Published by Thompsons Solicitors

CONTENTS

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 70 May 2002

Partners at work

Chief Constable of the Bedfordshire Constabulary v Graham [2002] IRLR 239

IT IS a commonly repeated statistic that many people these days meet their partners/spouses at work. However few expect their career to be affected or damaged by this.

The recent Employment Appeal Tribunal decision – **Chief Constable of the Bedfordshire Constabulary v Graham** is a welcome one. It means it will be difficult for employers to argue that spouses/partners cannot work together.

Ms. Graham was an inspector with the Bedfordshire Police Force. In April 1998 she married a Chief Superintendent, Mr. Minihane. The following year Ms. Graham successfully applied for a promotion to the division where her husband was chief superintendent.

The Chief Constable of Bedfordshire Police Force rescinded her appointment. He said it was inappropriate because her husband was the divisional commander and therefore her superior officer. He also said it would be difficult for officers under her supervision to make a complaint or lodge a grievance knowing of her relationship with the Divisional Commander.

Ms. Graham was later promoted into a different division so she did not lose pay or status.

However she brought a claim for direct and indirect sex discrimination, and for direct and indirect marital discrimination.

The claim for sex discrimination failed as it was held that a man would have been treated in exactly the same way as Ms. Graham would have been.

However the claims for indirect sex discrimination and direct and indirect marital discrimination succeeded.

The policy of Bedfordshire Police Force was that officers could not work with another officer to whom they were married or in a partnership relationship if one of the individuals was of a higher rank and in a supervisory role to the other.

Statistics showed as there were more women in relationships with other officers, a higher proportion of women were affected by this policy. The policy directly discriminated against married officers compared to single officers and it discriminated indirectly against married officers in the same way as it indirectly discriminated against women.

Equally of course a defence of justification can be raised by an employer in any indirect discrimination claim. The employer in this case said its policy was justified because of the problems of conflict which could arise, particularly when dealing with disciplinary matters or grievances of other officers.

The Tribunal was not satisfied with these arguments. In particular they felt that the issue of conflict could be readily dealt with by ensuring that a different officer, other than the spouse of the officer concerned, could deal with such cases. They also noted that a survey of other police forces found that many forces had married officers and couples working together at all ranks and some forces encouraged couples to work together.

The Employment Appeal Tribunal backed the decision of the original Tribunal at every point.

This is a practical and common sense decision which means employers would have to have compelling reasons to argue that spouses/partners cannot work together.

This is also a decision which reflects the reality of the modern workplace.

THOMPSONS SOLICITORS

Not Baird at all – workers' holiday judgement

Byrne Brothers v Baird and others [2002] IRLR 96

NOW THAT at least some employment rights extend beyond the confines of employees, the definition of a "worker" is becoming more important. The issue was recently considered in the case of Byrne Brothers v Baird. The Applicants in this case were self employed building trade workers who were required to sign a standard form sub-contractors' agreement. Under the terms of the agreement they were not entitled to holiday pay, sick pay or pension rights. So when they received no holiday pay for the Christmas/New Year break they presented applications to an Employment Tribunal claiming they were entitled to holiday pay under the Working Time Regulations.

Regulation 2(1), of the Working Time Regulations provides that a worker means:

"an individual who has entered into or works under (a) a contract of employment or (b) any other contract, whether expressed or implied, whereby the individual undertakes to do or perform personally, any work or services for another party to the contract, whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

This definition therefore potentially covers a wide range of individuals who provide personal services under a contract including many casual, freelance and some self employed workers as well as employees. However, the definition does not extend to self employed people who are genuinely pursuing a business activity on their own account.

The Tribunal found that as Mr Baird and his colleagues were obliged to perform personally work or services for the company and that they did not do so in the capacity of a business undertaking, they were workers for the purposes of the Regulations and accordingly entitled to holiday pay.

The company appealed to the EAT and the issues were:

(i) Whether the Applicants were undertaking personal work or services for the company and

(ii) whether the company was a customer of a business undertaking carried on by each of the Applicants.

There was a clause in the contract that provided that where the sub-contractor cannot provide these services, the sub-contractor may provide an alternative worker to undertake the services subject to obtaining the express approval of the contractors. The clause fell short of giving a sub-contractor a blanket licence to supply the contractual services through a substitute. The EAT held that a limited power to appoint substitute is not inconsistent with an obligation of personal service.

In respect of whether the company was a customer of business undertakings operated by the individual Applicants, the EAT stated they were going to focus on the term "carrying on a business undertaking" and "customer" rather than profession or client. In their view it was clear that the Applicants did not carry on a profession in the ordinary sense of the word and that the company was not a client. They noted that the term was not intended to have such a wide meaning.

