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Information Commission Guidance

Further to the decision in Durant -V- Financial Services Ltd (LELR 86, Feb 2004)**, the Information Commissioner has produced guidance on 2 main points. It covers what is meant by 'personal data' and clarifies when manual files are covered by the Data Protection Act 1998.**

When an individual's name is identified in a file, it will probably constitute 'personal data' and therefore be covered by the Act if there is also other information about him or her in it. The important point is that the information should be linked to a named person, and that other information about that person exists.

To decide whether a manual file is covered by the Act, the crucial thing is that it must be organised into a 'relevant filing system'. That means that the system has to be structured using names of individuals as file names, and allows the person trying to extract the personal data to do so without having to leaf through the whole file.

That means that personnel files categorised by individuals' names are likely to fall within the meaning of a 'relevant filing system'.

Dismissal causes injury to feelings

The Court of Appeal has decided - in Dunnachie -V- Kingston **- that the compensatory award in an unfair dismissal case can include an element for injury to feelings.**

This overturns the law in this area which has always excluded non-economic loss, although in **Johnson -V- Unisys Ltd**, the House of Lords had said that such awards could be made.

The Court of Appeal has now clarified that this comment was not part of the judgement and was therefore not binding on other courts. It has also made clear that tribunals should only compensate an employee for real injury to his or her self-respect.

The case may, however, be appealed to the House of Lords. In the meantime, the advice from the court is that 'tribunals should manage, list and decide cases in the knowledge that the last word has not been said, but is going to be said in the foreseeable future, on this topic'.

Justifying disability discrimination

In a case taken by Thompsons, backed by both BECTU and the Disability Rights Commission, the Court of Appeal has just decided a new point on disability discrimination law.

In Collins -V- Royal National Theatre Board, Mr Collins claimed unfair dismissal and disability discrimination after he had injured his thumb in an accident at work and was subsequently dismissed. The tribunal decided that the dismissal was both discriminatory and unfair, but the Royal Theatre successfully challenged both conclusions in the appeal tribunal.

The Court of Appeal was then asked to address a 'new and sharp question of discrimination law: can an employer's failure to make adjustments to accommodate a disabled employee be unreasonable but justified?' And the answer, in essence, is that it can't.

Some of the difficulty facing the court stemmed from the fact that the Disability Discrimination Act (DDA) 1995 currently sets out two different justification defences. Both use more or less the same words, but one is for less favourable treatment and the other for failure to make reasonable adjustments.

Although the justification defence in adjustment cases is being removed from the DDA on 1 October 2004, the court still had to grapple with the existence of both sections in this case. And that proved problematic.

We know from other cases that the justification defence for less favourable treatment is relatively easy for employers to make out. But what about justification in adjustment cases?

The issue facing the court concerned the link between reasonableness in an adjustment case and justification. Basically, whether employers can justify a failure to accommodate their disabled employee using a ground that the tribunal has already rejected as unreasonable?

The Court decided that they can't. So an employer can't justify a breach of section 6 (failure to make reasonable adjustments) by relying on a reason that has, in fact, contributed to that breach. The result is that the court has established that the threshold for justifying a breach is much higher when employers fail to make reasonable adjustments, than when they treat an individual less favourably.

PENSIONS BILL

The Government recently published its Pensions Bill, which contains measures on insolvency protection for employees and protection of their rights following a TUPE transfer.

In the first instance, it makes provision for the introduction of a Pension Protection Fund which will guarantee payment of pension benefits to members of the final salary scheme in the event of insolvency.

The fund will be financed by a levy calculated on two grounds. These include 'scheme factors' such as the number of members and the balance between active and retired members; and 'risk factors' linked to the level of underfunding in the particular scheme.

The Bill also sets out the conditions under which employees involved in TUPE transfers are eligible for protection. These are:

- that the employee is, or is eligible to be, an active member of an occupational pension scheme run by the transferor, and
- that where the scheme provides money purchase benefits, the transferor is required to make (or has made) contributions to it for the employee

Where those conditions apply, transferees also have responsibilities in that they have to ensure that the employee is (or is eligible to be) a member of a scheme for which the transferee is the employer.

