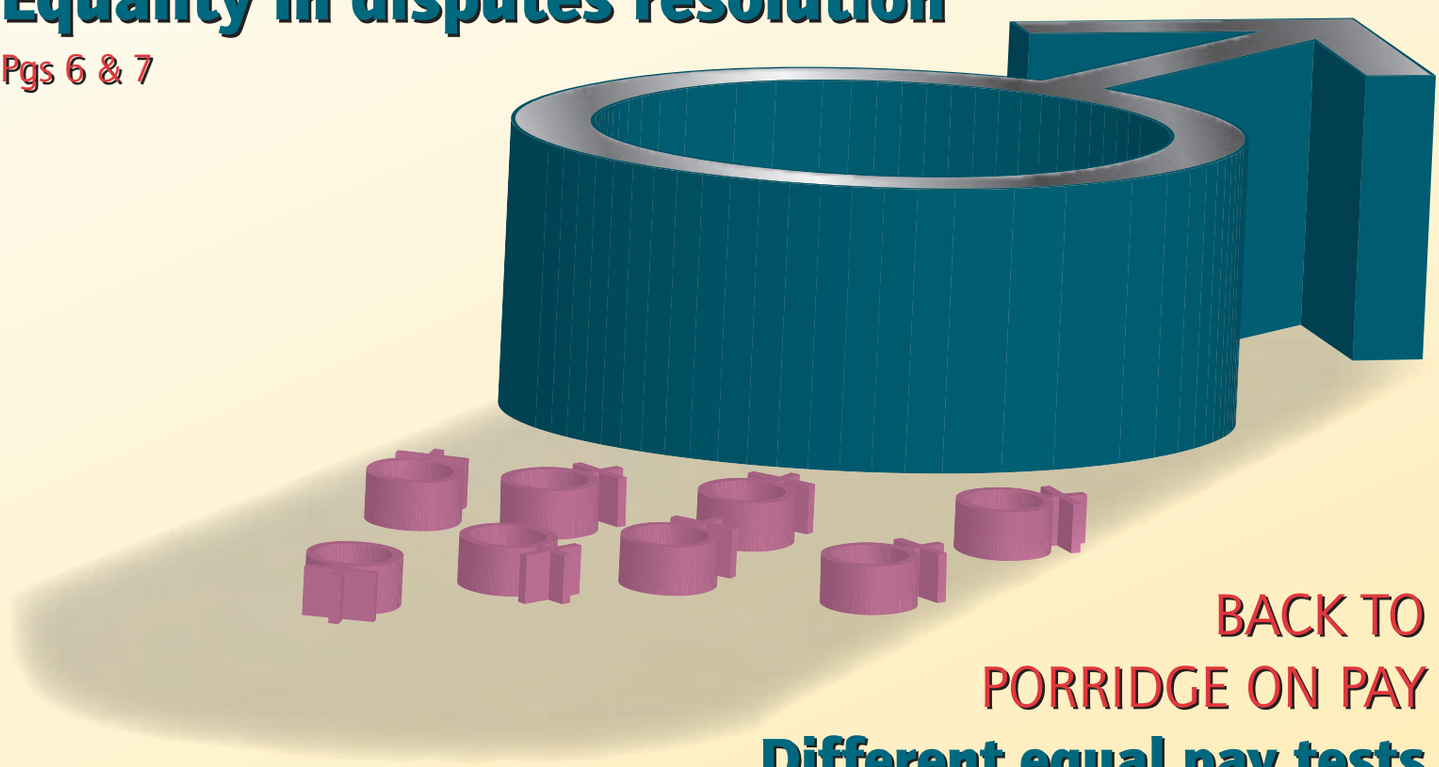

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NEW COMPENSATION LIMITS

From February 2005, a number of new compensation limits will come into force:

New Limits	Previously	From 01.02.05
Limits on guarantee payments	£17.80/day	£18.40/day
Limit on a week's pay	£270	£280
Maximum amount of a week's pay for calculating basic or additional award of compensation for unfair dismissal or redundancy payment	£270	£280
Maximum basic award for unfair dismissal (30 weeks' pay)	£8,100	£8,400
Minimum basic award for dismissal on trade union, health and safety, occupational pension scheme trustee, employee representative and working time grounds only	£3,600	£3,800
Maximum compensatory award for unfair dismissal	£55,000*	£56,800
Minimum award for employees excluded or expelled from a trade union	£5,900	£6,100

*There is no limit where the employee is dismissed unfairly or selected for redundancy for reasons connected with health and safety matters or public interest disclosure ('whistleblowing'), or the dismissal is contrary to discrimination law.