The intention behind the Regulation was to create an intermediate class of protected worker, who on the one hand is not an employee, but on the other hand cannot in some narrower sense be regarded as carrying on a business.

The EAT concluded that the basic effect of the definition of worker is to lower the pass mark so that individuals who fail to qualify for protection as employees might nevertheless do so as workers. Hence, the EAT upheld the Tribunal's decision of concluding that the Applicants were not carrying on a business undertaking but were workers.

No escaping pregnancy protection

Jiminez Melgar v Ayuntamiento de Los Barrios [2001] IRLR 848
Tele Danmark A/S v Handels-Og Kontorfunktionaerernes Forbund I Danmark (HK) on behalf of Brandt-Nielsen [2001] IRLR 853

IS THERE an illogicality in the treatment of pregnancy discrimination cases as direct, and not indirect, discrimination? If a person is dismissed by reason of their current or future maternity absence, is that not dismissal because of the absence as opposed to dismissal because of gender? But then if it were to be treated as indirect discrimination, it would leave open the option of a possible justification defence.

The European Court has confirmed that pregnancy discrimination is direct discrimination. Their recent decision of **Jiminez Melgar v Ayuntamiento de Los Barrios** restates this position in holding that the non-renewal of a fixed term contract is direct discrimination which cannot be justified.

Mrs Jiminez Melgar was employed on a series of fixed term contracts. She claimed that the most recent was not renewed by reason of her pregnancy. The European Court was asked whether the non-renewal of a fixed term contract due to pregnancy was contrary to the Equal Treatment Directive, just as would be the case with the dismissal of a woman with a contract of indefinite duration. In a ruling which is clear in its commitment to the principle of the illegality of pregnancy dismissals, the Court confirms that non-renewal of a fixed term contract is direct discrimination and whatever the circumstances there can be no defence.

The rigidity with which this principle is applied is all the more marked in another recent European Court of Justice decision, **Tele Danmark A/S v Handels-Og Kontorfunktionaerernes Forbund I Danmark (HK)** on behalf of **Brandt-Nielsen**. Here, Mrs Brandt-Nielsen took a six month fixed term contract. It was agreed that she would undergo training for the first two months. During her training, she informed her employers that she was due to have a baby in the beginning of the fifth month of the contract. She worked one month after her training, and then was dismissed. Her dismissal was stated to be due to her not having informed her future employers that she was pregnant when she accepted the job, in circumstances when she would in effect only be able to work for a very small part of the fixed term contract.

The Court ruled that notwithstanding the nature and economic loss incurred by the employer, and regardless of whether the contract in question is an open ended one or a short fixed term one, dismissal of a worker by reason of her pregnancy is direct discrimination. The size of the employer also has no relevance to the issue of direct discrimination.

The employer argued that the dismissal was not due to the pregnancy but to two other factors. Firstly, that the employee would be unable to perform a substantial part of the contract by reason of her pregnancy. Secondly, that her failure to inform them of her pregnancy in circumstances when she knew when accepting the job she would be unable to perform a substantial part of it amounted to a breach of the implied duty of good faith. The Court did not accept this argument. The length of the contract had no relevance to the question of whether or not there is direct discrimination. What mattered, was that the dismissal was because of pregnancy: "the employee's inability to perform her contract of employment is due to pregnancy".

The blanket application of the principle that pregnancy dismissals are unlawful is welcome. Following the decision of the European Court in **Webb v EMO Air Cargo** [1994] IRLR 482, the prospect of short term contracts amounting to an exception to the usual pregnancy dismissal rules was always lurking in the background. It was not an attractive option. It would potentially have been open to employers to employ a woman of child bearing age on a fixed term contract so as to be able to dismiss her if she became pregnant. Such an option, following the **Melgar** and **Tele Danmar**k decisions, becomes clearly unlawful.

Health & Safety watchdog shows its teeth

'The Work of the Health and Safety Executive. Report and Proceedings of the Committee'
published by the Environment, Transport and Regional Affairs Select Committee
HCP 31-I, ISBN 0 10211700 4, price £8 from the Stationery Office

THE HEALTH & Safety Commission (HSC) has issued a new enforcement policy statement outlining when and how the Health & Safety Executive (HSE) and other health and safety enforcing authorities (eg local authorities) will take action to investigate and prosecute companies for breaches of health and safety law.

