Published by Thompsons Solicitors

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 75 December 2002

Help for the aged

Rutherford v Town Circle (t/a Harvest) (in liquidation) and Secretary of State for Trade and Industry (No.2); Bentley v Secretary of State for Trade and Industry [2002] IRLR 768 Employment Tribunal Gidella and others v Wandsworth Borough Council and another (EAT Unreported 19.9.02)

Mr Rutherford's stoical challenge to ageism through sex discrimination legislation, is as persistent as the ageing process itself Broadly the argument goes that the retirement age discriminates indirectly against men. At the normal retirement age, or 65, protection from unfair dismissal is lost, as is the right to a redundancy payment and that disproportionately impacts to the detriment of considerably more men than women, since men are more likely than women to be economically active beyond retirement age.

We previously reported Mr Rutherford's first case (LELR 64 November 2001, page 8) **Town Circle (t/a Harvest) v Rutherford** when he succeeded in the Employment Tribunal only to be knocked back by the Employment Appeal Tribunal. The EAT was not satisfied that the statistics demonstrated the disparate impact needed to found an indirect discrimination claim, nor were they convinced by the Tribunal's approach to objective justification – which can provide a defence to what would otherwise be unlawful discrimination. So the case was remitted to the ET.

Back in the Tribunal **Rutherford v Town Circle and Secretary of State for Trade and Industry (No.2)** joined with the **Bentley** case, the Tribunal has again found in favour of the Applicants. On the statistics the Tribunal was satisfied that disparate impact was established by looking at the pool of people working, actively seeking or wanting to work, by looking at the workforce figures.

On objective justification, the Tribunal did not accept the Secretary of State's arguments for the limitation on the right to claim unfair dismissal or redundancy pay for the over 65s as it was tainted by discrimination because of its roots in the equalisation of pension ages. The case is being appealed to the EAT.

A month after **Rutherford (No.2)** in the ET, the EAT failed to endorse a different Tribunal's finding on the same point, in the **Gidella** case. Again they doubted the Tribunal's analysis of the statistics. The EAT did not consider there was an 'obvious' disparate impact between men and women from the retirement age provisions. That being so, an employment tribunal had to undertake an overall analysis of the figures in evidence on the impact of the section before them, before assimilating all the figures to judge whether the apparently neutral provision had a disparate impact on men that could fairly have been described as considerable or substantial. The tribunal had not undertaken that task, and the case was remitted back to the tribunal for that analysis to take place.

So the position remains uncertain for now. Confusion reigns. Claims for both men and women should be lodged protectively and stayed pending finality on the issue. The government is committed by the Employment Framework Directive to legislate in this area by 2006, and may wish to do so sooner in the light of the pensions problem and the ageing UK population. But whether it will be possible to ensure flexibility in retirement for those that want to work beyond the age of 65 without jeopardising current pensionable ages remains to be seen

Case of Kells illuminates scope of law

Kells v Pilkington plc 2002 IRLR 693

In an equal pay claim, it does not matter if the differential in pay between the applicant and the comparator ended more than six years before the tribunal claim was lodged. Also, where an applicant relies on a continuing act of sex discrimination, an applicant does not have to prove the existence of a discriminatory policy, rule or practice. Instead the Tribunal is entitled to draw an inference that such a policy, rule or practice existed. So holds the Employment Appeal Tribunal in *Kells v Pilkington plc*.

Ms Kells was employed by the company from 1972 until August 1999. She alleged that she was performing work of equal value to two male comparators from 1989 to 1991 and then from 1990 to 1993. She also brought a claim for sex discrimination for the refusal to re-evaluate her job and for being given a worse workload following her return to work part-time after maternity leave.

The Employment Tribunal struck out her claim for equal pay. After recent challenges in the European Court of Justice, the two year limit on arrears of back-pay contained in section 2(5) of the Equal Pay Act has been extended to six years. The Employment Tribunal found that this meant that Ms Kells could not rely upon a comparison with the pay received by her comparators because the pay differential ended more than six years before she lodged her claim.