ACAS E-LEARNING GUIDES

Acas now has a series of e-learning guides available to anyone who registers online for their courses. Registration is free.

The range of guides includes: Informing and consulting; Discipline and grievance; Absence; Contracts and written statement; Redundancy. Each course is divided into a series of sessions. For instance, under the Informing and Consulting course, students learn:

- What information and consultation (I&C) is
- Some of its benefits and limitations
- The forthcoming changes to I&C regulations in the UK
- How to introduce I&C into your organisation effectively
- How to maintain its momentum, once introduced

If the student wants more help after completing the course, Acas provides a range of services from half day training sessions to individual consultation.

Just go to *www.acas.org.uk/elearning/* to find out more.

COMPULSORY RETIREMENT?

The government has been locked in debate for months about whether to abolish compulsory retirement ages as part of the implementation of age discrimination laws, required by the EC Equal Treatment Framework Directive.

The government has just announced that it will set a default retirement age of 65, so that people will not have to retire before that unless their employer can justify it. It has also said it will create a right for employees to ask if they can work beyond a compulsory retirement age.

MATERNITY PAY INCREASE

Alan Johnson, Minister for Work and Pensions, has announced new rates of pay for maternity, paternity and adoption pay. These will be effective from April 2005 and current rates will go up from £102.80 to £106 per week.

He also announced that the lower earnings limit (the minimum amount that employees need to earn to qualify for the statutory payments) will increase from £79 to £82 per week, effective from April 2005.

REDUNDANCY GUIDE

Acas has also just updated its guide to handling redundancy, aimed at employers, trade unions and employee representatives and provides guidance on how best to handle redundancies.

The booklet emphasises the importance of planning labour requirements to avoid or to minimise the need for redundancies; the benefits of establishing an agreed procedure for handling redundancies; and the need for fairness and objectivity when selecting members of the workforce for redundancy.

It has a number of appendices providing a checklist for redundancy agreements, an outline of redundancy payments and an outline of the law governing redundancy.

You can access the booklet by going to:
www.acas.org.uk/publications/B08.html

A taxing matter

In September's LELR, we reported the High Court case of Wilson (HM Inspector of Taxes) -v- Clayton (2004, IRLR 611)**, in which Thompsons was instructed on behalf of the employees.**

The case has just been heard by the Court of Appeal which has once again decided in favour of Mr Clayton and his colleagues.

Mr Clayton was dismissed and subsequently re-employed on new terms and conditions by his employer, Birmingham City Council. He made a claim of unfair dismissal but before the case could be heard he reached an agreement with his employer that his old terms and conditions should be reinstated and he received the sum of £5,060 as compensation.

However, the Inland Revenue argued that he had to pay tax on it. Mr Clayton appealed against that decision to the General Commissioners who agreed with him that the payment was not chargeable to tax under section 19 of the Income and Corporation Taxes Act 1988 as an emolument (a profit on earnings) or under section 154 as a benefit in kind.

Instead, the commissioners decided that it fell within section 148 as a payment received 'in connection with the termination' of his employment. Since the payment was less than the £30,000 threshold set by the legislation, it was not taxable.

The Inland Revenue appealed against that decision to the High Court. It argued that the order for reinstatement meant that Mr Clayton had to be treated as though he had not been dismissed. The payment he received referred to his past and continuing employment, and was therefore either an emolument or a benefit in kind.

It then appealed to the Court of Appeal which said that the payment was made as a basic award, which required an effective date of termination. It said that the payment was not an emolument because it was made to compensate him for his unfair dismissal.

Nor was it a benefit in kind under section 154 because the payment was made as a genuine compromise to resolve the earlier proceedings, without any intention of giving a 'gratuity' to the employees. Accordingly it was not a benefit within section 154, and was therefore not taxable.

Part-time justification

The European Court of Justice has just decided in Schönheit -v- Stadt Frankfurt am Main (2004, IRLR 983) **that it was indirect sex discrimination against women to pay fewer pension benefits to part-time workers compared to full-timers. So far, so unsurprising.**

The court then went on to say, however, that '*a difference in treatment between men and women may be justified, depending on the circumstances, by reasons other than those put forward when the measure introducing the differential treatment was adopted*.'