If it's a money-purchase scheme, the transferee has to make contributions, which must match those of the employee up to six per cent. If it's not a money-purchase scheme, the transferee has to guarantee that it satisfies a standard set in the Pensions Scheme Act 1993, or some alternative that will be set out in regulations.

TRADE UNION MODERNISATION FUND

An amendment has been tabled to the Employment Relations Bill concerning the provision of a new funding scheme for trade unions. The new clause would give the Trade and Industry Secretary powers to make funds available to trade unions to modernise the way they operate.

The scheme – worth up to £10 million in total – could help trade union representatives promote the development of 'high performance workplaces'; review internal union structures to improve management systems; and help unions make greater use of the internet.

If the amendment gets parliamentary approval, the Government will issue a consultation document of the draft rules for the fund in due course.

EMPLOYMENT AGENCIES REGULATIONS

The Department of Trade and Industry has just produced useful guidance explaining new regulations covering employment agencies, which come into effect on 1 April. The rules – *Conduct of Employment Agencies and Employment Businesses Regulations 2003 (SI 2003/3319)* – govern the conduct of the industry and set up a framework for minimum standards.

The guidance explains the general duty of agencies to comply with relevant legislation – such as equal pay, health and safety, immigration, national minimum wage, working time and trade union membership. It also gives examples of possible situations that may arise when using an employment agency, as well as some solutions.

To view the guidance, log on to *http://www.dti.gov.uk/er/agency/conduct.pdf*

ACAS GUIDANCE ON BULLYING AND HARASSMENT

Acas, the Advisory, Conciliation and Arbitration Service, has just updated its two guides on bullying and harassment at work – one for employees and the other for employers. Both give a short guide to the law, along with examples of behaviour that might be considered to be bullying and harassment.

To get a copy of the guides, click onto the Acas website at *www.acas.org.uk/publications*

Wall -V- British Compressed Air Society

OLDER ...BUT STILL NORMAL?

In the absence of any legislation against age discrimination, older employees face a problem when they're dismissed or made redundant at 65. They have, therefore, little or no chance (until legislation comes into force at the end of 2006) of bringing a successful claim against their employer. But it can – and does – happen in certain circumstances.

WHAT DOES THE LAW SAY ABOUT THE NORMAL RETIRING AGE?

Take a look at the case of Wall -V- British Compressed Air Society (IDS Brief 750), in which the Court of Appeal said that although he was 67, he could bring an unfair dismissal claim because he was still below his contractual retirement age of 70.

Mr Wall relied on the fact that the legislation (Employment Rights Act 1996, section 109) says that you're only barred from bringing an unfair dismissal claim if you've reached the 'normal retiring age' by the date of termination, or you've reached the age of 65.

The difficulty, of course, is in establishing what the normal retiring age is. The House of Lords said (in *Waite -V- Government Communications Headquarters*) that it's either what is stipulated in the contract, or the age at which employees are, in fact, forced into retirement. That way, the Lords said, you ensure fair treatment between employees who hold similar positions to one another.

But what happens when employees have no one to compare themselves with? What's the normal retiring age in that situation?

WHAT DID THE TRIBUNALS SAY?

The tribunal decided that because Mr Wall had no one to compare himself with (he had been the director general of the Society), it couldn't establish a 'normal retiring age' for him. And as he was over the default limit of 65 that the legislation sets, he couldn't bring a claim.

The Employment Appeal Tribunal (EAT) decided, on the other hand, that because his contract stipulated 70 as his retirement age, then that was his 'normal retiring age'.

WHAT ABOUT THE COURT OF APPEAL?

The Court of Appeal decided, on a majority, that the normal retiring age for someone in Mr Wall's unique position was what was stipulated in his contract – ie 70.

But what about the other cases that seemed to contradict this conclusion? First, the court said that the case of *Waite* didn't deal with the point as it was about a group of employees doing the same jobs. It also distinguished the case of *Patel -V- Nagesan* on the basis that Mr Nagesan did not have a contractual normal retirement age, and so would be set by statute.

SO WHAT DOES 'NORMAL' MEAN?

The majority of the Court of Appeal decided that the word 'normal' in the legislation did not mean that there had to be more than one employee doing a particular job, in order to establish a 'norm'. Instead, it decided the phrase was just in the legislation to ensure that employees doing similar jobs were treated equally. It did not mean that an employee had to have a comparator.