The publication revises the previous enforcement statement policy issued in 1995. It comes after the House of Commons' Environment, Transport and Regional Affairs Select Committee published a report in February 2000 that was scathing about the HSE's performance. It concluded that the HSE was failing to investigate a sufficient number of workplace accidents and was not bringing enough prosecutions against companies that flouted health and safety legislation.

In response, in the summer of 2000, the Government and the HSC announced plans to increase the number of investigations by the HSE into workplace accidents. Later in the autumn of 2000 the HSC launched a public consultation on proposed changes to the enforcement policy statement.

The policy applies to all Britain's enforcing authorities, including the HSE and all local authorities in England, Scotland and Wales.

It makes clear to inspectors, employers, workers and the public, what standards they should expect when it comes to enforcing health and safety in the work place.

The policy determines when enforcing authorities should take action. The enforcing authorities have a range of options at their disposal to enable them to secure compliance with the law and to ensure a proportionate response to criminal offences committed by companies. These options include writing warning letters to companies, serving improvement and prohibition notices, withdrawing approvals, varying licence conditions, the issue of formal cautions and their ultimate deterrent, prosecution.

Decisions on whether to investigate a workplace incident must take into account a number of factors including:

- The severity and scale of potential or actual harm.
- The seriousness of any potential breach of health and safety law.
- The offending company's previous health and safety record.
- The wider relevance of the incident, including the public concern caused by it.

The policy sets out when a prosecution should normally take place in the public interest. These include any one of a number of circumstances, such as:

- Where a death has occurred as a result of a breach of health and safety legislation.
- When the gravity of the offence, taken together with the seriousness of any actual or potential harm, or the general record and approach of the offending company warrants it.
- If there has been a reckless disregard of health and safety requirements by the offending company.
- If there have been repeated breaches by the offending company of health and safety law which give rise to significant risk, or persistent and significant poor compliance.
- When a company's standard of managing health and safety is far below what is required by health and safety law and gives rise to a significant risk.

The HSE in its 1997 guidance – Successful Health & Safety Management (often referred to as HSG65) states that accidents, ill health and incidents are seldom random events and that they generally arise from failures of control by management. It says the immediate cause may be a human or technical failure, but they usually

arise from organisational failings which are the responsibility of management.

Some companies try to pass the buck by blaming health and safety failures on frontline workers who have made a mistake. However, in another guidance published by the HSE in 1999, entitled Reducing Error, Influencing Behaviour (often referred to as HSG 48), it says:

"Over the last 20 years we have learnt much more about the origins of human failure. We can now challenge the commonly held belief that incidents and accidents are the result of a 'human error' by a worker in the 'front line'. Attributing incidents to 'human error' has often been seen as a sufficient explanation in itself and something which is beyond the control of managers. This view is no longer acceptable to society as a whole. Organisations must recognise that they need to consider human factors as a distinct element which must be recognised, assessed and managed effectively in order to control risks."

In the past there have been very few prosecutions of directors and senior managers when there have been serious health and safety breaches. But, the policy makes it clear that the conduct of management should be considered. In particular enforcing authorities should consider the management chain and the role played by individual directors and managers. It says action should be taken by them where the inspection or investigation reveals that the offence was committed with their consent or connivance or to have been attributable to neglect on their part. The policy statement also says, where appropriate, enforcing authorities should seek to have directors disqualified under the Company Directors Disqualification Act 1986.

Bill Callaghan, Chairman of the HSC, commented on the publication of the enforcement policy statement that

"Inspectors must consider carefully the role of individual managers and directors when serious failures do occur - and ensure that appropriate action is taken against them if the evidence justifies it".

He also said:

"The HSC relies on the co-operation of responsible bosses to safeguard the health and safety of Britain's work force and tries to give every encouragement for them to do so."

Last year the HSC issued a guidance entitled Directors' Responsibilities for Health & Safety. The guidance sets out five action points which are:

1. The Board needs to accept formally and publicly its collective role in providing health and safety leadership in its organisation.
2. Each member of the Board needs to accept his/her individual role in providing health and safety leadership for their organisation.
3. The Board needs to ensure that all Board decisions reflect its health and safety intentions, as articulated in the organisation's health and safety policy statement
4. The Board needs to recognise its role in engaging the active participation of workers in improving health and safety.
5. The Board needs to ensure that it is kept informed of, and alert to, relevant health and safety risk management issues. The guidance recommends that one of the Board members is appointed as the "Health & Safety Director".

Mr Callaghan concluded with a warning for negligent employers: "Now, more than ever, there is no excuse for those at the top to be ignorant of their responsibilities or to fail to take effective action. If you cannot manage health and safety, then you cannot manage".