In other words, just because an employer does not have a good reason for an indirectly discriminatory policy when it was introduced does not mean to say that they cannot conjure one up at a later date. This is because, the court said, justification is objective, not subjective.

The last straw

It is always a high risk strategy for an employee to resign and claim constructive dismissal. Even more so when the last act relied on was not in itself unreasonable, but was the 'final straw' in a series of acts.

The Court of Appeal has now said in London Borough of Waltham Forest -v- Omilaju that '*the only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer. The last straw must contribute, however slightly, to the breach of the implied term of trust and confidence.*'

Mr Omilaju had brought a claim of race discrimination against the council. When he realised that he had not been paid during his absence at the tribunal hearing, he resigned saying that the decision not to pay him had destroyed his 'trust and confidence' in his employer.

The court concluded, however, that because 'the straw that broke this camel's back was perfectly reasonable and justifiable conduct of his employer acting fully in accordance with the terms of the applicant's contract', that his case could not succeed. The council's appeal was therefore allowed.

TO PAY OR NOT TO PAY

The Acquired Rights Directive (introduced to protect the rights of employees transferred from one undertaking to another) is the focus in the case of Johanna Maria Boor, née Delahaye -v- Ministre de la Fonction Publique et de la Réforme Administrative**.**

The European Court of Justice (ECJ) has said that the directive does not protect the pay of employees transferred from the private to the public sectors, if there are public sector rules that apply.

However, if this results in a substantial reduction in pay, the employee can terminate the contract on the basis that it is for a 'transfer-related reason.'

WHAT WERE THE FACTS?

Mrs Boor was an employee of a private, not for profit organisation, Foprogest, which helped the unemployed in Luxembourg back into work. The state decided to take on these functions itself, and with effect from 1 January 2000, Mrs Boor became a public sector employee on a contract governed by pay scales set by national law.

Unfortunately for her, she was classified in the first grade of the salary scale (with no allowance for length of service) which meant that she lost 37 per cent of her monthly salary.

The transfer was governed by the acquired rights directive (adopted into Luxembourg legislation by the Loi du 24 mai 1989). The national court asked the ECJ to decide two basic issues:

- Was the state obliged to maintain all the rights of its new employees (including their pay) that they had enjoyed before the transfer, or
- Could it substitute the rules on compensation applicable to its own employees?

The basic question facing the ECJ, therefore, was whether the acquired rights directive precluded the state from relying on national rules to reduce the pay of the transferred employees.

WHAT DID THE ECJ DECIDE?

The court clarified, first of all, that the directive applies to a transfer of an employee from the private to the public sector. It said that the only transfers to be excluded were those involving reorganisations of structures within the public sector, or the transfer of administrative functions between different public authorities.

It then made clear that although the transferor's rights and obligations are transferred to the transferee under the directive, there was an anomaly where the transfer was from the private to the public sector.

It said that, in those circumstances, the directive allowed the state to rely on national rules governing public employees to reduce the amount of pay of its new employees.

However, it then went on to say that '*if such a calculation led to a substantial reduction in the employee's remuneration, that would constitute a substantial change in working conditions to the detriment of the employees concerned by the transfer, so that the termination of their contracts of employment for that reason must be regarded as resulting from the action of the employer*'.

COMMENT

What does this all mean? Basically, the court seems to be saying that if an employee is dismissed or decides to resign and complains of constructive dismissal following a substantial reduction in salary, the dismissal will be for a transfer-related reason. And that would make it unfair, if the case was brought in the UK.

However, the ruling also seems to suggest that there is nothing to prevent a public sector employer from reducing someone's salary if this is required by national rules for public employees.

This decision is very specific to legislation that applies to Luxembourg and should not be interpreted as applying to other EU countries, including the UK, where public sector workers' terms and conditions are not directly set by legislation.

The decision only applies to legislation in Luxemburg

Astle and ors -v- Cheshire County Council and anor

TAKING ON TUPE

Under the acquired rights directive, employees' terms and conditions have to be protected if they transfer from one undertaking to another. But only if the directive applies.

Over the last few years, there have been a series of conflicting decisions (both at European and national level) which have made it difficult for tribunals to know when the directive should apply.