The Employment Tribunal made no finding as to whether there was a discriminatory policy, rule or practice because it heard no evidence from the company. Instead it concluded that any continuing act came to an end on a specific date, which was more than three months before Ms Kells lodged her claim.

This is an important case that highlights the scope of the Equal Pay Act 1970 to rectify long standing pay anomalies and the EAT was absolutely right to recognise the flaws in the Tribunal's reasoning. There have been numerous domestic and European equal pay decisions which confirm that the applicant and her comparator do not have to be in contemporaneous employment. The six year limitation is a limit on compensation, not on the ability to make a comparison.

The fact that Ms Kell's originating application did not specifically refer to a discriminatory policy, practice or rule was irrelevant. If an applicant can give evidence consistent with a discriminatory policy, practice or rule, then the Tribunal will need to consider whether to draw an inference that such a policy, practice or rule or existed and that requires evidence to be heard from the employer. This case is a timely reminder of the power of the Sex Discrimination Act 1975 to probe established workplace practices as they can constitute continuing acts capable of being discriminatory even if there have been no specific incidents within three months of the lodging of the Tribunal claim.

Tribunal compensation limits go up

The annual increase to the limits on tribunal awards have been published. They take effect as of the 1 February 2003 which means where the event giving rise to the complaint to a Tribunal occurs on or after 1 February 2003 the new limits will apply. For example in unfair dismissal claims, the new rates will apply where the effective date of termination, not the date of the tribunal hearing, is on or after 1 February 2003, .

The main increases are:	Current	From 1 Feb 2003
Maximum amount of "a week's pay" (for the purpose of calculating, eg, the basic award or redundancy payments)	£00,250	£00,260
Maximum compensatory award	£52,600	£53,500
Minimum basic award in prescribed situations (eg trade union related dismissal)	£03,400	£03,500

www.legislation.hmso.gov.uk/si/si2002/20022927.htm

Manner of dismissal compensation

McCabe v Cornwall County Council and the Governing Body of Mounts Bay School [2002] EWCA Civ 1887

When the Court of Appeal describes an area of law as "developing", you know two things – firstly that they do not much like the existing case law, and secondly that the current state is a mess. A perfect description of the state of the law on the interplay between unfair dismissal and the common law of breach of contract and general civil duties – tort – such as the duty not to be negligent and take reasonable care for others' health and safety when linked or connected to dismissal. There is no issue with a workplace accident and a subsequent capability dismissal – the dismissed, injured employee has the complete right to claim damages for personal injury in the County or High Court for the accident and unfair dismissal in the Tribunal. But what about when the employer's treatment during the disciplinary or dismissals process causes the injury, psychiatric damage for example?

In the very recent case of **McCabe** – a case of a teacher accused of inappropriate sexual conduct towards some female pupils – the Court of Appeal have made a valiant attempt to clarify and "develop" the law in this area. Mr McCabe won maximum compensation from the Employment Tribunal for unfair dismissal and the issue was whether he could also bring a civil claim in the County Court for alleged breach of the contractual duty of trust and confidence and claim of tort for breach of the duty to provide a safe system of work over the way he was suspended and treated during the disciplinary process.

The following principles emerge from the case and the distillation of recent authorities.

- The Court of Appeal accepted that loss caused by the unfair manner of dismissal is a consequence of dismissal and so can be provided for in the unfair dismissal compensatory award. It is part of the principle that tribunals compensate on a just and equitable basis for losses in consequence of the dismissal. McCabe therefore articulates fully what was hinted at in the House of Lords in **Johnson v Unisys** and expressly disapproves the previous case law which said that manner of dismissal compensation was not available. This type of damages should now be routinely claimed in Employment Tribunal cases for unfair dismissal.
- Compensation for the manner of dismissal cannot additionally be claimed in the County or High Court. A breach of contract that forms part of the process of dismissal cannot found a common law claim for breach of contract or tort but only in unfair dismissal cases.
- If however the breach of contract or tort precedes a dismissal, but is not part of the dismissal process, it can be litigated in the civil court thereby opening the way to the uncapped compensation available. For example a capricious suspension which does not form part of a dismissal process, that causes post traumatic stress disorder.