With this enforcement policy statement the health & safety watchdog has shown its teeth. We will now have to wait and see whether it actually bites.

TUPE: Engineered to fit employment rights?

Wynwith Engineering v Bennett [2002] IRLR 170 (EAT)

RCO Support Services Limited v UNISON and others [2002] EWCA Civ 464 (Court of Appeal)

Temco Service Industries SA v Imzilyen (Case C-51/00) (European Court of Justice)

THE CONSULTATION period for the proposed revisions to the TUPE Regulations ended in December 2001. The draft Regulations are still awaited. In the meantime, courts here and in Europe continue to grapple with applying the Regulations and the Acquired Rights Directive to differing sets of circumstances where workers are affected by a change of employer.

The latest in a line of welcome decisions by the Court of Appeal is **RCO v UNISON**, in which Thompsons represented UNISON. The transfers concerned involved cleaning and catering contracts. No cleaners transferred and only one of the catering staff.

The Employment Tribunal decided that each of the catering and cleaning services amounted to an undertaking: a distinct economic entity, in that "particular people did particular jobs in particular places for particular people; all the work in either group was homogeneous ...each was a group with its own identity; each staffed by people dedicated to particular tasks". RCO did not appeal against this finding.

The appeal concerned the Tribunal's finding that there had been a transfer. Both the EAT and the Court of Appeal upheld this finding. The central arguments concerned the proper interpretation and application of the **Suzen** decision. Lord Justice Mummery rejected the argument that there can never be a transfer of undertaking in a contracting out case if neither assets nor workforce are transferred. Whether or not the majority of workers are taken on by the employer is only one of the facts to be considered as part of the overall assessment required by the **Spijkers** decision. The Court went on to conclude that the facts as a whole showed that the cleaning and catering services had retained their identity following the transfer. They "had a discrete organisation for the exercise of special and important support skills, including established operating methods and training, and they were an integral part of the distinctive in-patients infrastructure" replicated after the transfer.

This is a positive approach which limits the scope for avoidance by employers. However, less helpfully, Lord Justice Mummery cast some doubt on the Appeal Court's (and his own) views in the **ECM** case that the court should take into account the employer's motive for failing or refusing to take on staff from the old employer. The Appeal Court had previously taken into account a refusal to take on staff in order to avoid TUPE and concluded that this did not prevent a transfer. Lord Justice Mummery now expresses some doubt about this, but does go on to say that the circumstances of any decision not to take on the workforce is to be taken into account.

The key part of the decision is that a refusal or failure to take on staff does not of itself mean there is no transfer.

A different set of circumstances was considered by the European Court of Justice in **Temco Service Industries.** Volkswagen in Brussels contracted out its cleaning to a company which in turn sub-contracted to a subsidiary. Volkswagen terminated the contract and signed a contract with a new contractor, Temco. The previous contractor dismissed all bar four of the staff. In accordance with Belgian law, Temco had to offer jobs to the majority of the dismissed staff as required by a mandatory collective agreement.

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

The Court reasserted (as in previous cases) that in the case of labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity which may retain its identity (and thus be a transfer) if the majority of staff are transferred. The fact that they were transferred under a collective agreement did not prevent there being a transfer.

Consistent with its previous decisions, the Court also said that it did not matter that there was no contractual link between the old employer (the sub-contractor) and Volkswagen or Temco: a transfer may take place where an organisation enters into two successive contracts with different organisations.

This decision is not particularly surprising, but it does represent a welcome continuity with earlier decisions.

A case where the EAT decided against a transfer was **Wynwith Engineering**. Here staff were made redundant, but the need for further work arose so they were engaged to provide their services through an employment agency who employed them for this purpose. They covered a wide group of workers within the plant, with a wide range of skills and occupations. They did not work together as a group, but were integrated with other staff.

The EAT decided that this was not a distinct undertaking. The employees were defined only by their employment relationship with the company and did not form any organised grouping which could be regarded as an economic entity. There was therefore no transfer.

The decision in this unusual set of circumstance is unlikely to have a wider negative impact in other cases.

continued from page 8

would have made. In **Armitage v Johnson** [1997] IRLR 162 EAT, the applicant received £21,000 and £7,500 for aggravated damages. In that case the tribunal noted that the applicant had been subjected to an 18-month campaign of appalling treatment on racial grounds. In Ms Vento's case the EAT said a proper award in line with the authorities would be £25,000 for injury to feelings and £5,000 for aggravated damages.