In Astle and ors -v- Cheshire County Council and anor, the employment appeal tribunal (EAT) decided that the council's main motive in not taking on staff was not to avoid its obligations under the TUPE regulations. This is, in any event, only one factor to take into account in trying to decide if there has been a transfer.

WHAT HAPPENED IN THIS CASE?

In 1994, the council transferred its architectural services to an outside contractor which took on all the staff. The contract did not go well and was awarded to another firm which took on about 65 of the original staff members.

This contract did not work out either, partly it was felt, because of the performance of some of the council staff. The council therefore decided to engage a panel of consultants, instead of a single contractor. It gave notice of termination to the contractor and temporarily took over some of its services until the new appointments were made.

The employees argued that there had been a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) – the UK legislation to implement the acquired rights directive.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal asked itself two questions:

- was the reason, or the principal reason, the council selected a market economy to thwart TUPE?
- would there have been a transfer if the workforce had been taken on?

It decided that, although the council was concerned to avoid a TUPE transfer, it accepted the council's argument that it had genuinely decided that the 'market economy' was the best method for delivering those services.

The reason that the council did not accept the workforce back, therefore, was not to defeat TUPE, but because it did not require a workforce to operate the business. That being so, the tribunal did not need to answer the second question as to whether there was a TUPE transfer.

WHAT DID THE EAT DECIDE?

The EAT reviewed a number of apparently conflicting cases starting with *Suzen* (as it has come to be known) which said that the directive does not apply to a change of contractor if no significant assets are transferred, or if the employer does not take on a major part of the workforce.

However, in *ECM (Vehicle Delivery Service) Ltd -v- Cox*, the Court of Appeal held that the contractor's motive for not taking on the workforce was also relevant in deciding if there had been a transfer.

Then in *ADI (UK) Ltd -v- Willer* the Court of Appeal said that tribunals have to look at the reason for the contractor's refusal to take on the workforce. Not surprisingly, courts have been unclear which case to follow.

The EAT has now said that if the transferee's main motive is not to avoid TUPE, then the fact that the employees were not taken on by the new contractor is not relevant. Conversely, if that is the main motive, then it is relevant to take that factor into account when deciding if there has been a transfer.

That being so, it said the tribunal had asked itself the right questions and in the right order. It also said that its decision was not perverse. Although the EAT might have decided the case differently, it could not be said that the tribunal's conclusion was one to which no reasonable tribunal could have come.

a brief overview of

ARGUING ABOUT

In October 2004, the government introduced new procedures for dealing with internal grievances and disciplinaries. The Thompsons' guide to the new rules, which you received along with the October edition of LELR, will help you find your way through them.

But apart from getting to grips with the new regulations themselves, which are far from straightforward, trade union representatives and officials also need to be aware of their impact on equality rights.

In this article, ***Nicola Dandridge***, Head of Equality at Thompsons' Employment Rights Unit in London, looks at the procedures and flags up some of the potential pitfalls in relation to equality issues.

ARE ALL EQUALITY CLAIMS COVERED BY THE NEW PROCEDURES?

In general terms, the new procedures apply to discrimination and equal pay claims in the same way as they apply to any other claim. However, there are a few cases to which the new procedures do not apply – see the box for details.

WHAT HAPPENS TO TIME LIMITS?

It's important to identify the cases to which the new rules apply (or do not apply) because the time limits for lodging a tribunal application will vary accordingly.

If the procedures do not apply (for example, in flexible working) the time limit is the usual three months from the date of the act being complained about. If they do apply (for example, in sex discrimination) then it is the step one grievance that has to be lodged within three months, with the tribunal application following no less than 28 days later.

As a result, it is now very important to be clear about the legal basis for a member's tribunal claim.

DOES THE PERSON'S EMPLOYMENT STATUS MATTER?

In a word, yes. This is because the new procedures only apply to employees and not workers. Most discrimination legislation and the Equal Pay Act, on the other hand, apply to workers as well as employees.

So a worker bringing a race discrimination claim does not have to comply with the new procedures, but an employee bringing the same claim does. If it's not obvious whether someone is an employee or a worker, the best advice is to start – and complete – the new grievance procedure before the normal time limit for lodging a tribunal claim expires.

If that is not possible, then lodge a tribunal application (to protect the member's rights) with a covering letter explaining that the claim is being lodged without prejudice to the ongoing grievance. The step one grievance can then be pursued at the same time.

