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Cross employers

South Ayrshire Council v Morton [2002] IRLR 256

THE SCOPE of comparisons in Equal Pay Act cases has been the subject of numerous Tribunal decisions recently. At issue is whom the Applicant can choose as her Comparator so as to compare her pay with his in an equal pay case. The trend of these cases has been to broaden the scope of the comparisons. The recent Scottish case of South Ayrshire Council v Morton has extended the scope still further.

Ms Morton's case is one of 600 of originating applications lodged by primary school teachers in Scotland who are seeking to compare their pay with the pay of secondary school teachers. The primary school teachers are employed by different education authorities to the secondary school teachers. Despite the different employers, the pay scales of both primary and secondary teachers are established by the Scottish Joint Negotiating Committee (SJNC) established under the Education Scotland Act. The SJNC determines the pay scales: the Education Authority implements the scales as they wish.

South Ayrshire Council has resisted Ms Morton's Equal Pay Act claim on the basis that although they employ her, they have no control over the pay of her comparator who is employed by a different authority. However, the Employment Tribunal, the Employment Appeal Tribunal and now the Inner House of the Court of Session (the Scottish equivalent of the Court of Appeal) have all upheld the validity of Ms Morton's comparator. There are two reasons given for this. Firstly, under European and UK equal pay law (Article 141), it has already been established that cross-employer comparisons can be made where the applicant and comparator are employed "in a loose and non-technical sense in the same establishment or service". This, according to the Court of Session in **Morton**, would cover not only education authorities in Scotland, but an applicant and comparator employed in the same branch of a public service subject to a uniform system of pay and conditions set by a statutory body. Secondly, and more radically, the Inner House rely on an early decision of the European Court of Justice in **Defrenne v Sabena** (1976 ECR 455) to decide that the scope of Article 141 covers any situation where the pay of the applicant and comparator is governed by an underpinning statutory regime or national collective agreement, whether that collective agreement has statutory underpinning or not.

The implications are enormous.

The European Court of Justice will shortly be considering the same issue in **Lawrence v Regent Office Care Ltd** ([2000] IRLR 608) and **Allonby v Accrington and Rossendale College** (2001 IRLR 364). We already have the Advocate General's opinion in **Lawrence** which is extremely encouraging. We must wait for the European Court of Justice's judgment but it seems likely that cross employer comparisons will be acceptable where, to use the words of the Advocate General in **Lawrence**, the "regulation of the terms and conditions of employment actually applied is traceable to one source".

THOMPSONS SOLICITORS

Court rules on 'integrated' pension schemes

Trustees of the Uppingham School Retirement Benefit Scheme for Non-Teaching Staff and another v Shillcock [2002] EWHC 641 (Ch)

WHAT IS an integrated pension scheme? Integration refers to the design of pension scheme benefits to take into account all or part of the state scheme benefits that the member is deemed to receive. In other words, the pension scheme will reduce the amount of pension it pays to take account of the basic state pension or SERPS.

They can also restrict membership of the scheme to workers earning more than the Lower Earnings Limit (LEL) which is the access point for national insurance contributions. 38% of private sector final salary pension schemes (covering 54% of members) integrate benefits with the state scheme.

The difficulty with the schemes is that they tend to disadvantage women and part-timers. Statistically, women earn less than men which firstly means they may not earn enough to join the occupational pension scheme and if they do, they will receive proportionately less from the scheme because of integration whilst their contributions to the pension scheme are not similarly integrated.

The Uppingham School Retirement Benefit Scheme for Non-Teaching Staff ("the Scheme") is an integrated scheme. Employees are eligible to join the Scheme only if they earn an annual salary in excess of the lower earnings limit, i.e. the limit for Class 1 National Insurance contributions specified in accordance with s1 of the Social Security Pensions Act 1975. In addition, employees who are admitted to membership of the Scheme accrue benefits in respect of annual salary less a deduction equal to the lower earnings limit.