In relation to the recommendations it was argued on appeal that the tribunal's jurisdiction is limited to making recommendations which obviate or reduce the adverse effect of the act of discrimination on the complainant and that they cannot make recommendations which are merely generally ameliorative. The EAT held that the recommendation made by the tribunal was appropriate. Section 65(1)(c) of the RRA (1976) gives the tribunal an extremely wide discretion and it is good practice for any employer, faced with findings such as those made in Ms Vento's case, to consider its behaviour and discuss the findings of the tribunal with those concerned. However, the EAT held that the tribunal had erred in recommending that each of the officers should be invited to apologise in writing to the applicant.

The case demonstrates the importance of the recommendation possibilities as part of the remedy for unlawful discrimination, but also the limitations. It also underlines the need for applicants and their advisors to be be able to back up a claim for financial compensation with evidence to support the claim – both of likely future losses and the extent of the injury to feelings and the damage done.

Remedial action?

Chief Constable of West Yorkshire v Vento (No.2) [2002] IRLR 177

VENTO (No. 2) confirms the approach to be adopted by tribunals in making awards of compensation, including awards for injury to feelings, and in making recommendations.

Ms Vento joined the West Yorkshire police as a probationary constable in December 1995. She was not confirmed in post at the end of her probationary period in December 1997, and she was therefore dismissed.

Following her marriage breakdown Ms Vento alleged that that there was a change in attitude towards her from her superiors. She alleged that they began to show an unwarranted interest in her private life, that they bullied her and subjected her to sexual harassment, and that they placed her under undue scrutiny.

Ms Vento's claim of sex discrimination was upheld by the Employment Tribunal who decided that in similar circumstances a male probationer would have been offered a permanent position.

The tribunal awarded compensation of £257,844. This consisted of the following:

1 £165,829 for future loss of earnings. This was calculated on the basis that there was a 75% chance that Ms Vento would have completed a full police career had she not been dismissed, serving for 21 years. The tribunal accepted that the statistical evidence showed that only 9% of women police officers who left service in the period 1989 to 1999 had served for over 18 years. However, it noted that family-friendly policies were being introduced, that social conditions were changing, and that Mrs Vento had shown a strong desire to provide materially for her children.

2 £65,000 for injury to feelings including £15,000 by way of aggravated damages. The award of £50,000 for injury to feelings reflected the tribunal's finding that Mrs Vento had been subjected to bullying from her superiors following the breakdown of her marriage, that this had contributed to clinical depression, and that she had then had the shock and disappointment of being dismissed and had gone through a tribunal hearing at which her private life had been subjected to minute scrutiny. The additional award of £15,000 for aggravated damages reflected the tribunal's finding that the Chief Constable and his officers "have throughout acted in a high-handed manner" and that their attitude was one of "institutional denial".

3 £9,000 for personal injury,

4 £18,015 for interest.

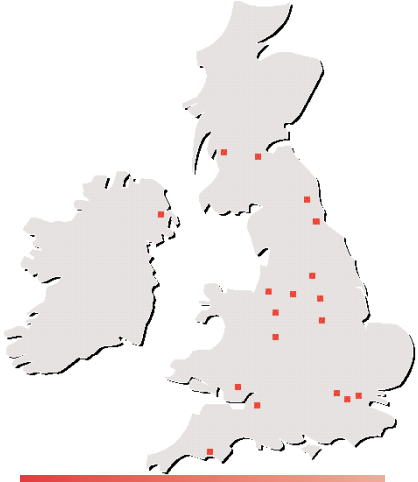
5 The tribunal also made recommendations that Ms Vento should receive apologies from various individual officers. It further recommended that the Deputy Chief Constable should interview named police officers and discuss with them relevant parts of the decisions of the employment tribunal and the EAT on liability.

The Chief Constable appealed against the remedies awarded.

On appeal the EAT set aside the award for loss of earnings and remitted to a differently constituted tribunal for reconsideration. In terms of the future loss of earnings the EAT held that there was no proper basis upon which the tribunal could have justified departing so far from the statistical evidence that only 9% of women who had left the police force had served for more than 18 years.

The EAT held that the award of £50,000 for injury to feelings plus £15,000 aggravated damages was too high and well outside the range which any tribunal properly directing itself to the cited authorities

continued on page 7



CONTRIBUTORS TO THIS ISSUE
MIKE APPLEBY
STEPHEN CAVALIER
NICOLA DANDRIDGE
RAKESH PATEL
MALIHA RAHMAN
KATE ROSS
EDITOR **MARY STACEY**
PRODUCTION **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