It also said that, as set out in the case of *Waite*, the normal retiring age was basically the age at which employees could reasonably assume they would be made to retire. Someone who was holding a unique position should also be able to make that assumption, they said.

WHAT WAS THE END RESULT?

The court has therefore established quite clearly that if an employee holds a unique position, as in the case of Mr Wells, he or she does not have to make a comparison with other employees to establish the normal retiring age. If the contractual retiring age is 70, then that's the age at which the person would normally retire.

Photo: Stefano Cagnoni (Report Digital)

Rai -V- Somerfield Stores Ltd

TAKE NOTICE WHEN YOU'RE DISMISSED

Although employees usually know exactly when they've been dismissed, there are times when that's not the case. Just look at what happened in Rai -V- Somerfield Stores Ltd (IRLR 2004, 124)**, in which the Employment Appeal Tribunal (EAT) said that a letter from the employer telling Mr Rai to come back to work by a certain date did amount to a dismissal, but not a dismissal with notice.**

WHAT HAD HAPPENED TO MR RAI?

Mr Rai had been employed by Somerfield as a home delivery driver for about a year, but was demoted to the position of store assistant in June 2000. After that, he failed to turn up to work again. He didn't tell his employers why he wasn't at work and he made no effort to communicate with them as to when he might return.

Not surprisingly, Somerfield decided it had to do something to resolve the situation. It wrote to him a number of times and finally got him to a meeting on 8 March 2001. Mr Rai was told that there was a job for him as a dairy assistant and that he should come back to work on 19 March.

But he didn't show and Somerfield wrote to him saying that if he didn't come back by 9 April, he would be deemed to have resigned on that day. Mr Rai didn't show up – again – and his employers wrote to him on 14 May saying that as they had not heard from him, they were operating on the basis that his employment had ended on that day.

WHAT WAS MR RAI'S CLAIM?

Unbeknown to them, however, Mr Rai had made a claim on 6 April to a tribunal for unfair dismissal and unlawful deduction from wages.

The tribunal decided that when he was demoted in June 2000, his employment had terminated and that he'd been re-employed as a store assistant. That being so, his originating application was outside the three month time limit, and there was no good reason why he hadn't been able to present his claim in that period (Employment Rights Act, section 112a).

It also said that his employment as a store assistant had come to an end on 9 April 2001. Mr Rai had, therefore, presented his application three days too early and the tribunal dismissed his complaints.

WHAT WAS THE VIEW OF THE APPEAL TRIBUNAL?

This time round, Mr Rai argued that the letter he'd received from Somerfield telling him to come back by 9 April amounted to a dismissal with notice. Since his application had been presented after the notice was given, but before the termination date (Employment Rights Act, section 111(3)), the EAT could consider his claim.

But according to the EAT, there is no statutory definition of either notice or dismissal with notice. Nor are there any decisions by the appeal tribunal (or any higher court) as to what constitutes a notice or dismissal with notice for the purposes of section 111(3).

The EAT therefore had to resolve this 'greenfield' point itself. That is, whether the termination of Mr Rai's employment constituted a dismissal with notice within the meaning of the legislation.

And it decided that it didn't. First of all, it said the tribunal was right that his employment had terminated on 9 April when he didn't turn up for work, and that it could not therefore consider his application which was presented three days before that.

It also said that the letter did not amount to a dismissal with notice. Telling someone that their employment will be terminated if they don't come to work (which only they can decide whether to do or not) does not constitute notice. It is simply telling them that if they don't show up, they won't have a job from that date onwards.

Photo: Paul Box (Report Digital)

a brief overview of pregnancy discrimination

IT'S A... BABY!

Having a baby isn't always straightforward. Unfortunately, neither are the legal rights that exist for women who are pregnant or on maternity leave. And despite recent attempts by the Government to simplify maternity rights, the law remains complex.

In this article, **Nicola Dandridge**, Head of Equal Rights, summarises the law and answers some commonly asked questions.

THE LAW

It's directly discriminatory for employers to treat a woman less favourably than a man just because she's pregnant. And as there's no defence, there's no way of justifying it.

