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CONTENTS

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Night nurses bank minimum wage

British Nursing Association -v- Inland Revenue (National Minimum Wage Compliance Team) [2002] IRLR 480 CA

The National Minimum Wage Compliance Team is an arm of the Inland Revenue charged with the task of enforcing the minimum wage with extensive powers to bring infringing employers to the Tribunal. It has had a remarkable track record of success with well selected and well prepared cases. The result is greater compliance with the NMW, more money for workers and more tax and NI revenue for the Treasury.

British Nursing Association -v- Inland Revenue (National Minimum Wage Compliance Team) concerned workers who operated a telephone booking service for a bank nurse agency. During the day the service was conducted from the employer's premises, but the night shift worked from their homes. The calls were diverted to the night "duty nurse" who would take the call and book the nurse. The workers were paid an amount per shift.

The employers considered that the staff were not working when they were not actually answering the phone and therefore not entitled to the minimum wage during these periods. Their pay therefore fell below the level of the minimum wage if calculated over their entire shift period. The nurses and the NMW Compliance Team disagreed.

A worker is entitled to be paid at least the rate of the NMW for all periods of "time work". The NMW Regulations as they then were provided that "In addition to time when a worker is working, time work includes time when a worker is available at or near a place of work, other than his home, for the purposes of doing time work, and is required to be available for such work except that, in relation to a worker who by arrangement sleeps at or near a place of work, time during the hours he is permitted to sleep shall only be treated as being time work when the worker is awake for the purposes of working".

So the employer's argument was that the night shift staff were not actually working apart from the time on the phone and, as they worked from home, were excluded by Regulation 15(1) from pay for the other periods.

The Employment Tribunal, the Employment Appeal Tribunal and now the Court of Appeal disagreed. Cutting right to the heart of the issue and with an enviable clarity the Court of Appeal stripped the fallacy of the employer's argument bare. The truth of the matter is that an employee engaged to operate a night-time telephone service from home is "working" when waiting to answer the phone. It would not be argued that an employee sitting at the employer's premises during the day waiting for phone calls was only working, in the sense of only being entitled to remuneration, during periods when he or she was actually on the phone. It was no different at night when the same service was being provided.

Practice makes custom perfectly binding

Henry and others -v- London General Transport Services Ltd [2002] IRLR 473 CA

Disputes over contractual terms have kept lawyers in good business over the centuries. There is an unofficial hierarchy of ways of establishing contractual rights. The ideal is an unambiguous term in a contract signed by both parties. One of the hardest ways of establishing a contractual right is to rely on custom and practice. As the lawyer's cliché goes: custom and practice is the last refuge of a scoundrel when no better arguments are to hand.

But the case of **Henry and others -v- London General Transport Services Ltd** is a useful reminder of the scope and power of custom and practice and when the principle can be invoked particularly in the arena of collective bargaining.

In this case the TGWU was recognised by the employer and in anticipation of a management buy-out a framework agreement was negotiated with the union, accepted by the union on behalf of its members after a series of workplace meetings and details of the new terms being posted around the workplace. The framework agreement reduced the workers' wages and other terms and conditions. Individuals were also asked to sign new terms and conditions. Of the 1,500 staff, 130 signed a petition objecting to the new changes and asserted they were working under protest. Two years later they commenced wages claims for the balance between the old and the new pay rates. There were two issues for the Employment Tribunal – were the workers bound by the agreement between the employer and the union and had they anyway affirmed the contractual changes by working to the new terms for two years in spite of their petition?

The tribunal found that although there had been a tradition of collective bargaining with the TGWU for many years, indeed a closed shop before these were outlawed, it was not satisfied that the tradition was sufficient to establish that such fundamental changes were incorporated into individuals' contracts by virtue of collective bargaining. "Strict proof" of the custom and practice had to be shown by the employer (as the party seeking to rely on the custom and practice in this case). Furthermore the petition in protest was sufficient to protect the individuals' rights: they had not elected to affirm the amended terms and conditions of employment by remaining at work.

Neither the Employment Appeal Tribunal nor the Court of Appeal agreed. The tradition of collective bargaining between employers and the recognised trade union was sufficient to establish a custom and practice that fundamental changes such as those in the framework agreement were incorporated into individual contracts. The Court of Appeal has taken the opportunity to set out the principles.

