LELR AIMS TO GIVE NEWS AND VIEWS ON EMPLOYMENT LAW DEVELOPMENTS AS THEY AFFECT TRADE UNIONS AND THEIR MEMBERS

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19926/0404B/1097

THOMPSONS SOLICITORS

Labour&European Law Review

ISSUE 89 MAY 2004

PAY UP IN PREGNANCY PERIOD

UK law says that employers must calculate statutory maternity pay (SMP) using a set formula. This stipulates that SMP has to be based on the woman's normal weekly pay during an eight week reference period ending with the 'qualifying week'. This is the 15th week before the woman is due to give birth.

In Alabaster -V- Woolwich plc & the Secretary of State for Social Security, however, the European Court of Justice has just decided that employers now have to include any pay rises that come into effect after that 'qualifying week'.

Mrs Alabaster, an employee of the Woolwich Building Society, went on maternity leave on 8 January 1996. She started to receive SMP from the week beginning 7 January.

On 12 December 1995 Mrs Alabaster received a pay increase with effect from 1 December. However, this increase was not reflected in the calculation of her SMP because it came after the relevant period for calculating normal earnings - in her case 1 September to 31 October 1995.

In January 1997 she brought a tribunal complaint against the Woolwich arguing that the failure to pay her the salary increase constituted sex discrimination. After two tribunal rulings in Mrs Alabaster's favour, the Court of Appeal asked the ECJ two questions:

- does the calculation of a woman's SMP have to take into account any general pay rise awarded after the end of the reference period but before her maternity leave is completed, even when the pay award itself is not backdated to a date within the reference period?
- if she is entitled, how is the pay rise to be taken into account in calculating (or recalculating) the pay due to her during maternity leave?

The ECJ said that any pay rise awarded after the beginning of the period covered by her reference pay must be included in the calculation to decide the amount of pay owed to the woman during her maternity leave. This entitlement is not limited to cases where the employer agrees to backdate the pay award to a date that falls within that period.

HOLIDAYS FOR PREGNANT WORKERS

In Maria Paz Merino Gómez -V- Continental Industrias del Caucho **the European Court of Justice (ECJ) has ruled that a pregnant worker does not have to take her annual leave during the period of her maternity leave. It also confirmed that this principle applies even when the woman's maternity leave coincides with a period of annual leave that applies to the whole workforce – in this case, a general shutdown.**

This is because the purpose of the entitlement to annual leave is different from that of maternity leave. The Working Time Directive must therefore be interpreted as meaning that where the dates of a worker's maternity leave coincide with those of the entire workforce's annual leave, the requirements of the directive relating to paid annual leave cannot be met.

EMPLOYMENT RELATIONS BILL

The Employment Relations Bill has now completed its passage through the Commons, and was introduced into the Lords at the end of March.

If it becomes law, one of the new provisions will result in the burden of proof being shifted to the employer to show the reason for the dismissal in trade union dismissal cases, if the employee has less than one year's service. There will be new clauses dealing with intimidation of workers during a ballot for trade union recognition (or derecognition).

In addition, the bill contains measures to improve the operation of the statutory recognition procedure and to simplify the law on industrial action ballots and ballot notices.

The Secretary of State will also have powers to make funds available to independent trade unions to modernise their operations (see LELR 87).

Click here to view the chronological stages of the Bill: *http://bills.ais.co.uk/DH.asp?title=d#7*

Roll up Roll up

Instead of following an EAT decision that rolled-up holiday pay can be legal (*Marshalls Clay Products -V- Caulfield*, Issue 82 of LELR), an employment tribunal has decided to refer the issue to the European Court of Justice.

Two questions have been referred in the case of Robinson-Steele -V- RF Retail Services Ltd:

- whether the EC Working Time Directive precludes employers from making 'rolled-up' contractual payments to a worker that include an element of holiday pay, but that do not relate to specific periods of leave taken by the worker
- whether employers should be given credit for such payments if a claim is brought against them for holiday pay

Interim employment order

Under section 163 of the Trade Union and Labour Relations (Consolidation) Act, an employment tribunal can order an employer to continue employing a trade unionist who has been dismissed, if two conditions are satisfied. The first is that the application is lodged within seven days of the dismissal; and the second that the case is likely to succeed.