The approach of the Court of Appeal in **McCabe** is to minimise overlap between statutory rights to unfair dismissal and common law rights. They felt bound to do this by the House of Lords authority, but we consider it a false distinction.

There will inevitably be overlap and the law of contract should be allowed to devlop to take account of modern views of the employment relationship and the duties owed by employers to their staff.

On the Court's reasoning, employers can deliberately dismiss employees in order to limit their liability. Nor does the Court of Appeal help the situation where the employee feels forced to resign in a constructive dismissal situation. In both these circumstances unfair dismissal, with its compensatory award limit of £53,500 may be an inadequate remedy. In the High Court damages are assessed to put the empoyer in the position they would have been in had the contract been properly performed.

Nonetheless, this case is a welcome clarification of the current position and a hint that creative judicial interpretation could be deployed in an appropriate case to extend protection to employees in this area.

Court of Appeal sets out remedies

Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871

The proper level of compensation in discrimination cases has long been a battleground with two of the most controversial elements being how Employment Tribunals should approach awards for injury to feelings and how to assess the loss of the chance of a career where the discrimination has resulted in dismissal or loss of employment.

For the first time for over a decade the Court of Appeal has considered these issues and set down guidelines in both areas. This case is likely to become the benchmark for the foreseeable future.

Ms Vento was a probationer police officer who had been unlawfully sexually discriminated against for a period of a year in the form of criticism of her conduct, her personal life and her character in an unwarranted, aggressive and demoralising manner and a trumped up dismissal. The Tribunal awarded her compensation on the basis that she had a 75% chance of working in the police force for the rest of her career. The award came to £170,000 as it was discounted to reflect other likely earnings and for her receiving it as a lump sum rather than month by month as she would have done had she been working as a police officer for the rest of her life. For injury to feelings she received £50,000 plus £15,000 aggravated damages and £9,000 for psychiatric damage. The psychiatric damage took the form of clinical depression and adjustment disorder. Ms Vento had been affected for a period of three years by the discrimination.

The Employment Appeal Tribunal held that the assessment of a 75% chance of Ms Vento remaining in the police force was too high and remitted that part of the case back to the Tribunal. On the other parts of the award, the EAT reduced the injury to feelings to £30,000 and the aggravated damages to £5,000 but did not interfere with the psychiatric damage award. Both parties appealed to the Court of Appeal.

LOSS OF FUTURE CAREER PROSPECTS

The EAT had overturned the Tribunal's decision that there was a 75% chance of Ms Vento remaining a police officer had she not been discriminated against because the statistical evidence was that only 9% of women serve more than 18 years (the number of years to take Ms Vento to retirement age) and for men there is a less than 50% statistical chance of serving this long.

The Court of Appeal explained that a forecast is required to answer the question of the likely length of future service – to be answered on the basis of the best assessment that can be made on the relevant material available to the court or tribunal. Statistical material – such as the percentage of women in the past who have served until retirement age – will be relevant, but that is not the only relevant information.

In this case the tribunal had other evidence – such as special factors about Ms Vento's long held career ambitions to become a police officer, her determination to continue notwithstanding the discrimination and the fact that the statistics on women police officers were inevitably historical and did not reflect up to date female career patterns, nor take account of family friendly and equal opportunities policies recently introduced by the police service. Nor did the statistics take account of the fact that Ms Vento could no longer have children and so would not be leaving the force to start a family.

So the Court of Appeal reinstated the original tribunal decision – it was a permissible conclusion and the tribunal had evidence to depart from the statistical evidence in forecasting the Ms Vento's future career prospects if she had not been discriminated against. The importance of the case is the endorsement of a tribunal's right to look beyond headline statistics to form its own judgment from the information before it provided it can justify its thinking. Even where such an approach produces startling results.

INJURY TO FEELINGS

Ms Vento was less fortunate in this part of the case. Her injury to

feelings compensation went down still further to £18,000 although the aggravated and psychiatric damages awarded by the EAT were upheld, making a total of £32,000 for general damages. The Court of Appeal approached assessment of damages by reference to other cases – both discrimination and personal injury. As the original tribunal's decision to award a total of £74,000 was seriously out of line with other cases, it amounted to an error of law, the Court held. For example, £74,000 is the going rate for total deafness and loss of speech, or for loss of vision in one eye and reduced vision in the remaining eye or moderate brain damage involving epilepsy in a personal injury claim under Judicial Studies Board guidelines.