- In order to a establish custom and practice, clear evidence of the practice is required, but the evidence is assessed on the balance of probabilities, not strict proof;
- If a custom and practice is established that changes are incorporated into individual contracts through collective bargaining, it can be expected to cover all terms, unless there is evidence that the custom and practice is otherwise

The Tribunal had also been wrong to find that the employees could still rely on their petition objecting to the changes, after working to the new terms for two years. For a limited period of time they would be able to say they had not agreed the changes, but not after working for two years as normal alongside their colleagues who had agreed the changes.

In this case, unusually it was the employers seeking to rely on custom and practice to establish contractual rights. Their success is a timely reminder that custom and practice can be a useful haven for unions seeking to show that long held practices amount to contractual rights.

The essence of time in discrimination cases

Hendricks -v- Commissioner of Police for the Metropolis [2003] IRLR 96

Three months is the magic number for bringing most Tribunal claims. A claim must be presented to the Tribunal within three months from the act complained of. (Equal pay is the notable exception to this rule where it is six months from the ending of the employment contract). The rule begs the question: three months from when? In unfair dismissal cases this is the effective date of termination of employment, and can only be one date, but in discrimination cases where the allegations often span a lengthy period the position is much more complex.

The law provides in each of the Sex Discrimination Act 1975, Race Relations Act 1976 and Disability Discrimination Act 1995 that an act which extends over a period of time is treated as being done at the end of that period. So whether something can be described as a continuing act is often determinative of whether the claim has been brought within the three month period.

It was exactly this point that the Court of Appeal has considered in the landmark case of **Hendricks -v- Commissioner of Police for the Metropolis.** Ms Hendricks' claim alleged discrimination over most of her 11 years service in the force, involving nearly 100 specific allegations against 50 or so officers. She had been off sick for a period of 12 months before the Tribunal claim was lodged and the police force sought to argue that her claim was out of time and that it would not be just and equitable to extend time to validate her late complaints.

The Employment Tribunal accepted Ms Hendricks' arguments that her allegation was in effect of a continuing act that "a policy, rule or practice could be detected as a result of which female officers and officers from ethnic minorities were treated less favourably than white male officers". The Employment Appeal Tribunal overturned this decision finding that there had neither been an allegation of a discriminatory policy, rule or practice, nor allegations that others had been similarly affected.

The Court of Appeal has now restored the original Tribunal decision in a significant judgment. They found that the approach by the EAT had been too literal. The concepts of policy, rule, practice, scheme, or regime in the various cases such as **Owusu -v- LFCDA** were only examples of when an act extends over a period. Instead, the focus should be on the substance of the complaints that the Commissioner of Police was responsible for an ongoing situation or state of affairs in which female or ethnic minority staff members were treated less favourably. The question is whether that was an act extending over a period, or a succession of unconnected or isolated specific acts which would each carry their own time limit.

To describe it as an ongoing situation or state of affairs was, the Court of Appeal said, a more precise way of characterising Ms Hendricks' case than to use terms such as "institutional racism" or a "prevailing way of life", a "general policy of discrimination" or a "climate" or "culture" of unlawful discrimination. The Employment Appeal Tribunal had been sidetracked into focusing on whether a policy could be discerned.

The Court of Appeal also noted that Ms Hendricks also alleged discrimination in the way she was treated whilst off sick and absent from the workplace, for example, in relation to sick pay and the contact that had been made with her when she was at home.

This is an important case which will make it significantly easier for Applicants to overcome possible time limit difficulties. The Court of Appeal also stated that there must be close case management in lengthy discrimination cases, with agreed lists of issues, and attempts to keep the proceedings within reasonable bounds by concentrating on the most serious and most recent allegations.

Ms Hendricks case can now proceed to a full hearing.

Violence in the workplace

Collins -v- First Quench Retailing Ltd
31 January 2003,
Court of Session,
[2003] GWD126
Cook -v- Bradford Community Health NHS Trust, CA,
23 October 2002
[2002] EWCA Civ 1616
Rv Merseycare NHS Trust, Ormskirk MC
5 September 2002

Violence at work is a huge and ever increasing problem at many workplaces. It is more prevalent in the public sector – as anyone will tell you who has had the misfortune to visit an A & E Department on a Friday night and witnessed the abuse that hospital staff suffer.