The benefit for the employee of the interim order is obvious. He or she continues to receive pay and benefits until the full hearing, but does not have to work.

In Dowling -V- Berkely Logistics, the EAT has held that if there is a TUPE transfer after the interim order is made, the individual does not transfer over. This is because the so-called continuation of employment is a 'statutory fiction', and the individual is not, in fact, an employee immediately before the transfer took place.

Flexibility works

The DTI has produced figures showing that employers are granting eight out of 10 requests to work flexibly from parents with young children.

The statistics show that since last April – when the law was introduced – almost a quarter of the parents who are eligible have taken advantage of the new right.

And employers are turning down far fewer requests. The figures show that prior to April 2003, employers were refusing about a fifth of requests. That figure has now almost halved - to 11%.

But the figures also show that only 10% of those asking for a change are men, compared to 16% of women. All in all, about 13% of employees have asked to work flexibly.

The most common requests were for part time and flexi working.

To find the survey, go to *www.dti.gov.uk/er/inform.htm* Scroll down to Other Publications, and look under 'Results of the first flexible working employee survey.'

Stressed out

The House of Lords has reached its first decision on workplace stress – in the case of Barber -V- Somerset County Council**.**

Although a borderline case, their Lordships overturned the decision of the Court of Appeal that the employer was not in breach of the duty of care to their employee. It said that Mr Barber suffered a breakdown caused by job-related stress. By a majority, it decided that the Court of Appeal had not given enough weight to the fact that Mr Barber had been off work in May 1996 for three weeks with no physical ailment or injury. During that time, a doctor certified that his absence was due to stress and depression.

The senior management team should have made more effort to resolve the problems he faced at work. For instance, by reducing his workload in order to help him return to work. That, coupled with the feeling that the senior management team was on his side, might have made a real difference. In any event Mr Barber's condition should have been monitored and, if there was no improvement more drastic action taken. Mr Barber's appeal was therefore allowed.

The case was one of four heard as a composite appeal.

Bamsey & Ors -V- Albon Engineering & Manufacturing Plc

SHORT CHANGED?


Photo: Paul Carter (Report Digital)

Although the Working Time Regulations 1998 introduced the concept of paid holiday, workers are still having to haggle over the amount they should be paid when they go on leave.

In the case of Bamsey & Ors -V- Albon Engineering & Manufacturing Plc, backed by the GMB and taken by Thompsons, the Court of Appeal has said that when calculating workers' holiday pay, employers do not have to include overtime working, unless it is contractual.

WHAT WERE THE BASIC FACTS?

Mr Sturge was the test case appellant. He was entitled, under his contract, to a basic working week of 39 hours, with substantial compulsory overtime, but which was not guaranteed. Nevertheless, apart from occasional variations, he was required to work a 58 hour working week.

Over the twelve weeks before the holiday period in question, Mr. Sturge had averaged 60 hours' work, but he was only paid for a basic 39-hour week when he went on holiday. Mr Sturge argued that he should have been paid at the same rate as he averaged, with overtime, while at work.

WHAT WAS THE RELEVANT LEGISLATION?

The appeal court was asked to look at the provisions of two different pieces of legislation – the Employment Rights Act 1996 and the Working Time Regulations 1998 – and how they inter-relate.

First of all, it considered in detail the meaning of the term 'normal working hours' in sections 221-224 of the Act in order to calculate 'a week's pay'. It then considered the meaning of 'normal working hours' for the purpose of calculating paid holiday leave under regulation 16.

Finally, it looked at the effect of the meaning on 'a week's pay' of an employee whose contract of employment requires, but does not entitle him or her, to work overtime in addition to the basic contractual hours.

The difficulty, as the court emphasised, was that although the Act specifically defines 'normal working hours' by reference to a worker's entitlement to overtime in a working week, it says nothing about how it should apply that to calculating 'a week's pay' for each week of paid annual leave.

The interpretation of section 234 of the Act was crucial to Mr Sturge's argument. It says that if an employee works a fixed number of hours per week but also works overtime, the 'normal working hours' are the fixed hours (excluding the overtime). It is only if the overtime is contractual that it can be included in the definition of 'normal working hours'.