That means that it's unlawful to refuse a woman a job because she's pregnant, even if the job is short term and she'd be absent on maternity leave for most or all of the duration of the contract That protection lasts for the whole of the pregnancy and continues during maternity leave.

Other rights - to maternity leave, pay and other benefits - are governed by a separate statutory code of maternity rights set out in the Employment Rights Act 1996 and related maternity regulations. In addition the woman may be entitled to other benefits in her contract of employment.

In addition to all that, the amended Maternity and Parental Leave Regulations 1999 set out rights for biological and adoptive parents of 13 weeks' unpaid parental leave. New paternity regulations allow a father, or adoptive partner, to have two weeks' paternity leave at the time of birth, paid at a flat rate of £100 per week. Finally, new adoption rules allow adoptive parents to take paid adoption leave, which are very similar to maternity leave and pay.

FREQUENTLY ASKED QUESTIONS

■ ***Does a woman have to tell a prospective employer that she's pregnant before accepting a job offer?***

There is no legal obligation on a job applicant to tell a prospective employer that she is pregnant. If an employer asks in an interview if a woman is pregnant and then does not offer her the job, a tribunal may well make a finding of unlawful direct discrimination. The same principle applies even if the job is short term, or to replace someone else on maternity leave.

■ ***If a prospective employer finds out that a woman is pregnant and decides not to offer her a job, what can she do?***

If the woman can prove that the reason for not offering her the job is because she is pregnant, then she'll be able to argue that the decision is unlawful and she should be offered the post. If the employer refuses, she has three months in which to lodge a claim for unlawful direct sex discrimination.

■ ***What questions can an employer legitimately ask a woman at interview?***

It is direct sex discrimination for employers to ask questions about a woman's plans to have children or their child care arrangements, if similar questions aren't put to a man. To find out what questions were asked at interview, you can request copies of interview notes in a Sex Discrimination Act Questionnaire.

■ ***If a woman is dismissed when pregnant or on maternity leave, what are her rights?***

It is not automatically unfair to dismiss an employee who is pregnant or on maternity leave. However, if it can be shown that that was the reason for the dismissal, then it's unlawful direct sex discrimination as well as automatic unfair dismissal (so no service requirement is needed).


Photo: Janina Struk (Report Digital)

Similarly, it is not automatically unfair or discriminatory to make a woman redundant when she is pregnant or on maternity leave, unless it can be shown that the reason for selecting her for redundancy was because she was pregnant or on maternity leave.

If a woman is selected for redundancy when on maternity leave, she has the right to have first pick of any suitable alternative job vacancies.

■ ***What are the woman's rights to holiday on maternity leave?***

A woman can't usually take paid holiday during maternity leave. However, during the first 26 weeks of ordinary maternity leave (OML), she still has the right to accrue annual leave.

This means that although a woman can't take paid holiday during OML, she can take it some other time. And the period of OML itself counts towards entitlement. She also doesn't have any automatic legal right to public holidays – that will depend on the terms of her contract of employment.

Additional Maternity Leave (AML) lasts for up to 26 weeks and follows on from OML. During AML a woman has no rights to accrue holiday, unless her contract of employment says she does.

Under the Working Time Regulations, which provide for four weeks' paid annual leave, a woman will continue to accrue entitlement during unpaid periods of absence from work. This should also apply to maternity leave, whether OML or AML.

■ ***What rights do women have to work reduced hours after maternity leave?***

If a woman wishes to work flexibly on her return to work, the new Flexible Working Regulations 2003 may help, though if an employer refuses her request, a tribunal is unlikely to interfere with that decision. And even if it does, compensation is limited to eight weeks' pay.

The Sex Discrimination Act 1975 is more likely to be of help. That's because any policy or decision by an employer which affects a greater proportion of women than men (such as a refusal to allow flexible or part-time work) is likely to amount to indirect discrimination requiring objective justification by the employer. And if the employer cannot come up with a justification, then it's likely to be unlawful.

The advantage of pursuing a claim for indirect discrimination in these circumstances is that a tribunal will require the employer to objectively justify any potentially discriminatory practice, and compensation is unlimited.