The HSE's definition of work related violence is:

"any incident in which a person is abused, threatened or assaulted in circumstances relating to their work"

(*Violence at Work*, INDG 69 (rev) published by HSE in 2000)

This covers not just actual physical assaults, but also verbal abuse and threats. It includes work related assaults and threats from members of the public, fellow employees, contractors, managers and others.

Given this problem, are employers expected to do anything about it?

Following the death of a social worker in 1986, the DHSS Advisory Committee on Violence to Staff was set up, chaired by Lord Skelmersdale. In his report of 1988 he said:

"Where violent incidents are foreseeable employers have a duty under Section 2 [of the Health and Safety at Work Act 1974] to identify the nature and the extent of the risk and to devise measures which provide a safe workplace and a safe system of work."

A contract of employment imposes an obligation upon the employer to provide 'trust and support' to employees in performing their work. In **Keys -v- Shoe Fayre Ltd [1978] IRLR 476** the employee, Keys, was required to take money to the bank. She was worried about being mugged as there had been a number of muggings in the area. She refused to go to the bank and was consequently sacked. It was held that the employer had failed in its obligation of trust and support: the employee's concerns had not been taken seriously nor had alternative methods of getting the money to the bank been explored. In these circumstances their had been a breach of contract.

In a personal injury case in Scotland, **Collins -v- First Quench Retailing Ltd,** an employee recovered £179,000 from her employers when the off-license she managed was robbed.

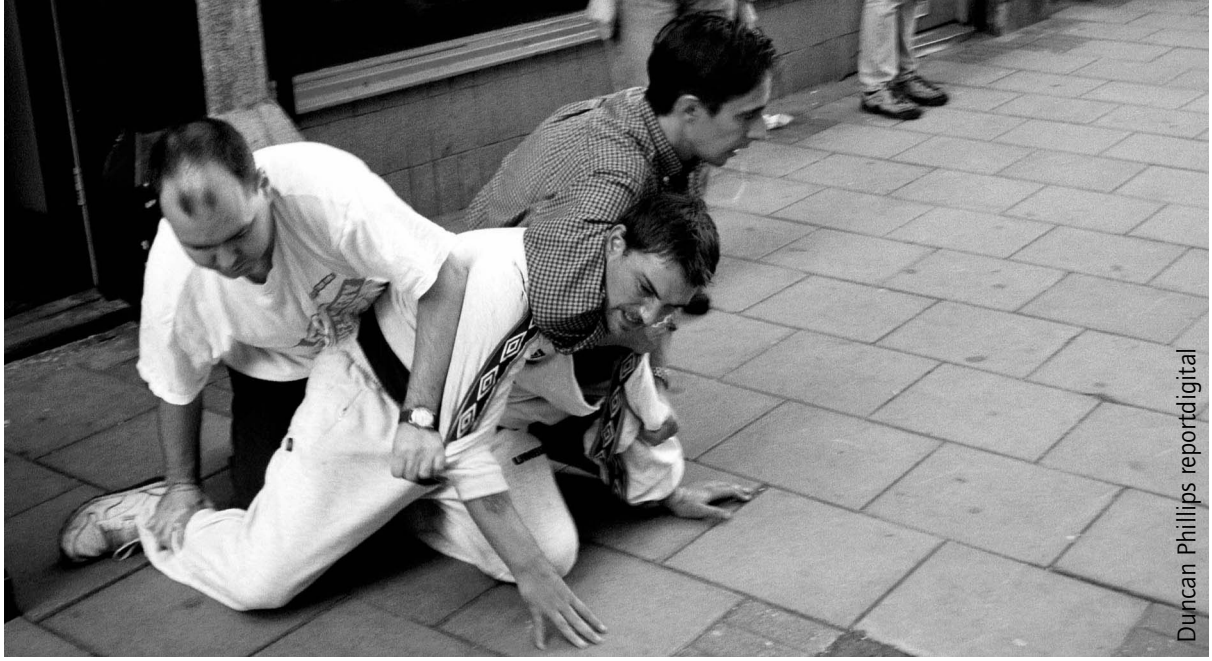
Mrs Collins sued on the basis that her employers were at fault for failing to provide her with adequate protection from such an attack Under Regulation 3 of the Management of Health and Safety at Work Regulations 1999, employers are required to carry out risk assessments of hazards in the workplace. Arguably the risk of violence is a hazard that has to be assessed like any other. Although the term risk assessment was not mentioned directly in the judgement, the judge considered what the risk was and, effectively, what control measures should have been in place.