Mr Sturge argued that section 234 was not included in the regulations – and should therefore not apply – because it runs contrary to the purpose of the original directive. That is, giving workers the right to paid annual leave. If workers get paid less during annual leave than when at work, what incentive do they have to take leave?

WHAT DID THE COURT DECIDE?

The Court disagreed. It said that overtime working can only be included in the definition of 'normal working hours' for the purpose of calculating 'a week's pay' if the contract of employment requires the employer to provide that overtime and the employee to do it. That was not the case for Mr Sturge.

And the Court said that as regulation 16 incorporates the definition of 'normal working hours' in section 234, Mr Surge was not entitled to holiday pay at the same rate as he normally earned.

Nor did the Court think that there was anything in the regulations that ran contrary to the original Working Time Directive. Although it recognised that its purpose was to protect the health of workers, it did not think that member states were required to ensure that workers receive more pay during their period of annual leave than that which they were contractually entitled to earn at work.

Canada Life Ltd & Anor -V- Gray

HAPPY HOLIDAYS

The issue of holiday pay is becoming more and more of a minefield. In this case – Canada Life Ltd -V- Gray & Anor (IDS Brief 754) **– the employment appeal tribunal (EAT) decided that two ex-workers were entitled to holiday pay even though they had worked for many years without taking any.**

WHAT PROMPTED THE COMPLAINTS?

The two ex-workers had operated on a commission-only basis as self-employed consultants for Canada Life for well over 25 years. Their contracts did not provide for any paid holiday.

The company terminated their contracts at the end of October 2002 and made two final commission payments to them at the end of November and December. The following January, both consultants lodged claims saying that they were entitled to holiday pay as a result of the introduction of the Working Time Regulations.

By failing to pay them, the consultants said that Canada Life had made a series of unlawful deductions from their wages under the Employment Rights Act 1996. Canada Life argued that neither of the consultants had been workers as defined by the regulations; that even if they were workers, they were not entitled to holiday pay for leave that had not been taken; and that their claims were out of time.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal decided that the two consultants were, in fact, workers. It also said that as a result of the decision in *List Design Group Ltd -V- Catley & Ors (2002, ICR 686)*, they did not have to take the holiday to be entitled to be paid for it.

The company's failure to pay holiday pay since 1998 therefore amounted to an unlawful deduction of wages. The claims were not out of time because they were brought within three months of the last deduction.

WAS THERE A CONFLICT BETWEEN THE CASES?

Relying on the decision in List Design, the EAT agreed with the tribunal that both consultants were entitled to holiday pay, and that the company had made unlawful deductions from their wages.

It also reconciled the apparent conflict between the cases of *List Design and Kigass Aero Components Ltd -V- Brown & Ors (2002, ICR 697)*, which had been decided by different divisions of the EAT.

In Kigass, the EAT said that during employment, workers should be encouraged to take their full entitlement for health and safety reasons. For that reason, it ruled that during employment, employees must actually take their leave in order to be paid for it.

There was, therefore, no conflict between the two cases because Kigass dealt with the situation during employment; List Design after employment had ended. The latter applied in this case.

WERE THE CLAIMS OUT OF TIME?

The EAT said they weren't. The two consultants were entitled to a payment in lieu of untaken holiday when they left in October 2002, which should have been made at the end of November and December. The failure to make the payments amounted to an unlawful deduction of wages, and therefore the claims were in time.

WHAT ABOUT INLAND REVENUE -V- AINSWORTH?

The EAT has also just decided in *Inland Revenue -V- Ainsworth* that the case of *Kigass Aero Components -V- Brown* was correct to conclude that workers on long-term sick leave are entitled to four weeks' paid holiday under the Working Time Regulations, even if all their contractual entitlement has been exhausted.

The decision will be considered by the Court of Appeal in early November 2004.


Photo: Jess Hurd (Report Digital)

a brief overview of redundancy

LOST LABOUR

If you are dismissed because of redundancy, you will probably be entitled to a redundancy payment. And there is a possibility that the dismissal will be unfair. In this article, Bernie Wentworth, a solicitor from Thompsons' Employment Rights Unit in Liverpool, summarises the law and answers some commonly asked questions.