If an employer has a policy of allowing women to work flexibly but not men, this may amount to direct discrimination against a man.

■ ***What is the position if a woman is too ill to return to work?***

Once an employee's entitlement to maternity leave has expired at the end of OML or AML, the employee has to return to work under her contract as normal. However, if she is too ill to return, then she becomes entitled to sick leave and sick pay under her contract of employment in the usual way.

■ ***Do women have to repay maternity benefits if they don't return to work?***

A woman is not obliged to repay any statutory maternity pay if she decides not to return to work. However, some contracts of employment state that any contractual maternity pay, over and above the statutory minimum, has to be repaid if an employee does not return to work after maternity leave.

PAY UP EQUALLY

Despite having had equal pay legislation for many years, women are still having to bring long and complex claims – such as the case of Allonby -V- Accrington and Rossendale College & Ors (IDS Brief 750)**, which has just been heard by the European Court of Justice (ECJ).**

It decided that a woman can't rely on European equal pay legislation if her comparator works in the same 'establishment', but for a different employer. It also said that a woman who is excluded from an occupational pension scheme because of indirect discrimination, can turn to EC law, whether or not she has a comparator.

WHAT WAS MS ALLONBY'S EQUAL PAY CLAIM ABOUT?

Ms Allonby, who worked for the college through an agency, claimed that under the Equal Pay Act she should be paid at the same rate as the lecturers employed by the college. Her income was less than that of a male lecturer because part of her pay went to the agency as their fee.

But the Court of Appeal said she couldn't make that comparison because they had different employers, despite the fact that both of them worked at the same establishment.

So Ms Allonby then argued that the Equal Pay Act didn't comply with Article 141 of the EC Treaty, which says that men and women doing the same job at the same place, should be paid the same. And, she argued, she should be able to compare herself with a man, irrespective of his employer.

AND WHAT WAS HER PENSIONS CLAIM?

Ms Allonby also claimed that because she had been employed by the college between 1990 and 1996 (when her contract was terminated), that she had unlawfully been denied access to the pension scheme since then.

She said that because she could rely directly on Article 141, the pension scheme rule that excluded contract workers amounted to indirect discrimination against women and should be set aside. She should therefore be allowed to join, whether or not she could identify an appropriate comparator.

WHAT DID THE COURT OF APPEAL ASK THE ECJ?

So the Court of Appeal put three basic questions to the ECJ:

1. Are two people working in the same establishment (or service), but for different employers, nevertheless working in the same 'employment' as far as Article 141 is concerned?
2. As Article 141 has direct effect on the college, was Ms Allonby entitled to join the pension scheme by comparing her circumstances to that of her male comparator?
3. And was she entitled to join the scheme, irrespective of whether she had a comparator, if she could show that significantly more women than men were excluded by the rule about contract workers?

WHAT DID THE ECJ DECIDE ON QUESTION ONE?

In answer to question one, the ECJ said that your comparator doesn't have to be working for the same employer as you. But it added that where you can't pin down the difference in pay to one particular source, then you can't rely on Article 141 to help you.

In other words, because the college paid the agency a fee for Ms Allonby's services there was no 'single source' to which the difference between her pay and that of her comparator could be attributed.

AND WHAT ABOUT QUESTIONS TWO AND THREE?

The ECJ said that Ms Allonby could not compare herself with a man to claim membership of the pension scheme. But, it added, that if she is trying to challenge a discriminatory rule that is based in national law, she can rely on statistical evidence to show a different impact on men and women.

And if she was able to show that it was indirectly discriminatory, then that would be binding not only on the Secretary of State responsible for the statistical rule, but also on the private employer – in this case, the college.

BUT COMPARED WITH WHOM?

In equal pay cases, applicants have to show (among other things) that the difference in pay that they're complaining about can be attributed to a 'single source' *(Lawrence & Ors-V-Regent Office Care Ltd & Ors)***. In other words, that there is just one body that is responsible for the problem and which can do something about it.**

In Department for Environment, Food and Rural Affairs -V- Robertson and ors (IDS Brief 750), the Employment Appeal Tribunal (EAT) decided that male civil servants in Defra could not compare themselves with female civil servants in another government department.