Mrs Shillcock complained to the Pensions Ombudsman that she had been excluded from membership of the Scheme in circumstances which amounted to indirect sex discrimination. The Pensions Ombudsman upheld Mrs Shillcock's complaint.

On appeal, the High Court found that there was no indirect discrimination as there was no relevant difference in treatment; and furthermore that even if there was that difference was objectively justified.

A relevant difference in treatment

The Court held that, applying the decision of the House of Lords in **Barry v Midland Bank plc** [1998] 1 All ER 805, [1998] IRLR 138, the correct question in terms of sex discrimination was whether there was a relevant difference in treatment between those earning more, and those earning less, than the lower earnings limit. The Court had regard to the purpose of the deduction of the lower earnings limit: "to achieve a broad integration between benefits under the Scheme and the provision of the state pension". Having regard to this purpose, there was no relevant difference in treatment.

The Court also held that as the deduction applied equally to all employees, it was not discriminatory. Where the method used is not discriminatory "one sex cannot object that they would have done better against the other if a different method had been employed".

The decision of the High Court highlights the inadequacies of the decision of the House of Lords in **Barry**. In that case, the House of Lords considered whether a payment made under a severance scheme was indirectly discriminatory. The severance scheme only took into account salary at the date of termination, rather than salary throughout the employment. Ms Barry's hours had changed from full to part time and the calculation of contractual redundancy payments took no account of her long service as a full time worker and was calculated only on her part-time hours at the date of redundancy. The House of Lords held that as the severance scheme treated both men and women in exactly the same way, there was no

relevant difference in treatment.

However, on any understanding, indirect discrimination allows the same treatment of two groups to be challenged if that treatment has a disparate impact. In **Barry**, the fact that the same rule was applied to all employees, both part-time and full-time, was used as a reason for holding that there was no difference in treatment. Surely, though, the existence of a rule that applies equally i.e. one that does not discriminate directly, is the very essence of an indirect discrimination claim?

The House of Lords were also concerned, in deciding whether there was any difference in treatment, with the purpose of the payments made under the severance scheme. As the purpose was to cushion the effects of loss of employment, the Court considered that it was not indirectly discriminatory for the Scheme to ignore the previous full time service of an employee who was part time at the time of the termination. Again, it seems strange that the subjective purpose of a payment is taken into account at the initial stage of establishing whether there is a difference in treatment rather than at the final stage of deciding whether the treatment in question was objectively justified.

Objective justification

In the light of its conclusion on the existence of discrimination, it was not strictly necessary for the Court to look at the issue of whether the policy was objectively justified. However, the Court held that the policy of the Scheme was that it was sufficient that all employees had the opportunity to accrue a state pension, rather than a pension under the Scheme, on earnings equal to, or less than, the lower earnings limit. The fact that the policy applied irrespective of whether employees actually chose to make such contributions did not render that policy illegitimate. To leave it to those earning below the lower earnings limit to decide whether to make Class 3 contributions to the state pension scheme, or whether to make no contributions, and to ensure such employees could not have a double pension in respect of such earnings, was not illegitimate.

Conclusion

No further appeal will be made, but it seems unlikely to be the end of this issue. Although the reasons advanced by the High Court are consistent with the reasoning of the House of Lords in **Barry**, it is strongly arguable that they are contrary to the jurisprudence of the European Court of Justice. Many trade unions are campaigning against integration (clawback) and an Early Day Motion in the House of Commons calling for its abolition received significant support in 1999.

Give me a reason

THE RIGHT to written reasons for dismissal is often overlooked and can be extremely valuable. The right is contained in section 92 Employment Rights Act 1996 and applies to all forms of dismissal apart from constructive dismissal. There are two important conditions – firstly that the dismissed employee must have asked for written reasons and the employee must have one year's service at the effective date of termination of employment. In pregnancy dismissals not even these conditions apply.