The robbery took place in October 1998. Since 1977 there had been 13 reported crimes at the shop, including five thefts, one minor assault, one serious assault and one assault with intent to rob. There were two armed robberies in 1994 and four in 1996. There was an incident in November 1997 when one employee resigned after being threatened by a violent customer.

When Mrs Collins started in the shop she had been concerned about security and raised this with management. Her case was that there should have been security screens and/or double staffing.

The employers argued that the shop was not located in a "high risk" area and the number of incidents there was not "significantly higher" than other similar outlets in Edinburgh. They also said other shops suffered more serious incidents.

The judge did not find that there was a requirement upon the employers to have security screens



but did find there should have been double staffing ie the client should not have been in the shop on her own. The question was whether this failure was causative. The judge ruled:

"...I hold the prospect of this robbery occurring would have been substantially diminished had there been double manning. [The employers] created a situation in which a robbery, or similar act of physical violence to staff, was much more likely too occur than if there had been double manning …I am satisfied that the [employers'] failure to take reasonable care and introduce double manning materially increased the risk of a robbery of this type …happening. I am accordingly satisfied [their] failure was a material cause of the incident, which resulted in [Mrs Collins'] condition."

In another personal injury claim, **Cook -v- Bradford Community Health NHS Trust**, the claimant, a healthcare assistant, was awarded compensation after being assaulted by a patient.

Ms Cook worked at a psychiatric hospital. She was taking cups of coffee to her colleagues in the 'seclusion suite' of a unit for violent patients. As she was delivering the coffee, a patient asked to go to the toilet. He was known by the hospital to be unstable, unpredictable and dangerous. While she was in the suite the door was opened allowing him to get out. He attacked Ms Cook and as a result she suffered severe psychiatric injuries.

The Court of Appeal said the defendants had a duty "not to place her unnecessarily in a position where there is a risk of foreseeable danger". The risk could have been avoided by not having the patient out of his room.

Employers can also face criminal prosecutions over workplace violence. On 5 September 2002, Ormskirk magistrates heard how a care worker was beaten unconscious by a schizophrenic who threatened to kill her. Elizabeth Barrett was punched to the floor by the male patient after she had volunteered to take him on a caravan holiday in Cumbria. Her colleague, Mellissa Darby, was also elbowed in the face as she tried to restrain the man.

Mersey Care NHS Trust was found guilty of breaching the Health and Safety at Work Act 1974 because it failed to carry out sufficient procedural checks. It was ordered to pay a fine of £12,000.

Large organisations often pay lip service to taking workplace violence as a serious issue. The reality is that although they might have an impressive strategy document and policy, at the coal face, employees are left to fend for themselves.

Many employers seem to think that workplace violence is a risk which employees should cope with alone. They are expected to use their experience and professional training to identify when they are at risk and then determine how to cope with it. In other words employers have handed the responsibility and management of the problem over to the employees.

Much of the risk of violence at work is foreseeable. It therefore can be assessed and prevented or, failing that, mitigated. Employers who do not adequately tackle the problem could find themselves on the wrong end of a compensation claim, or even worse, in the dock of a criminal court.

Law fails 'real life' test

Croft -v- Consignia plc [2002] IRLR 851
A -v- Chief Constable of the West Yorkshire Police [2003] IRLR 32

Two recent decisions deal with what can often be sensitive issues surrounding the employment of transexuals. The Sex Discrimination Act 1975 (SDA) makes it unlawful to discriminate on the ground of sex in employment, education and the provision of housing, goods, facilities and services. The Sex Discrimination (Gender Reassignment) Regulations 1999 have extended the SDA to make it unlawful to discriminate on grounds of gender reassignment, but only in the areas of employment and vocational training. The Regulations do not apply to discrimination in education or in the provision of housing, goods, facilities and services.