CAN TIME LIMITS BE EXTENDED?

The regulations allow the normal three-month time limit to be extended, in certain circumstances:

- if the step one grievance letter is sent within the usual time limit, the claimant will get an automatic three-month extension for submission of their tribunal application
- if someone submits a claim within the normal time limit, but does not send a step one letter, their tribunal application will automatically be rejected. They then have to submit the step one letter within one month of the expiry of the normal time limit, and send another application to the tribunal within three months
- if the person sends the step one letter in time, but does not allow 28 days to pass before submitting their

EQUALITY CLAIMS TO WHICH TI

Section 2 Equal Pay Act 1970 – equality clauses
Section 63 Sex Discrimination Act 1975 – discrimination in the employment field
Section 54 Race Relations Act 1976 – discrimination in the employment field
Section 8 Disability Discrimination Act 1995 – discrimination in the employment field
Regulation 28 Employment Equality (Sexual Orientation) Regs 2003 – discrimination in the employment field
Regulation 28 Employment Equality (Religion or Belief) Regs 2003 – discrimination in the employment field
Section 47 Employment Rights Act 1996 –

EQUALITY CLAIMS EXCLUDED FI

ER Act 1996
Section 47E – Detriment in relation to flexible working
Section 55-57 – Paid time off for antenatal care
Section 57A-B – Paid time off for dependants
Section 70 – Remuneration when suspended on medical/maternity grounds
Section 80 – Refusal or postponement of parental leave
Section 80H – Refusal or breach of procedure re flexible

EQUALITY RIGHTS

tribunal application, they have to resubmit their claim form at the end of the 28-day period following the step one letter

If the person submits their step one grievance in time, the tribunal is likely to keep its discretion to extend time limits (where it considers it just and equitable to do so). However, if someone submits their step one grievance late then the tribunal will probably have no discretion to allow a late claim.

That means that the old case law on when tribunals can let discrimination claims proceed may become irrelevant if someone misses the three-month deadline for submitting the step one grievance. This makes it essential for trade union officials and members to comply with the deadline.

WHAT ABOUT EQUAL PAY CLAIMS?

As with discrimination claims, members have to pursue their grievance before they can lodge an equal pay claim. If there are multiple equal pay cases, however, the union can submit a single grievance listing each of the claimants.

Under the Equal Pay Act, the normal time limit for submitting a claim is six months from the date of termination of employment with that employer. If someone pursues a step one grievance, they will get a three-month extension of time automatically added on to that. But neither the Act nor the regulations allow for any additional discretionary extension of time.

WHAT ABOUT TIME LIMITS FOR QUESTIONNAIRES?

When time is extended by three months for lodging the tribunal claim, the person has to serve their questionnaire within the extended period – in other words, six months.

The questionnaire cannot, however, be treated as a step one grievance.

WHAT DO MEMBERS NEED TO INCLUDE IN A WRITTEN STATEMENT?

The regulations define 'grievance' as 'a complaint by an employee about action which his employer has taken or is contemplating taking.' This suggests that members need to include a factual account of what their employer has done or failed to do, but not an account of the legal basis for the claim.

Where the discrimination relates to something that has gone on for a long time, the person should include all the acts about which they are complaining in the grievance (but not the evidence). If they have background information that is not part of the actual claim, they don't have to supply that in the grievance. However, it may make sense to do that to strengthen their grievance.

In relation to adjustments under the Disability Discrimination Act, it is probably not necessary to specify each and every adjustment that the employer should have carried out, as this is ultimately the employer's responsibility. But it is likely to be a good idea to suggest adjustments. Employees should also give an account of how the disability affects them.

WHAT HAPPENS IF THERE IS AN OVERLAP WITH A DISCIPLINARY?

If the grievance relates to a discriminatory decision by the employer to discipline the employee, then the grievance procedure still applies, but the employee will be deemed to have complied with it if they send their written grievance to the employer before the disciplinary meeting.

If they do not send the grievance prior to the disciplinary meeting, they will need to comply with the full grievance procedure. Where the grievance relates to the actual conduct of the disciplinary action, again they have to follow a separate grievance procedure.