The Court of Appeal was at pains to explain that the reduction in the amount of compensation was made solely to bring the global award more into line with conventional wisdom on levels of compensation for non-financial losses.

The Court of Appeal warned of the risk of overlap between psychiatric damage and injury to feelings – and warned tribunals against inadvertent double counting, which they said had happened to a degree in this case.

The Court of Appeal went on to identify three broad bands of compensation for injury to feelings, as distinct from compensation for psychiatric damage or similar personal injury. This means that the earlier case in the EAT of **ICTS (UK) Ltd v Tchoula** [2000] IRLR 643 is no longer good law.

- The top band should normally be between £15,000 and £25,000. Sums in this range should be awarded in the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment on the ground of sex or race. Only in the most exceptional case should an award of compensation for injury to feelings exceed £25,000.
- The middle band of between £5,000 and £15,000 should be used for serious cases, which do not merit an award in the highest band.
- Awards of between £500 and £5,000 are appropriate for less serious cases, such as where the act of discrimination is an isolated or one off occurrence. £500 is pretty much the minimum award – anything less fails to give proper recognition of injury to feelings.

The correct approach is to identify firstly the band the discrimination falls into, and there is then flexibility within each band for the tribunal to award what is fair, reasonable and just compensation in the particular circumstances of the case.

Aggravated damages, on top of the injury to feeling award – both whether to award them, and if so how much to award, will depend on all the circumstances of the discrimination and the way in which the complaint of discrimination has been handled. It seems therefore that the trend to award a global sum, inclusive of both injury to feelings and aggravated damages may not survive this judgment. Time will tell. But whether awarded as a separate figure or not, regard must be had to the overall size of the award of compensation for all non-financial losses.

OFFICE POLITICS

"Please don't make me redundant. I don't want it now. I've changed my mind." David Brent's final words in the second series of the The Office, the excellent BBC2 fly on the wall tragi-com by Ricky Gervaise which throws the spotlight on poor management (about time too). His plea is met with embarrassed silence and a mumbled reply about the wheels already being in motion. The compromise agreement has been drawn up ("I think you'll find it quite attractive"), the staff informed of his departure and Gareth appointed acting manager, ready to use his Territorial Army skills in his management style.

But something's not right here. After a temporary distraction, sharing Tim's pain in his hour of rejection by Dawn, is it too late to notice that something is wrong? Gareth has been appointed to David Brent's job while they recruit externally and David Brent is being made redundant. No wonder senior management needed the compromise agreement to be signed. Redundancy? What redundancy? The job has not disappeared so the employer's "redundancy" reason for dismissal is hopeless and without showing a potentially fair reason for dismissal, victory, on liability at least, is certain for Brent. Assessing compensation would be more difficult – reinstatement perhaps? What about contributory fault? Or did he agree to resign? Does it constitute a dismissal at all?

David Brent's needs a trade union official or Thompsons lawyer.

On the horizon

EMPLOYMENT ACT 2002

We reported in detail on the provisions of the Employment Act 2002 in our extended Summer issue July/August 2002.

Here we set out the implementation timetable.

EMPLOYMENT ACT 2002 IMPLEMENTATION TIMETABLE

Part 1: Maternity / Paternity / Adoption leave and pay (sections 1-21) – regulations approved by Parliament. Operational from 6 April 2003.

In July we summarised the then current draft regulations. The final published approved regulations are largely unaltered from the draft. The government has decided that paternity leave and pay will only be available in one block of either one or two consecutive weeks, but may wish to look again at this issue in the light of experience over time. For now however the possibility of two one week blocks of leave has been ruled out.

Provision has been made to enable fathers of premature babies a longer period in which to choose when to take paternity leave from any point between actual date of birth and 56 days following the expected week of childbirth. This is intended to enable them to support the mother at the time they feel will help her most.