In employment and vocational training, section 2A of the SDA protects individuals who are discriminated against because they:

- Intend to undergo gender reassignment
- Are currently undergoing gender reassignment
- Have already undergone gender reassignment

In **Croft -v- Consignia plc** the EAT held that an employee who was undergoing male-to-female gender reassignment treatment had not been constructively dismissed or discriminated against on the grounds of sex because the employer would not let her use the female toilets, requiring her to use the gender-neutral disabled toilet.

When a person undergoes gender reassignment, usually prior to surgery, they will undergo a "real life test" which involves presenting him or herself as a member of the opposite sex. Ms Croft, a pre-operative male to female transexual, had been employed for more than 10 years at Leicester sorting centre before she embarked on her "real life test". It was important to her as part of this process to use female toilets, but this was objected to by female staff who had known her as a man. The employers would only let her use the gender-neutral disabled toilet, and eventually she resigned claiming that this amounted to discrimination contrary to the Sex Discrimination Act, as amended by the 1999 Gender Reassignment Regulations.

The government guidance accompanying the regulations suggests that: "The employer and employee should agree the point at which the use of facilities such as changing rooms and toilets should change from one sex to the other. An appropriate marker for using the facilities of the employee's 'new' sex may, for example, be the point at which the individual begins to present permanently in the sex to which they identify. It is not acceptable to insist for the long term on a transexual employee using separate facilities, for example a disabled toilet."

However, the EAT held that as far as toilet facilities are concerned, the regulations are overridden by the Workplace (Health, Safety and Welfare) Regulations 1992, which implement EC Workplace Directive 89/654, and require that "separate rooms containing conveniences are provided for men and women". According to the EAT, that means that an employer is required to assign persons to the use of such toilet facilities as are consistent with what the employer knows or believes to be the legal sex of the person concerned. The legal sex of a pre-operative transexual in the UK is their biological sex at birth and even the European Court of Human Rights in **Goodwin -v- United Kingdom ECHR [2002] IRLR 665** distinguished between "fully achieved and post-operative transexuals" and others. On that basis, Ms Croft's treatment concerning the use of toilet facilities was not considered to be less favourable treatment, but represented similar treatment to her colleagues who were also prohibited from using toilets reserved for the opposite sex. The EAT accepted that the correct comparators when dealing with discrimination against transexuals were employees of either sex who were not transexuals. However in this case the employers had not treated her less favourably than

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

her comparators because in relation to her legal sex the Regulations and Directive had been not been applied differently to her comparators. The position would have been different if Ms Croft had been a post-operative transexual person because she would be entitled to have her gender reassignment recognised in law as per **Goodwin.** The judgment appears to be an over literal interpretation of the Gender Reassignment Regulations and the case is being appealed to the Court of Appeal.

In **A -v- Chief Constable of the West Yorkshire Police,** Ms A, a male to female *post-operative* transexual, was turned down for a post as a police constable because it was considered that she would not be capable of carrying out intimate searches of women. The Force admitted that it had treated Ms A less favourably on the grounds that she is a transexual but claimed that it had not acted unlawfully. It argued that conformity of legal and apparent gender was a "genuine occupational qualification" for the job of police constable within the meaning of section 7 (2)(b)(i) of the Sex Discrimination Act 1976 on which an employer can rely where being male (or female) is a genuine occupational qualification for a job because, for reasons of privacy or decency people might reasonably object to a task involving physical contact being carried out by a person of a particular sex.

The Court of Appeal held that in light of the decision of the ECHR in **Goodwin**, in the field of employment law, a post-operative male to female transexual is entitled to be regarded as female, unless there are significant factors of public interest to weigh against the interests of the individual applicant in obtaining legal recognition of her gender re-assignment. In Ms A's case the West Yorkshire Police Force was bound to treat Ms A as female during the recruitment process and had not been entitled to treat her less favourably on the basis that she was a transexual and there was no possibility for the Force to invoke the genuine occupational qualification defence.