The entitlement is to written reasons within fourteen days of the request. If the employer either fails to provide written reasons or the reasons are inadequate or untrue, the employee is entitled to two weeks gross pay in compensation – and that is actual pay – the limit on a week's pay of £250 does not apply. What's more the reasons given in the written statement are admissible in evidence so it is often possible to drive a wedge between reasons given in response to a request and the employer's evidence in a tribunal thus maximising the opportunity of a finding of unfair dismissal and breach of the written reasons duty. But it is not necessary to win the unfair dismissal claim, or even to bring one, in order to succeed in a claim for breach of the right for written reasons for dismissal.

If an employee is dismissed whilst pregnant or on maternity leave, she is entitled to written reasons without having to request them. It is depressing to see how many women dismissed during this time do not claim this important right and how rarely employers remember to provide written reasons.

Future equality

Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin. Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation

DISCRIMINATION LAW as we know it is about to change. With the arrival of two new European Directives on Race and Employment, will come new rights prohibiting discrimination on the grounds of religious belief and sexual orientation by 2003, and on the grounds of age by 2006. In addition, both our existing Race Relations Act and Disability Discrimination Act will need to be expanded, with the Race Relations Act needing to be changed by 2003 and the Government committed to changing the Disability Discrimination Act by October 2004.

The Government has just completed a first round of consultation on the two Directives. In their consultation paper "Towards Equality and Diversity", some provisional views are expressed as to how they see the Directives being implemented. Further consultation is anticipated later this year. At the moment therefore we do not know exactly what the new laws will look like. Nonetheless, we can draw some preliminary conclusions.

SEXUAL ORIENTATION

Desperately overdue, the Employment Directive will require Member States to introduce laws outlawing discrimination on the grounds of sexual orientation. A number of difficult issues will need to be resolved. For example, the consultation paper raises the question of how "sexual orientation" should be defined: should it be specified as "heterosexual, bisexual or homosexual" or left open for the Tribunals to determine (and so for example cover cross dressing)? On a separate point, the consultation paper also raises the vexed question of the extent to which pension benefits for same sex partners are to be protected. Although the document concedes that discrimination on the grounds of sexual orientation in relation to pension benefits is on the face of it covered by the Directive, they limit its application by pointing to the exemption in the Directive which states that rights are "without prejudice to national laws on marital status and the benefits dependant thereon". In a conservative interpretation of this provision, the consultation document suggests that this exemption will allow pension scheme rules to restrict benefits to surviving (married) spouses. What will not be allowed any more is less favourable treatment of homosexual (unmarried) partners in comparison to unmarried heterosexual partners. Whether this interpretation is a correct interpretation of the Directive is debatable.

Concerns have also been expressed at the confusion that is likely to arise in that the Employment Directive only covers employment issues, whereas our current Sex Discrimination Act covers not only employment but also access to goods, facilities and services. So far attempts to establish that the Sex Discrimination Act, interpreted in the light of the Human Rights Act, already covers sexual orientation have failed, but the House of Lords will decide the issue later this year in **Pearce v Governing Body of Mayfield School** (2001 IRLR 669). If this argument succeeds, then it is likely that the all areas of protection under the Sex Discrimination Act will cover sexual orientation discrimination, but if it does not, the new sexual orientation provisions could cover no more than employment. A similar confusion will also arise with the Race Relations and Disability Discrimination Acts. It is to be hoped that during the course of the consultation process, the lack of consistency between the new rights under the Directive and our existing discrimination laws will be resolved and made coherent.

RELIGION OR BELIEF

New rights not to be discriminated on the grounds of religion or belief will need to be implemented by 2003. This area is also controversial. The consultation paper seeks views as to what should be covered by the words "religion or belief". Should specific religions be named, or should it be left to the discretion of the Tribunals? Where does this leave marginal religious groups such as, for example, the Scientologists? The consultation paper also seeks views on what exemp-

tions should be available to churches that require their staff to be of their religion. The terms of the Directive potentially allow discrimination where it relates to the requirements of the organisation's "ethos". The consultation document asks whether this means that, for example, a denominational school would be allowed to recruit staff only of a particular denomination, regardless of the actual demands of the job or only where the demands of the particular job require it.