The government's proposal to extend notification of intention to take parental leave from 21 to 28 days, in line with notification requirements for other forms of leave has been dropped, following disapproval of the idea during the consultation process. It will remain as at present.

Part 2: Tribunal Reform (sections 22-28) – consultation over the winter and introduction of package of measures planned for 2003.

Part 3: Dispute Resolution (sections 29-41) – consultation over the winter and introduction expected late 2003 (Advisory, Conciliation & Arbitration Service (ACAS) invited to revise code on disciplinary and grievance procedures. Guidance will be provided by collaboration between ACAS, Small Business Service and other advisory groups).

Part 4: Equal Pay Questionnaire (section 42) – regulations to be laid before end 2002. Consultation on the design of the questionnaire form started on 17 October and will end on 10 January 2003. Expected to come into effect in April 2003.

Part 4: Union Learning Representatives (section 43) – Department for Education & Skills (DfES) responsibility. Currently working with ACAS on draft code. Not expected to take effect before 2003.

Part 4: Dismissal Procedures (section 44) – no timing decisions made.

Part 4: Fixed-term work (section 45) – consultation complete. Regulations approved by Parliament. Provisions effective from October 2002. Guidance available.

Part 4: Fixed-term work: Northern Ireland (section 46) – Northern Ireland Legislative Assembly responsible for drafting and implementing regulations.

Part 4: Flexible working (section 47) – consultation exercise closed October 2002. Implementation from April 2003.

Part 4: Rate of Maternity Allowance (section 48) – Department for Work & Pensions (DWP) responsible for drafting. Regulations approved by Parliament. Operational from April 2003.

Part 4: Partner work-focused interviews (section 49) – DWP responsible for drafting regulations. No timetable for implementation yet, unlikely to be before April 2004.

The following regulations have now been approved by Parliament:

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

- The Maternity and Parental Leave (Amendment) Regulations 2002
- The Paternity and Adoption Leave Regulations 2002
- The Statutory Paternity Pay and Statutory Adoption Pay (Weekly Rates) Regulations 2002
- The Statutory Paternity Pay and Statutory Adoption Pay (General) Regulations 2002
- The Statutory Paternity Pay and Statutory Adoption Pay (Administration) Regulations 2002
- The Statutory Paternity Pay and Statutory Adoption Pay (National Health Service Employees) Regulations 2002
- The Statutory Paternity Pay and Statutory Adoption Pay (Mariners and Persons Abroad) Regulations 2002

MODEL DOCUMENTS

The following forms and model documents are now available from the DTI website and by post. They are:

- SC3 Self-certificate of entitlement to paternity leave and pay in respect of a birth child
- SC4 Self-certificate of entitlement to paternity leave and pay in respect of a child placed for adoption
- Certificate of notification of matching with a child for adoption
- Model letter for employers to acknowledge notification of maternity leave

IMPLEMENTATION OF THE EMPLOYMENT FRAMEWORK AND RACE DIRECTIVES

The government's proposals for implementing the new European equality directives (2000/78/EC and 2000/43/EC) are out for consultation, with a closing date of 24 January 2003. We reported on the requirements set out by the Directives in LELR 71, June 2002.

The draft regulations adopt a minimalist approach to the point of absurdity. The result will be concurrent definitions and regimes for such fundamental matters as the definition of "race" for race discrimination purposes, the definition of indirect discrimination and the burden of proof. Which set of rules and definitions that will apply will depend on whether the act in question is covered by the European Directives or domestic legislation.

Confused? So are we.

Whether the government will bow to pressure to simplify and upwardly harmonise remains to be seen. For a copy of Thompsons full submission on all the draft regulations and consultation issues contact Nicola Dandridge, Head of Equality at the Employment Rights Unit, Congress House, Great Russell Street, London WC1B 3LW

The implementation timetable can be predicted with greater certainty than the actual contents, which is dictated by the Directives themselves.

The draft Equal Pay Amendment Regulations 2003, amending equal value procedure and tribunal time limits in equal pay cases are due for implementation in July and December 2003

The introduction of protection from discrimination on grounds of sexual orientation (The draft Employment Equality (Sexual Orientation) Regulations 2003) is scheduled for implementation on 1 December 2003.