THE LAW

An employee is redundant if the reason for dismissal is because:

- the business is shutting down; or
- the workplace is closing down; or
- the employer does not need so many employees to do certain work, even if the work still exists

The third category is the most common. For example, employees may be made redundant because of a business reorganisation which results in a more efficient use of labour. They are unlikely to be able to claim unfair dismissal, however, even though their previous duties are now being carried out by an ex-colleague.

But employers always need to follow certain procedures to avoid facing claims of unfair dismissal. They need to engage in meaningful consultation, identify and choose a selection pool, establish selection criteria, apply the criteria fairly and consider whether any suitable alternative employment exists for those facing redundancy.

FREQUENTLY ASKED QUESTIONS

■ *What is the employer's duty to consult?*

In every redundancy situation employers must carry out meaningful consultation. They should give as much warning as possible of redundancies and try to agree a selection pool and selection criteria with the recognised trade union and/or individual employees. They should also consider whether any suitable alternative employment exists.

■ *When should consultation begin?*

Employers should start consulting as soon as they are aware there may be redundancies.

There is no set timetable for consultation unless the employer is proposing to dismiss at least 20 employees at one workplace, when specific rules apply under section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992. If the employer breaches the rules, they could end up paying a protective award claim of up to 90 days' pay to each affected employee.

■ *Why should consultation take place?*

The point behind the compulsory consultation process is to encourage trade unions and employees to come forward with ideas during the consultation process to minimise its impact. For instance, there may be employees who are prepared to volunteer for redundancy.

It also gives employees the chance to find out why they have scored badly (if they have) on specific selection criteria. For example, if attendance is one of the criteria and they have been absent due to a disability, this should be taken into account by the employer to avoid any possible breaches of the Disability Discrimination Act 1995.

The dismissal will be automatically unfair if the employer fails to consult, even if the consultation would not have made any difference to the outcome. In these circumstances, tribunals will only award compensation for the period of time that it would have taken for a proper consultation to take place.


Photo: Jess Hurd (Report Digital)

■ *What is the pool for selection?*

It is crucial for employers to choose the selection pool carefully to avoid claims of unfair dismissal. They should take the following factors into account:

- whether other groups of employees are doing similar work to the group at risk
- whether employees' jobs are interchangeable
- whether the employee's inclusion in the pool is consistent with their previous position, and
- whether the selection pool was agreed with the union

■ *What are the selection criteria?*

The selection criteria must be objective. For instance: skills, qualifications, absenteeism, disciplinary record and length of service. In large organisations, the selection criteria may have already been agreed with a trade union and will be set out in the company handbook.

Once the selection criteria have been applied, employees should have a right of appeal against their individual scores. Employers are not required to provide employees with details of their colleagues' scores, but they should notify employees of the cut off score for retention. If selection criteria are applied unfairly then the dismissal is unfair.

■ *What obligation is there to find other employment?*

Employers are obliged to do what is 'reasonable' in order to look for alternative employment for affected employees. However, there is no obligation to create posts. If an employee discovers that suitable alternative employment existed for them at the time of their dismissal for which they were not considered, then their dismissal is likely to be unfair.

■ *Can an employee work on a trial basis?*

Employees are entitled to try out a new role for a trial period of four weeks. If they then think that the job is unsuitable, they can inform the employer and still make a claim for a redundancy payment. However, they must tell their employer they are not taking the alternative job before the end of the four week trial period. If certain conditions are met the trial period can be extended.

■ *Can the employee refuse the other work?*

If an employee facing redundancy is offered suitable alternative employment and unreasonably refuses to accept this job, then they may lose their entitlement to a redundancy payment. The question of what is reasonable will ultimately be determined by an employment tribunal.

■ *Is there a right to time off to look for work?*

Employees who are under notice of redundancy have a right to a reasonable amount of paid time off during working hours to look for new work or to make arrangements for training for new work. These rights only apply to employees with two or more years' continuous service. If an employer refuses this right, then the employee can claim compensation from an employment tribunal of not more than 40% of a week's pay.

■ *What payments do employees qualify for?*

Employees with at least two years' continuous service are entitled to receive a statutory redundancy payment. This is calculated by reference to gross weekly pay and length of service. The amount of weekly pay is capped at a maximum of £270. The maximum entitlement is £8,100 for an employee aged 61 to 64 with 20 years' service.