DISABILITY

The Disability Discrimination Act will require amending in the light of the Directive, and the consultation paper states that amendments will be made by October 2004 at the same time as the other changes to the Act being proposed as a consequence of the Disability Rights Task Force report.

The Directive's provisions in relation to disability differ to discrimination on the other grounds, in that in place of the traditional indirect discrimination protection, the alternative duty to adjust is available. However, the relationship between indirect discrimination and the duty to adjust is not clear, either in the Directive or the consultation document. Likewise, the consultation paper does not touch upon the question of whether there will need to be any changes to the Disability Discrimination Act's current requirement for the employer to have knowledge of the disability before they are under any obligation to adjust (Section 6(6)). The justification defence will no longer be sustainable when the Directive is in force and the rather subjective justification test set out in **Jones v The Post Office** may be too low a threshold to comply with the Directive. Many of the current exclusions and exemptions under the Disability Discrimination Act will need to be removed such as the small employer exemption, occupational restrictions such as police officers and fire-fighters as well as the restrictions in relation to pensions, performance related pay and insurance.

AGE

Some of the most radical changes are likely to come with the implementation of the new provisions on age. Laws prohibiting discrimination on the grounds of age will need to be in place by 2006.

The consultation paper seeks views as to whether retirement ages should be permitted or outlawed. On the one hand they allow younger staff and under represented groups to be recruited and promoted, and they also facilitate a suitable exit for older staff. On the other hand, there are many employees who can actively contribute to an organisation and for whom a retirement age of 60 or 65 unfairly and inappropriately deprives them of a job. The Government has not yet decided how the age provisions are to be implemented. An indication of their thinking may be gained from the very recent abolition of minimum age requirements for judicial posts and the reversion to a retirement age of 70.

HARASSMENT

As the law now stands, we do not have any statutory definition of harassment in the current discrimination legislation, though Tribunals have long recognised its existence as a form of direct discrimination. This will now change, and it appears from the consultation paper that the same definition of harassment is likely to apply to all forms of discrimination. The definition proposed will follow the definition in the Directive, which covers unwanted conduct (on one of the discriminatory grounds) which takes place "with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment".

The consultation document invites views as to whether Tribunals should judge harassment by reference to whether "a reasonable person would have regarded the conduct concerned as violating the dignity of the complainant". Many unions and other parties have expressed concern at this definition which ignores the perception of the individual concerned, leaving the assessment of whether or not harassment has taken place in the hands of the judges.

POST EMPLOYMENT VICTIMISATION

If a former employee has been discriminated against in the provision of a reference after their employment has ended, they are currently protected under the Sex Discrimination Act, but not under the Disability Discrimination Act or the Race Relations Act. This anomalous situation will need to change under the two Directives. It is not clear from the consultation paper whether it is proposed that the discrimination be extended to cover all post employment circumstances, such as appeals, or just the provision of letters of reference.

The consultation process on the Employment and Race Directives is ongoing, with a further consultation paper expected later this year.

● Copies of Thompsons' detailed submissions on the two Directives are available from the Employment Rights Unit, Congress House.

Whistle blowing in the wind

Parkins v SODEXHO Ltd [2002] IRLR 109
The Met Office v Edgar [2001] ICR 149
Miklaszewicz v Stolt Offshore Ltd [2002] IRLR 344

THE PUBLIC Interest Disclosure Act 1998 has now been in force for nearly 3 years. So far there have been very few reported cases, although both anecdotal evidence and newspaper reports of cases would suggest the provisions are being well used in Employment Tribunals. The Act started life as a Private Members Bill and in response to a number of well publicised whistleblowing cases where employees who blew the whistle were sacked. The Bill was taken up by the Government and came into force on 2 July 1999. The Act amends the Employment Rights Act 1996 where its main provisions are now found.