The introduction of protection from discrimination on grounds of religion or belief (The draft Employment Equality (Religion or Belief) Regulations 2003) will come into force on 2 December 2003.

The draft Race Relations (Amendment) Regulations 2003, which provide for post employment victimisation protection and create a statutory definition of harassment are due later in 2003, probably December.

The government is also considering whether separate Sex Discrimination regulations are required to comply with European minimum requirements on harassment and post employment victimisation.

Changes to the DDA in the draft Disability Discrimination Act 1995 (Amendment) Regulations 2003 are scheduled for introduction on 1st October 2004. These will repeal many of the current exemptions such as for small employers, but fail to extend the definition of disability and do little to tackle the difficulties with the justification provisions. Harassment is defined and post employment victimisation covered.

Age discrimination provisions are required by 2006 and consultation documents are not yet available.

We have a busy time ahead.

Industrial inaction

Burgess and others v Stevedoring Services Limited [2002] IRLR 810

Up until now, case law has held that a worker who sticks rigidly to his or her contract of employment with the object of disrupting her employer's business is taking part in industrial action *Secretary of State for Employment v ASLEF* (no.2 [1972] 2 QB 455 CA). Trade unions have been hamstrung by the judgment of Lord Denning in that case who held that an employee who "takes steps willfully to disrupt the undertaking…is guilty of a breach of his contract" even when the steps taken by the employee, such as a work to rule, would not usually be considered to amount to a breach of contract. This means that it is necessary to comply with the notoriously onerous balloting and notification provisions to protect both the union and the worker from legal action by the employer.

This perceived wisdom is now in doubt after the decision of the Privy Council in **Burgess and others v Stevedoring Services Limited.**

The case concerned an overtime ban by the Bermudan Industrial Union (BIU) in the port of Hamilton. The definition of "industrial action" under Bermudan law includes "any concerted course of conduct which…….is carried out in breach of [the workers] contracts of employment…". The Court held it to be unlawful industrial action and granted an injunction against the officers of BIU.

BIU applied for the injunction to be discharged. They failed before the courts in Bermuda and appealed to the Privy Council in London.

The Privy Council distinguished between two situations:

- where the worker performs her duties within the confines of the contract in a way which does not suit the employer and is designed to be obstructive; and
- where the worker refuses to do things outside the terms of the contract.

The first situation may amount to industrial action, whereas the second does not.

Although the judgment is helpful, it needs to be handled with caution. The legal analysis is over-simplistic and is hard to reconcile with the developing law on terms implied into contracts of employment.

We suspect that courts will be quick to distinguish other cases in the UK on their facts: a key feature of the overtime arrangements was that BIU was responsible for organising overtime gangs and workers were only required to undertake overtime once they had been assigned to a gang. If they were not assigned to a gang because of BIU's actions, then they could not be held responsible for failing to work overtime.

As the Privy Council said, however, if the workers had been assigned to gangs and then refused (on a concerted basis) to work overtime, then the legal position may have been different - ie the workers may have been participating in "industrial action". In practice, the latter scenario is likely to be more analogous to bans on voluntary overtime in this country, but tantalizingly the Privy Council blurred the distinction between voluntary and compulsory overtime in their example. However what is heartening about this case is the willingness of the Court to distance itself from the full impact of Lord Denning's judgment that has so often been used against trade unions in strike action injunctions.

CONTRIBUTORS TO THIS ISSUE
RICHARD ARTHUR
MARY STACEY

EDITOR **MARY STACEY**
PRODUCTION **ROS ANDERSON-ASH**
NICK WRIGHT
PRINTED BY **TALISMAN PRINT SERVICES**

LELR AIMS TO GIVE NEWS AND VIEWS ON EMPLOYMENT LAW DEVELOPMENTS AS THEY AFFECT TRADE UNIONS AND THEIR MEMBERS. THIS PUBLICATION IS NOT INTENDED AS LEGAL ADVICE ON PARTICULAR CASES

VISIT US AT: **www.thompsons.law.co.uk**
OR
CONTACT US AT: **info@thompsons.law.co.uk**