Some employers have enhanced redundancy agreements for employees. If so, employees may qualify for these payments in addition to, or instead of, the statutory redundancy payments. If the employer fails to honour this contractual payment, a claim for breach of contract needs to be issued within three months from the date of dismissal.

■ *What can an employee do if their redundancy is unfair?*

If all the requirements of a fair redundancy procedure have not been followed correctly, then the dismissal may be unfair. An employee needs one year's continuous service to qualify for unfair dismissal rights. If an employee wishes to pursue a claim of unfair dismissal, it must be lodged at an employment tribunal within three months of the date of dismissal.

Fairhurst Ward Abbotts Ltd -V- Botes Building Ltd & Ors

MORE THAN THE SUM OF ITS PARTS

It has already been established (*Abler -V- Sodexho*, LELR 86) by the European Court of Justice that TUPE applies to second generation transfers. Now the Court of Appeal has ruled in Fairhurst Ward Abbotts Ltd -V- Botes Building Ltd & Ors (IDS Brief 753**, see LELR 85 for the EAT decision) that they also apply when only a part of the entity is transferred.**

WHAT WERE THE FACTS?

In 1996, Botes Ltd won the contract to look after Southwark Borough Council's building maintenance services. A number of Southwark's employees transferred with the contract under TUPE (the Transfer of Undertakings Regulations).

In 1998, Southwark decided to divide the original geographical area into two parts and invited separate tenders for each of them, on the basis that TUPE applied.

Fairhurst Ward Abbotts Ltd (FWA) won the contract for Area 2. There was no transfer of assets from Botes Ltd, but it argued that TUPE applied to the transfer of that contract, and therefore to the employees affected by it. The new contractor disagreed and refused to take them on. The employees launched unfair dismissal proceedings against both FWA and Botes.

WHAT DID THE TRIBUNAL SAY?

The tribunal rejected the argument put forward by FWA - that TUPE could not apply because Area 2 had not existed as a discrete economic entity before it won the contract.

The tribunal also said that FWA was liable for the unfair dismissal of six of the employees, but that Botes was liable for the unfair dismissal of two of them, including a Mr Salih, who was on sick leave at the time of the transfer.

WHAT DID THE EAT SAY?

The employment appeal tribunal (EAT) agreed with the tribunal that TUPE applied to the transfer of Area 2 to FWA, but disagreed about the status of the employee on sick leave. It said that the tribunal should have asked whether in fact he would have been working in the relevant part, had he not been off sick at the time.

WHAT DID THE COURT OF APPEAL DECIDE?

FWA again argued that for there to be a TUPE transfer, there had to be an identifiable, stable economic entity. And the Court agreed to the extent that there cannot be a transfer of an undertaking under TUPE unless some stable, economic entity can be identified as having existed before the transfer.

But that's where the Court parted company with FWA because it went on to reject their argument that a 'part' has to exist as an identifiable, stable entity before the transfer.

Instead, the Court said that TUPE can apply when a part of the original entity becomes identifiable in its own right for the first time, at the time that it separates from the whole. It took the view that it would be contrary to the aims of TUPE if the rules did not apply when that happened.

This was consistent with the decision in *Hassard -V- McGrath & Ors (1996, NILR 586)* which said that there has to be an economic entity capable of being transferred, but the part being transferred does not need to have been a separate or distinct part of the entity beforehand.

WHAT ABOUT ABSENT EMPLOYEES?

This decision also clarifies the position of employees who are off sick or on maternity leave at the time of the transfer. According to the Court of Appeal, what matters is whether the employee's contractual place of work was in the part of the undertaking transferred. It agreed with the EAT that the matter should be remitted to a tribunal to ask where this employee would have been placed, had he been well enough to work.

Photo: John Harris (Report Digital)

Kaur -V- MG Rover Group Ltd

THE WAY AHEAD?

It's not often these days that people are told that they cannot be made redundant, but that's just been confirmed by the High Court in the case of Kaur -V- MG Rover Group Ltd (2004, IRLR 279)**.**

WHAT WERE THE TERMS AND CONDITIONS?

Mrs Kaur was a staff grade employee employed at the Longbridge plant for over 14 years. Her terms and conditions of employment expressly stated that her employment was governed by her contract of employment and, where appropriate, a number of collective agreements made from time to time with the recognised trade unions. There was also a provision giving either party the right to terminate on notice.