The purpose of the Act is to strike a balance between the interests of the whistleblowing employee and those of the employer. So whilst there is a wide category of "protected disclosures" (see box) to get protection an employee must make the disclosure in the accepted way, normally by bringing the matter to the employer itself. Disclosure to the press, which is right at the end of the scale of qualifying disclosures is subject to considerable conditions and must not be for payment. Many employers' response to the Act has been to introduce formal whistleblowing or concern policies which set out a procedure for bringing concerns to the attention of the employer.

The provisions of the Act apply not only to employees but also to the wider definition of worker. A worker who has the protection of the Public Interest Disclosure Act has protection against detriment (Section 47B) and dismissal (Section 103A). Dismissal of a whistleblower is automatically unfair. Interim relief is available (Section 128) and there is no statutory maximum to the compensatory award.

One of the first issues to be referred to the courts in relation to the legislation was when the disclosures had to been made to qualify for protection. Did the legislation only protect those who made qualifying disclosures after 2 July 1999?

Miklaszewicz v Stolt Offshore Ltd is a decision of the Court of Session in Scotland. In 1993, Mr Miklaszewicz, then an employee of Stolt Offshore, reported them to the Inland Revenue for fraudulently trying to change his status from employee to self employed. Stolt dismissed him for contacting the Revenue. Later Stolt were prosecuted by the Revenue and fined. In 1999, Mr Miklaszewicz found himself employed by Stolt again due to a number of TUPE transfers. In September 1999, he was again dismissed, this time purportedly for redundancy. He brought an unfair dismissal claim relying on section 103A. As a preliminary issue it was considered whether or not he could bring a claim relying on a disclosure which was made some six years before the dismissal which was the subject of his Employment Tribunal claim.

Both the EAT and Court of Session found that he could. It was the dismissal itself which triggered the employee's entitlement to rely on the statutory protection provided. It is after dismissal that the Court is required to consider whether the reason for dismissal was because of the disclosure. The Court commented that there was no unfairness to employers in this approach "Any employer who, since 2 July 1999 is contemplating the dismissal (or victimisation) of an employee for making a qualifying disclosure must be taken to be aware that if he does so the disclosure will be treated as a protected disclosure". Whether the disclosure was before or after 2 July 1999 is therefore immaterial.

The same point came up in **The Met Office v Edgar.** Mr Edgar worked at the BBC Weather Centre and in March 1999 made a complaint of bullying and harassment to his employer about the conduct of his manager. His complaint was investigated and the person he had complained about was disciplined.

A QUALIFYING DISCLOSURE?

1 A 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show one or more of the following—

a that a criminal offence has been committed, is being committed or is likely to be committed,

b that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

c that a miscarriage of justice has occurred, is occurring or is likely to occur,

d that the health or safety of any individual has been, is being or is likely to be endangered,

Mr Edgar had been off sick during the course of the investigation and disciplinary action. He wanted to return to work but in February 2000 he was told that he would not be returning to the BBC weather centre. Mr E said that this was to his detriment both in relation to his career and earning power. He brought his claim in the Tribunal under Section 47B. As a preliminary point the Tribunal determined that despite the fact the original disclosure was made before the Act was in force it would be contrary to public policy not to allow the employee the benefit of the protection of the Act.

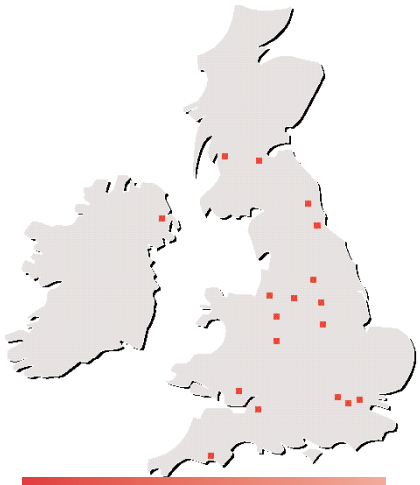
Parkins v SODEXHO Ltd is a case which considers the nature of a qualifying disclosure and in particular Section 43 (1)(b) "that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject". Mr Perkins was dismissed with less than one year's service so could not bring an ordinary unfair dismissal claim. He said that he was entitled to bring a claim that his dismissal was automatically unfair and an interim relief application because he had been dismissed because he had raised a matter of health and safety and had made a protected disclosure under the Act. Mr Perkins alleged that he was sacked after complaining about a lack of adequate on – site supervision which he said gave rise to a breach of contract and therefore involved a protected disclosure within Section 43 (1)(b).