H THE NEW PROCEDURES APPLY

an employee has the right not to be subjected to detriment for a prescribed reason relating to:

1. pregnancy, maternity or childbirth
2. ordinary, compulsory or additional maternity leave
3. ordinary or additional adoption leave
4. parental leave
5. paternity leave
6. time off for dependants

Regulation 20 Maternity etc Regs 1999 – automatic unfair dismissal cases for reasons outlined above

Section 99 Employment Rights Act 1996 – automatic unfair dismissal cases for reasons outlined above

D FROM THE NEW PROCEDURES

working

Regulations 5 and 7 Part-Time Workers etc Regs 2000 –
Less favourable treatment and detriment

Regulations 3 and 6 Fixed-Term Employees etc Regs 2000 –
Less favourable treatment and detriment

Regulation 15 Flexible Working etc Regs 2002
Right to be accompanied and postpone a meeting

Sections 62 – 64 Pensions Act 1995 –
pensions equality clause

BACK TO PORRIDGE ON PAY

Recent figures from the Office for National Statistics show that the gender pay gap – the gap between average hourly earnings for full-time male and female employees – was 19.5 per cent in 2003.

The decision by the employment appeal tribunal (EAT) in the equal pay case of Home Office -v- Bailey & ors (2004, IRLR 921) will do little to reduce it. The women were backed by their union (PCS) who instructed Thompsons.

WHAT WERE THE FACTS?

About 2,000 administrative staff in the prison service decided to pursue equal pay claims with prison officers, or industrial or non-industrial support staff. The ongoing equal value claims for most claimants are being heard at tribunal level.

However, in this appeal – brought by two higher executive officers (HEOs) Ms Clemens and Mrs Pollak – the women tried to rely on a prison service job evaluation scheme dating back to 1996.

This had rated their jobs as equivalent with governor 4, governor 5 and principal officers.

In 2000, the proportion of women HEOs was 50.7 per cent. The composition of the comparator groups was overwhelmingly male.

The Home Office defended the women's applications by claiming that the difference in pay had nothing to do with sex discrimination (direct or indirect), so that they were not required, under the Equal Pay Act, to objectively justify any difference between the two groups.

The employment tribunal decided, on the evidence available (and in particular the gender breakdown of the two groups), that there was sex discrimination which required the Home Office to justify the difference in pay.

WHAT WAS THE ISSUE FOR THE EAT?

The EAT had to decide whether the tribunal had relied on the right evidence, and if not, to decide what evidence should have been used.

In the speech therapists' case of *Enderby -v- Frenchay Health Authority (1993, IRLR 591)*, the European Court of Justice (ECJ) said, among other things, that if the disadvantaged group is predominantly female whereas the advantaged group is predominantly male, then there is a prima facie case of discrimination.

In *R -v- Secretary of State for Employment ex parte Seymour-Smith and anor (1999, IRLR 253)*, the ECJ said that courts had to ascertain whether a 'considerably smaller' percentage of women than men were able to satisfy the disputed rule. It was ultimately up to the courts and tribunals to decide what evidence was relevant.

The employment tribunal had relied on the approach in Seymour-Smith because it had become the leading authority for the ECJ in deciding disparate impact on men and women.

As a result, the tribunal found that the proportion of women in the pool who were disadvantaged was 26 per cent, whereas the proportion of disadvantaged men was 3.4 per cent. It decided that there was discrimination and the employer therefore had to objectively justify that outcome.

WHAT DID THE EAT DECIDE?

The EAT, however, disagreed. It felt there was a clear difference between a situation in which there was a practice that presented a barrier to women becoming a member of a particular work group; and a situation in which the disparity in pay had arisen because of different arrangements for collective bargaining.

In the former it made sense to compare the different 'pools' of men and women who can satisfy the provision (as in *Seymour-Smith*). In the latter, however, what mattered was whether the claimant group was disproportionately female, as in the speech therapists' case.

The EAT concluded, therefore, that, where the advantaged group is predominately male and the composition of the disadvantaged group is neutral in gender terms, then the situation may not be fair but it is not automatically discriminatory on grounds of sex.

The union has lodged an appeal against this decision to the Court of Appeal, which will be heard in March 2005.

THE COST OF SEX DISCRIMINATION

Unlike unfair dismissal claims which have a cap on both the basic and the compensatory award, compensation is unlimited in sex discrimination cases.

In Orthet -v- Vince-Cain (2004, IRLR 857), the EAT said that a tribunal was justified in making awards for loss of earnings and injury to feelings while the claimant was at university. It should not, however, have compensated her for the loss of pension rights.