In March 2003, Mrs Kaur, (plus about 100 other employees), were threatened with compulsory redundancy. She said that Rover was not entitled to make employees of her category and grade redundant because of the collective agreements incorporated into her contract.

WHAT DID THE AGREEMENTS SAY?

There were two main agreements – one that dated from 1992 and the other from 1997. The first – called The New Deal – set out general principles including a commitment that reductions in manpower would be achieved voluntarily, and setting out changes to terms and conditions of employment.

The second – called The Way Ahead – provided that there would be no compulsory redundancies, and that any necessary reductions in numbers would be achieved voluntarily.

WHAT DID THE TWO PARTIES ARGUE?

Mrs Kaur applied for a declaration that both agreements were incorporated in her contract of employment, giving her a contractual right not to be made compulsorily redundant.

The employers argued that although individual contracts could (and did) incorporate elements of the collective agreements, that did not include the right not to be made compulsorily redundant. It argued that the provision relating to job security was simply a general aspiration.

They also argued that even if the provision could be incorporated, it had to be read subject to the unfettered right of the employers to serve notice to terminate for whatever reason, including compulsory redundancy.

WHICH TERMS CAN BE INCORPORATED?

The court said that it had to look at the terms in context to decide whether they can be incorporated or not. If there are general provisions that are not appropriate for incorporation, then it is more difficult to establish that one isolated provision should be.

In this case, the provisions relating to job security in The New Deal agreement were not incorporated into the claimant's contract of employment. These were simply expressions of future aims or expectations.

But the job security provision in The Way Ahead" could be incorporated. This was because the words 'there will be no compulsory redundancy' were included in the agreement.

So although no compulsory redundancy was a general aspiration on the part of the company, the inclusion of that specific wording changed the overall thrust of the document. The wording recognised that no compulsory redundancy would be the consequence of, and the assurance behind, the introduction of the Way Ahead which had other important provisions about flexible working which could also be incorporated.

The court therefore made a declaration that the provision in the collective agreement, The Way Ahead, that there would be no compulsory redundancies was incorporated in Mrs Kaur's contract of employment.

WHAT ABOUT THE RIGHT TO TERMINATE?

The existence of an express contractual term giving the employers the right to terminate the contract with notice for any reason was not incompatible with the term that there would be no compulsory termination on grounds of redundancy.

The notice provision had to be read subject to the express agreement that the employer will not terminate where the reason is redundancy.

Seeing ahead

In personal injury claims – which are essentially negligence claims and therefore decided at common law – the courts can only award compensation for loss or damage if it was 'reasonably foreseeable'.

In the case of Essa -V- Laing Ltd (2004, IRLR 313), the Court of Appeal has decided that in a case involving race discrimination, applicants only have to show a causal link between the act of discrimination and the loss. They do not need to show that the harm was reasonably foreseeable.

WHAT HAPPENED TO MR ESSA?

Mr Essa, who is black, started work as a labourer at the Millennium Stadium site in Cardiff. From the start, he was subjected to petty acts of humiliation. On 28 July, a foreman for Laing, Mr Pritchard, made a particularly offensive remark about him in front of a gang of other men.

Mr Essa was very distressed by it and complained to Laing. The company apologised to Mr Essa and disciplined Mr Pritchard. He was given a final written warning on 6 August, by this time Mr Essa had already left the site. Mr Essa was not satisfied with the company's response, and brought a claim of race discrimination.

He was subsequently treated for depression and stopped looking for other work because he had been so affected by the abuse. He also gave up representing Wales as an amateur boxer because the incident had such an effect on him.

WHAT DID THE TRIBUNAL DECIDE?

The employment tribunal heard from two psychiatrists that Mr Essa had undergone a personality change as a result of his experience. It upheld his claim against Laing, and awarded compensation of £5,000 for injury to feelings and just over £500 for financial loss.

The tribunal restricted the amount of financial loss on the basis that the employers 'are... only liable for such reasonably foreseeable loss as was directly caused by the discriminating act'.

Although it was reasonable to expect Laing to have foreseen that Mr Essa would experience some distress because of the abuse from Mr Pritchard 'they could not have reasonably foreseen the extent of Mr Essa's reaction to it'.

WHAT HAPPENED ON APPEAL?