The EAT said that a legal obligation could be one which arose under a contract of employment but that for the purpose of Section 43(1)(b) it is not sufficient that there has simply been a breach of contract. What has to be shown is first a breach of contract as being a breach of a legal obligation under that contract. Secondly, the worker must have a reasonable belief that this has, is, or is likely to happen. Thirdly, the EAT held "there must be a disclosure of that which is alleged to be the reason for dismissal. In other words, where it is a breach of the contract of employment, the worker is bound to make his case on the basis that the reason for dismissal is that he complained that his employer has broken the contract of employment".

So although it is possible to show a breach of an employment relationship can be a qualifying disclosure it will only be in the clearest cases that Tribunals will be prepared to find a breach.

For advisers it is important that reasons for detriment or dismissal are fully explored before discounting the possibility of a claim for anyone with less than one year's service. Equally, the Government made clear in introducing the legislation that it was not intended to be a complainers charter and only gave protection as long as internal procedures were used. Courts will be slow to find public interest disclosure where a worker is not prepared to utilise internal concern procedures.

Career breaks



Curr v Marks & Spencer plc (2002) All ER (D) 76

CAREER BREAKS may not be all that they seem, according to the Employment Appeal Tribunal in Curr v Marks & Spencer plc. In a majority decision, the Employment Appeal Tribunal conclude that during a four year career break there was no contract of employment but there was continuity for the purposes of the Employment Rights Act 1996.

Mrs Curr worked as a manager for Marks and Spencer. She took a career break for four years in accordance with their management career break scheme. This involved her resigning from her job and being given her P45. During the four years there were a number of conditions. In particular, she had to keep in touch with Marks and Spencer, not take up any other paid employment, and work a minimum of two weeks each year (or part time equivalent). At the end of the four year period, she would be guaranteed a management post though it might not be in the same function or at the same level as her previous job.

Mrs Curr returned to work after her career break. Four years later she was made redundant. The issue was whether her continuous service for the purpose of calculating her statutory redundancy payment was based just on her four years service, or whether continuity was preserved before and throughout the career break.

The Employment Appeal Tribunal overturned the Employment Tribunal in finding that continuity was preserved. The basis of the decision was that the career break was a period of non-employment where continuity is preserved as set out in section 212(3) of the Employment Rights Act : "any week… during the whole or part of which an employee is… (c) absent from work in circumstances such that by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose". By definition, this section will only come into play where there is no actual contract of employment. But a career break scheme will nonetheless amount to an arrangement between the employer and employee relating to the employee's employment. In this case, the ongoing arrangements were, according to the majority of the Employment Appeal Tribunal, an arrangement that could only sensibly be described as "continuing the employment arrangement", albeit not by way of an employment contract.

The most obvious implications of this decision, if it is not overturned on appeal, are that career breaks will count in calculating continuity for redundancy and unfair dismissal purposes – both in terms of calculating service in order to qualify for the rights and also for calculating compensation. It is also likely to apply in respect of other employment rights which are dependent on a period of prior continuous service, such as additional maternity leave and parental leave. It should not however mean that a woman on career break is a worker for the purpose of the Working Time Regulations (eg entitlement to paid annual leave). Nor should it mean that they are an employee for any benefits under statute or contract which are dependent on employment status such as under a contractual redundancy scheme nor in relation to rights that follow on from a dismissal such as unfair dismissal or redundancy since an employee can only be dismissed if they have an employment contract.

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