WHAT WERE THE BASIC FACTS?

Ms Vince-Cain started work for Orthet in August 1992 as a store manager in the Emporio Armani store in Manchester. Three years later she was promoted to regional manager.

However, she was dismissed in October 2001 after two periods of maternity leave. She successfully complained of unfair dismissal, victimisation, breach of contract and sex discrimination to an employment tribunal and was awarded the following:

- a basic award of £2,400 plus £500 for loss of statutory rights
- a further award for loss of earnings of almost £95,000 (£30,000 of which was to be paid as a gross amount, without deduction of tax) under the Sex Discrimination Act
- an award of £15,000 for injury to feelings, with £2,160 interest (including a sum for aggravated damages)

WHY DID THE TRIBUNAL MAKE THESE AWARDS?

The sum for loss of earnings reflected the tribunal's view that Ms Vince-Cain had discharged the duty to 'mitigate' her loss. She had taken other work and continued to look for suitable retail work as a regional manager between the date of her dismissal and the final hearing date in June 2003.

However, the tribunal also recognised that she had no realistic chance of finding retail work at the same level, given her childcare responsibilities and that her decision to retrain as a dietician if she could not find work was, therefore, a reasonable alternative.

It also included almost £5,000 for future pension loss from the date of her dismissal until 2006.

The employer appealed on a number of points:

- whether a tribunal award for injury to feelings should include some recognition of taxation (as it was not entirely clear whether 'grossing up' was included) in case Ms Vince-Cain asked for this to be reviewed at a later stage
- whether the company should have to pay compensation while she was at university
- what approach should be taken to the assessment of pension loss for a period of four-and-a-half years

WHAT DID THE EAT DECIDE?

Injury to feelings: The EAT said that, strictly speaking, there was no ground for appeal on this point. However, it made a finding that the tribunal was right to make an award of compensation for injury to feelings without grossing-up the award. As far as the EAT could ascertain, there is no authority that says that tax is payable on an award for injury to feelings.

The decision to go to university: The employment tribunal was also right to award Ms Vince-Cain compensation for

loss of earnings during her time at university, as it was under a duty to consider all the losses flowing from her dismissal. It was entitled to find that her decision to change careers was a reasonable step, particularly in the light of her assertion that if she found suitable work, she would abandon the course. In any event, the company had been unable to prove that there was suitable work that she could have done, but which she refused to do.

Loss of pension rights: However, the tribunal was wrong to award money for loss of pension rights simply because her employers were about to introduce a scheme when she was dismissed. It was compensating Ms Vince-Cain in 2003 for a loss which might not occur at all, or which might change significantly by the time she finished her course. This was remitted to the employment tribunal.

Looking after an award

Following the Court of Appeal decision in the Thompsons case of *Susie Radin Ltd -v- GMB & ors (LELR 90; 2004, IRLR 400)***, the employment appeal tribunal has just revisited the issue of protective awards.**

It has confirmed, in Smith & Moore -v- Cherry Lewis Ltd that the whole point of a protective award is to enforce the statutory requirement of consultation and to persuade employers to comply with it.

WHAT HAPPENED IN THIS CASE?

Both women had been employed as cutters (one of them for 22 years) by Cherry Lewis, but in December 2003 a receiver was appointed and all the employees were made redundant.

No one had been consulted about the redundancies (no union was recognised, nor were there any employee representatives). Instead, the firm just wrote to everyone on 11 December telling them they had been dismissed and that although it had no money to pay staff, they could make a claim from the National Insurance Fund.

The two women brought a claim under section 189 of the Trade Union and Labour Relations (Consolidation) Act 1992 which allows a redundant employee to present a complaint, if there are no employee representatives nor a recognised trade union.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal chair decided that the employers' approach was contrary to section 188 of the Act, which requires them to consult appropriate representatives if they are going to make 20 or more employees redundant within 90 days or less. In this case, at least 45 employees had been dismissed.

The chair then said, however, that because of the decision in *Susie Radin,* which made clear that the purpose of the award was to provide a sanction against the employer and not to compensate the employees, that it was not just and equitable to make one in this case.

The reason, he said, was that it would be completely ineffective as a sanction against an insolvent employer. The only person to be affected would be the Secretary of State for Trade and Industry and the Redundancy Payments Fund.

WHAT DID THE EAT DECIDE?