Mr Essa appealed against the compensation award, arguing that he should only have to prove a causal link between the act of discrimination and the loss, not that it was reasonably foreseeable.

The employment appeal tribunal (EAT) allowed the appeal, saying that compensation is not limited to cases of reasonably foreseeable harm.

A majority of the Court of Appeal agreed. It held:

- the employment tribunal was wrong to decide that the applicant was not entitled to compensation under the Race Relations Act because the loss was not reasonably foreseeable
- a claimant who is the victim of direct discrimination in the form of racial abuse is entitled to be compensated for the loss which arises naturally and directly from the wrong
- it is not necessary for the claimant to show the loss was reasonably foreseeable in order to be entitled to compensation for unlawful racial discrimination
- the claimant only has to show that the particular type of injury alleged was caused by the act of discrimination

COMMENT

Although the Court of Appeal dismissed the employer's arguments, it has not come up with a cast iron statement of general principle. That is, that victims of discrimination can always claim compensation for their loss without having to show that it was reasonably foreseeable.

The Court has also restricted its findings to cases of race discrimination, saying that 'It is possible that, where the discrimination takes other forms, different considerations will apply'.


Photo: Paul Box (Report Digital)

Upping the ante

In another decision about compensation for victims of racial abuse – British Telecommunications Plc -V- Reid (2004, IRLR 327) – the Court of Appeal awarded aggravated damages to the victim because of the high-handed way in which management handled the case.

WHAT WAS THE HISTORY TO THE CASE?

Following a promotion, Mr Reid, who was of Afro-Caribbean descent, transferred to a division at St Albans. Unfortunately, he did not get on with his new colleagues – Mr Edwards and Mr Scott.

After a number of disputes, there was a heated argument in November 2001 about personal use of a phone by Mr Reid. This culminated with Mr Edwards adopting a threatening manner, prodding him and saying 'I will get someone to put you back in your cage'.

Mr Reid left work in distress, and on the following day, Mr Scott reported that he had not returned to work. He was disciplined for his absence, and he, in turn, brought an internal grievance against Mr Edwards for racial harassment.

Following an investigation, the disciplinary case was closed but the grievance was not upheld. Mr Reid appealed internally against the decision and eventually went off with stress. Shortly after he returned to work, he was transferred to another location where he was not likely to have contact with Mr Edwards.

When the review of his grievance was finally completed in February 2002 (14 months later), his employer concluded that he had not been subjected to racial harassment. Prior to this decision, however, Mr Edwards and Mr Scott were both promoted to new posts which made them senior to Mr Reid.

WHAT DID THE TRIBUNALS DECIDE?

An employment tribunal found that Mr Reid had been discriminated against on grounds of race as a result of the remark made by Mr Edwards. The tribunal awarded £6,000 for injury to feelings because he 'had to suffer the indignity of a disciplinary investigation, which was totally unjustified' and the length of time he had to wait for his grievance to be finally resolved.

The tribunal awarded a further £2,000 for aggravated damages because Mr Edwards had not been punished, and had been promoted to a higher grade.

The employment appeal tribunal (EAT) upheld both awards against BT, which then appealed to the Court of Appeal against the award for injury to feelings and aggravated damages.

WAS MANAGEMENT TO BLAME?

Contrary to the argument put forward by BT, the Court of Appeal said the tribunal was right to take a number of factors into account when deciding on an award for injury to feelings. In this case, the disciplinary investigation; the transfer to another location; and the inordinate wait for Mr Reid's grievance to be dealt with.

Nor was the tribunal wrong to award aggravated damages. It was entitled to take account of the fact that Mr Edwards was not punished, remained in post and was then promoted, even though the charges against him had not been decided.

Although the Court said there is nothing to stop an employer from promoting an employee while disciplinary proceedings are ongoing, it was relevant in this case because it demonstrated the high-handedness of the employer.

Lord Justice Keene said: 'Where an investigation is one into a complaint by an employee about a serious act of racial discrimination alleged by him against a fellow employee, it is open to an employment tribunal to regard the promotion of that fellow employee while the investigation is still proceeding as being a high-handed action and one which is insulting to the complainant'.

The other lesson for managers is that grievances relating to harassment and discrimination should be resolved a lot quicker than the 14 months taken by BT.