WHAT WAS THE LEAD UP TO THE CASE?

Over the previous ten years, the applicants had been moved from one department to another as a result of various mergers and reshuffles. Unfortunately for them, the way in which terms and conditions were negotiated also changed.

For many years, all pay bargaining was administered centrally by the Treasury, but this ended in 1995, when responsibility was delegated to individual departments. The question, then, was whether the individual departments constituted separate employers or whether one body remained that was responsible for pay.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal decided that the Crown employed all civil servants.

However, because of the decision in *Lawrence*, the tribunal went on to say that the claimants still had to show that both they and their comparators were under the control of the same body that was responsible for the inequality in pay between them. And that that body could remedy it.

SO WAS THE TREASURY STILL BASICALLY IN OVERALL CONTROL?

The tribunal thought it was because it still retained the power to remedy any inequalities in terms and conditions of employment. And, more importantly, it decided that it was responsible for any inequalities.

The tribunal was satisfied, therefore, that the Treasury was the body that pulled together all the various departments into one establishment.

This conclusion, they said, was within the meaning of Article 141 which says that men and women should be paid equally for work of equal value. And, they said, it's in line with the ECJ decision in *Defrenne -V-Sabena (No 2)*, which says that applicants can compare themselves with someone who works in the 'same establishment or service, whether public or private.'

BUT WHAT DID THE EAT MAKE OF THAT DECISION?

The EAT agreed with the tribunal that the applicants had to show two things - that they worked for the same employer as their comparators; and that the employer could resolve the inequality in pay between them.

But that was where the two parted company because the EAT said that although the Treasury has overall budgetary control, individual departments fix terms and conditions and are responsible for any inequalities.

In other words, there was no single source to which the difference in pay between the applicants and their comparators could be attributed.

COULD THE PRIME MINISTER BE THE SINGLE SOURCE?

The EAT also rejected a new argument put to it – that the Prime Minister was the single source. When the new pay structure was introduced in the 1990s, certain responsibilities were transferred over to him, but in March 1996 these were delegated to individual government ministers.

The applicants tried to argue that the Prime Minister still retained the powers regarding pay, holidays and working hours but the EAT disagreed.

WILL THERE BE AN APPEAL?

Perhaps not surprisingly, the applicants have already lodged an appeal, so watch this space for future developments in this case.

A Dressing Down

The question of what to wear to work isn't necessarily about whether you look good in something, however important that may be. It may, at times, amount to sex discrimination. The question is when and under what circumstances?

In Department for Work and Pensions -V- Thompson (IDS Brief 751), a case taken by Thompsons, the Employment Appeal Tribunal (EAT) has just said that requiring men to wear a collar and tie to work does not necessarily amount to sex discrimination.

SO WHAT ARE THE RULES ON DRESS CODES?

There are no rules, as such. In some circumstances (such as health and safety or because an employee has contact with the public), it may be perfectly reasonable for an employer to tell their employees to dress in a certain way.

But employers can't just impose a code on a whim - otherwise, they leave themselves open to a claim of sex discrimination.

WHAT HAPPENED IN THIS CASE?

In April 2002 Jobcentre Plus said that it was introducing a new dress code, with effect from June, that required staff to dress in a professional way. For men, that meant a collar and tie; and for women something to a similar standard.

Mr Thompson, who worked as an administrator and did not come face to face with the public, refused to comply. He was given a formal warning, after which he wore a collar and tie under protest, but lodged a claim of direct sex discrimination.

WHAT WAS THE VIEW OF THE TRIBUNAL?

The tribunal said the new dress code amounted to direct discrimination – the only reason Mr Thompson was required to wear a collar and tie was because he was a man.

This worked against him in two ways. First of all, he had been forced to dress differently for no good reason, unlike the female staff, which amounted to less favourable treatment. And secondly, he had been subject to disciplinary action.

WHAT ABOUT THE EAT?

The appeal tribunal said that what the applicant had to show was not that he had been treated differently, but that he'd been treated less favourably.

Based on previous decisions, the EAT said that clothing rules should be looked at as a whole to assess whether they were more restrictive for one sex as opposed to the other.