CALCULATING PENSION LOSS

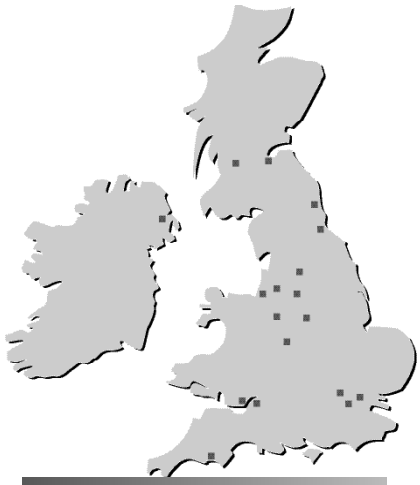
New on the Employment Tribunal Website is the welcome and overdue consultation document on pension calculations in tribunals. Although only in draft form, it will be a reliable guide through the calculation of pension loss on dismissal. Clearly written and working through examples it will enable union officials and representatives to calculate their members' pensions loss with confidence when negotiating compromise agreements and at all stages in the dismissal process.

As jobs with final salary pension schemes become rarer, future pension loss can be the most valuable part of a dismissed employee's claim. It is crucial that the value of the pension loss is accurately calculated and included where the remedy sought is compensation.

Also on the site are all ETS booklets including the booklet on how to prepare for a Tribunal hearing. It contains useful tips on preparation and is essential reading for representatives and very helpful for applicants and witnesses. In clear language it answers most pre-hearing questions and allays many fears that union members have about the hearing of their case.

www.employmenttribunals.gov.uk/england/

Court of Appeal fails to deduce disability



Woodrup -v- London Borough of Southwark [2002] EWCA Civ 1716, [2003] IRLR 111

The role and importance of medical evidence in determining whether an individual is disabled in disability discrimination claims has now been considered by the Court of Appeal judgment of Woodrup -v- London Borough of Southwark.

At a preliminary hearing as to whether Ms Woodrup was disabled under the DDA, she gave evidence herself of her *"anxiety neurosis"* which she had had for many years and in relation to which she received psychotherapy treatment. Her evidence to the Tribunal was that *"If medical treatment were stopped, then I would deteriorate and full symptoms would return."*

She also produced letters, one from a locum at the Maudsley Hospital, a specialist psychiatric teaching hospital, summarising her treatment there from 1991, sick notes from two GPs and a 1999 letter from a consultant psychotherapist confirming her attendance at regular psychotherapy sessions and stating that she was not yet fit enough to leave the group and that if she did do so her recovery would be jeopardised. She relied on paragraph 6 of Schedule 1 of the DDA dealing with *"deduced effects"*. Paragraph 6 states that *"An impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect."*

The Tribunal held that there was an absence of medical evidence to enable her to substantiate her claim. They decided not to adjourn the hearing to allow her more time to obtain suitable evidence in that the opportunity of obtaining medical evidence had been offered to her previously and she had not taken it up. The EAT upheld the Tribunal's decision and rejected Ms Woodrup's argument that the Tribunal failed to take into account paragraph 6.

The Court of Appeal likewise dismissed Ms Woodrup's appeal. The main issue before the Court was the impact of paragraph 6. In deciding that Ms Woodrup had failed to bring herself within that paragraph, Lord Justice Simon Brown describes the deduced effects provisions as being *"a peculiarly benign doctrine"* and that applicants seeking to bring themselves within its ambit *"should not readily expect to be indulged by the tribunal of fact. Ordinarily, at least in the present class of case, one would expect clear medical evidence to be necessary."* In terms of what would have happened had she stopped receiving the psychotherapy treatment, the Court held that she, a lay person, could not possibly know what the effect of her stopping the treatment would be. Her evidence carried little weight on this point.

Ms Woodrup also argued that the Tribunal were subject to Part III of the DDA and should have adjusted the conduct of the hearing by adjourning the case so as to allow her as a disabled person to obtain suitable medical evidence. In rejecting this suggestion, Lord Justice Simon Brown described this proposition as carrying paragraph 6 to absurd lengths to say a Tribunal in deciding whether someone is disabled must in deciding its own procedures pretend that the claimant is disabled when it knows he or she is not.