The EAT, on the other hand, disagreed. It said that the tribunal chair had failed to apply the guidance of the Court of Appeal in *Radin*, and that his decision contravened the requirement for the provision of a sanction imposed by the relevant EC directives.

It said it was clear from the *Radin* decision that, in referring to an 'effective sanction', the court was recognising that it should be punitive and have a deterrent effect. The aim was to enforce the statutory requirement of consultation and to dissuade employers from failing to comply.

The tribunal chair had not focused on the seriousness of the employers' default in failing to comply with their statutory duty of consultation. Instead, he took into account irrelevant factors, namely the employers' insolvency, their inability to pay and the likelihood that the government would have to step into the employers' shoes.

As a result, the chair had approached the concept of a 'sanction' in a 'retributive rather than a punitive or a dissuasive sense'. As a result, he had concluded that imposing a financial debt on an insolvent company did not amount to a sanction.

As the EAT pointed out, taking insolvency into account would mean that the threat of the sanction of a protective award would be removed in the vast majority of cases where employees are made redundant. Such an approach would therefore seriously undermine the impact of the legislation.

The focus should always be on the employer's default, and in this case the tribunal's findings were beyond doubt. The employers had failed totally to comply with their duties and the EAT made a protective award in favour of the two women.

> *'The focus should always be on the employer's default, and in this case the tribunal's findings were beyond doubt'*

No justice for NUJ

Under the Employment Relations Act 1999 (updated in October 2004), trade unions can apply to the Central Arbitration Committee (CAC) for recognition if they cannot reach a voluntary agreement with the employer.

In NUJ -v- Central Arbitration Committee & MGN Ltd, the High Court decided that the CAC was right to rule an NUJ application inadmissible, despite the fact that it had the support of a majority of the journalists in the bargaining unit.

The NUJ instructed Thompsons.

WHAT WERE THE FACTS IN THE CASE?

On 25 September 2003, the NUJ applied to the CAC for recognition for collective bargaining with Mirror Group Newspapers (MGN) for journalists employed in the sports division. It had the support (in the form of a petition) of about 100 of the 130 journalists involved.

MGN said that the British Association of Journalists (BAJ) was already recognised, although negotiations had only started in June (some time after the NUJ had approached the MGN management). The NUJ had no idea that the BAJ was also talking to MGN until there was a 'done deal' on 3 July.

The CAC decided, in December 2003, that the NUJ's application was inadmissible and confirmed this in March 2004. The NUJ applied to the High Court for a judicial review of that decision.

WHAT DID THE PARTIES ARGUE AT THE HIGH COURT?

In the High Court, the NUJ argued that the collective agreement with the BAJ had no validity because it had never come into force. Nor could the union conduct negotiations 'on behalf of' any of the workers because it did not have the support of even a 'substantial' number of the journalists that it was supposed to be representing.

It said that the CAC decision violated the right to workers' freedom of association, which includes the right to be heard within the workplace. This individual right, said the NUJ, was breached by letting the employer decide which union to bargain with, and conversely by imposing a union on the workers about which they had not been consulted.

MGN, on the other hand, argued that the wishes of the workforce was irrelevant in relation to the question of whether a union is recognised or not. And it pointed out that once a union is recognised, certain statutory rights follow. If the NUJ's arguments were correct, these would not apply (contrary to the law for the last 30 years) until it was clear that the agreement had come into force or whether the union was representative of the potential membership.

In any event, MGN pointed out that the CAC had no mechanism to test the level of support for a union.

WHAT DID THE HIGH COURT DECIDE?

Unfortunately, the High Court agreed with the CAC. It said that the committee could not proceed with an application for recognition if another collective agreement was already in force.

In this case, the High Court said that the 3 July agreement between MGN and the BAJ was clearly designed to be a recognition agreement and satisfied the requirements of the legislation. And because it was binding from the moment it was signed, it was therefore in force when the CAC considered the NUJ's application.

It also said that although everyone has the right to freedom of association, that right is not breached even if most of the workforce is 'shut out' from the collective bargaining process because the employer has recognised another union.

The CAC decision was, therefore, neither wrong in law, nor perverse. The result of this decision, however, as the court itself pointed out, is that a trade union with a substantial number of members can be prevented from bargaining on their behalf by an agreement between an employer and another union with very few members. This is surely an unjust conclusion for workers.

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