For instance, the Court of Appeal decided in *Smith v Safeway plc* that requiring a male member of staff to have collar length hair was not discriminatory, although women could have long hair. It said that having a particular requirement in a code that applies to one sex does not necessarily make the whole code less favourable to them.

WHY WAS THE TRIBUNAL'S REASONING FLAWED?

The EAT therefore decided that the tribunal's reasoning was flawed. First of all, it had misapplied the 'but for' test and said that 'but for' the fact that Mr Thompson was male, he would not have been required to wear a shirt and tie.

This test should only have been applied after it had established that there had been less favourable treatment, not to ascertain whether there had been unfavourable treatment.

In Thompsons' view, this is a technical point. It is clear from the decision of the employment tribunal that there was less favourable treatment - in that men were required to dress to a smarter standard than women.

The EAT said the tribunal should have asked whether 'an equivalent level of smartness to that required of the female members of staff could only be achieved in the case of men, by requiring them to wear a collar and tie'. If it could be achieved in some other way, then imposing such a rigid code might suggest less favourable treatment towards male staff.

Instead, the tribunal asked whether men were being required to attain a higher level of smartness than women, so the case was remitted for a fresh hearing.

Part-Time Pensions

It is now generally accepted that an employer can't exclude a worker from membership of an occupation pension scheme on the basis of their part-time status.

Although that may seem like an obvious thing to say, the litigation leading up to that conclusion has been complex and has given rise to a large number of test cases - about 60,000 in all, many of which were lodged almost a decade ago.

In Preston & Ors -V- Wolverhampton Healthcare NHS Trust & Ors no.3 (IDS Brief 750), the Employment Appeal Tribunal (EAT) has just considered appeals on a number of complex points arising from some of these test cases.

BUT WHAT WAS THE HISTORY TO THESE CASES?

Known as the 'Preston' cases for short, the women brought their claims under the Equal Pay Act 1970 and Article 141 of the EC Treaty. They complained that they had been unlawfully excluded from membership of a number of different occupational pension schemes, simply because of their part-time status.

Anyone wanting to bring a claim had to lodge it within six months of leaving the employment where they had been excluded from the scheme, and claims could only be backdated to 8 April 1976.

The successful applicants were given an entitlement to backdated pension scheme membership, rather than financial compensation for loss of their pension rights.

WHAT DID THE TEST CASES DEAL WITH?

The test cases dealt with a variety of situations including:

- part-time workers who had moved from one employer to another either voluntarily or as a result of a TUPE (Transfer of Undertakings) transfer
- part-time workers who had been employed under a series of fixed-term contracts
- part-time workers who worked sufficient hours to be technically eligible to join their employer's pension scheme, but were not informed of their right to do so.

HOW DO THE TIME LIMITS WORK IN TUPE TRANSFERS?

Where a worker has had her employment transferred under the TUPE regulations from one employer to another, the EAT has ruled that the six month time limit for bringing a claim against the transferor does not start running until the date that the worker leaves the employment of the transferee.

This is a positive decision that would help many workers who were transferred from one employer to another. However, the employers are appealing against this decision and the case will now go to the Court of Appeal.

HAD THE EMPLOYERS BREACHED EQUAL PAY LAW?

The part-timers argued that their employers had breached equal pay law by excluding them from membership of a pension scheme, for which membership was obligatory for full-timers.

The EAT agreed. It said that exclusion of part-timers in such circumstances did constitute a breach of equal pay law.

But was there a breach if membership was compulsory for full-timers, and voluntary for part-timers?

The EAT said no – a worker who had to opt in to membership of a pension scheme was not treated less favourably than someone for whom membership was obligatory.

CAN A PART-TIMER BRING A CLAIM IF THEY WEREN'T TOLD THEY COULD JOIN THE SCHEME?

The EAT ruled, on the whole, that the employers had not breached equal pay law by failing to inform the part-timers that they were now eligible to join the pension scheme.

There would probably only be a breach if the worker was able to show that their employer operated a 'policy' or 'practice' of not informing their part-time workers of their pension scheme eligibility.

This decision may well create difficulties for workers who find themselves in this situation, as many may not be able to prove the existence of a discriminatory policy or practice – as opposed to, for example, simple incompetence by the employer.


Photo: John Harris (Report Digital)