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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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Cause and effect

Edwards v Governors of Hanson School [2001] IRLR 733

THE SITUATION is familiar to all trade union officials. Your member has a work related illness and the employer is moving to dismiss. At some stage you have to tell the employee that the fact they consider their employer caused the illness will have no bearing on the fairness of the dismissal itself. You go on to say it will be irrelevant to the level of their compensation even if they win their unfair dismissal case. They are aghast and cannot believe that can be so. They either lose confidence in your advice, or the judicial system. Or possibly both.

The situation has been significantly improved by the case of Edwards v Governors of Hanson School. Mr Edwards, a teacher at Hanson School, attributed his serious depression to years of unfair treatment at the hands of the school's headteacher. After six month's absence for depression he was referred to the occupational health service who did not consider he would be fit to return to work for the foreseeable future. He was dismissed.

He won his case at an Employment Tribunal on the grounds that there had been no proper consultation and the appeal process had not cured the unfairness. However, when it came to the remedy hearing the tribunal said that Mr Edwards' allegations about the headmaster's treatment of him – which he thought caused his illness – were irrelevant. In fact the Tribunal awarded no compensation as they thought he would have been dismissed even if a fair procedure had been followed.

Mr Edwards appealed. In a significant judgment the Employment Appeal Tribunal have drawn back from the earlier case of LFCDA v Betty [1994] IRLR 384 which held that the duty to act fairly in dismissing on grounds of ill-health is unaffected by considerations as to who was responsible for the employee's unfitness for work.

The EAT said it will not always be the case that the cause of the incapacity for work is irrelevant. The example they gave was where the employer has acted maliciously or wilfully caused the incapacitating ill-health which then leads to dismissal. There is, the EAT say, no reason why that should not lead to a finding of unfair dismissal. In Mr Edwards' case there was no need to consider responsibility for the ill-health in looking at the fairness of the dismissal, but only because the tribunal had found it to be unfair for other reasons – lack of consultation.

But the Tribunal were wrong not to consider Mr Edwards' allegation in assessing compensation. The law does not require that questions of responsibility for an applicant's illness must be ignored when deciding whether it would be just and equitable to make a compensatory award for unfair dismissal. The words "just and equitable" enable a tribunal to take full account of the conduct of the employer, as well as the employee, in assessing compensation providing the losses flow from the dismissal and the award is to compensate for actual losses. The tribunal's failure to carry out at least some investigation into Mr Edwards' allegations about the cause of his depression was not "just and equitable in all the circumstances" and the question a of a compensatory award has been remitted to a fresh tribunal.

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Tell it like it is

Amor v Galliard Homes Ltd
EAT 25.09.01
Case No. 47/01

In Amor v Galliard Homes Ltd the Employ-ment Appeal Tribunal make an important decision which emphasises that em-ployers must be careful when identifying the reason for an employee's dismissal – particularly where the employee has been transferred to an alternative position following a redundancy situation.

In a case of unfair dismissal, it is for an employer to show the reason for the dismissal. A failure by the employer to plead the right reason for a dismissal can lead to a finding of unfair dismissal as was the case for Mr Amor.

Mr Amor was a forklift truck driver and as the need for forklift truck drivers was diminishing, Mr Amor was offered work as a labourer for the same pay. He accepted this position but after three days doing the new job his employers told him he was redundant. The employers claimed he had become disruptive and they had no choice but to make him redundant.

Mr Amor brought a claim for unfair dismissal. The Employment Tribunal found that he had been dismissed by reason of redundancy but that the dismissal was unfair because there had been insufficient consultation prior to the redundancy. The Tribunal awarded £804.36 compensation. Mr Amor appealed on the grounds that he may have received more compensation had the reasoning been different.

In allowing Mr Amor's appeal, the Employment Appeal Tribunal carefully considered the Tribunal's finding that Mr Amor had been dismissed for redundancy. They held that this could not be justified and considered that the real reason for Mr Amor's dismissal was the fact of his disruptive behaviour. In particular, they took into account section 138 of the ERA 1996 which states that

(1) Where -

a) an employee's contract of employment is renewed, or he is re-engaged under a new contract of employment in pursuance of an offer… made before the end of his employment under the previous contract; and

b) the renewal or re-engagement takes effect either immediately on, or after an interval of not more than four weeks after, the end of employment.

- the employee shall not be regarded for the purposes of this Part as dismissed by his employer by reason of the ending of his employment under the previous contract

The EAT distinguished between the situation when there would have been a dismissal for redundancy after the ending of one job (and during the currency of the second job) and one which does not.

They considered that where the reason for the redundancy is connected with, or arises out of, a difference between the renewed or new contract and the previous contract then that will be a dismissal for redundancy. However, if there is a dismissal for conduct or capability during the second job (even if that is within the four week trial period) then that is a fresh dismissal and will not reinstate the redundancy. The conduct allegation introduces another reason for the dismissal which does not arise out of a difference between the renewed (or new contract) and the previous contract .

As the EAT had found that there was no redundancy they considered that the employer had failed to establish that the reason for the dismissal was within s.98 (2) and therefore the dismissal was unfair. The case was referred back to an Employment Tribunal to consider the question compensation.

In many instances it is convenient for both employees and management to describe a dismissal as "redundancy".

Where this approach does not suit an employee, this case demonstrates the scope for undermining the rationale for the dismissal itself.

ECJ sees through opaque pay system

Brunnhofer v Bank der Osterreichischen Postparkasse AG [2001] IRLR 571

THE NEED for transparency in pay systems is a recurring theme in European Court of Justice equal pay decisions. In Brunnhofer v Bank der Osterreichischen Postparkasse AG, the European Court considered a pay system which included performance related monthly pay supplements. Ms Brunnhofer's monthly supplement was lower than that of her male colleague, where both she and her male colleague were doing jobs that were classified the same under a collective agreement.

The bank's explanation for the difference in pay was that at the time that the male colleague was recruited Ms Brunnhofer's performance was poor. He was considered to be a more able employee and was therefore given more responsibility. To reflect the greater responsibility his monthly supplement was higher than hers.

The Court held that the bank's defence did not succeed. It was not lawful to decide that the male comparator was a better performing employee before he had even started his employment so as to justify a higher supplement for him rather than the existing employee, Ms Brunnhofer. Such performance pay "cannot be determined objectively at the time of that person's appointment". The quality of their performance can only be assessed during the actual performance of their activities.

The Court were also required to decide whether the fact that both Ms Brunnhofer and her male comparator were in the same category of collective agreement was sufficient to establish same work or work of equal value. Unsurprisingly, the Court held that the collective agreement alone was not enough. To establish the same work or work of equal value under Article 141, the same classification under a collective agreement should be supplemented by evidence of precise and concrete factors based on activities actually performed by the employees. It was for the national Court to determine the issue of the same or comparable work, and in carrying out this exercise the Court would also have to decide whether Ms Brunnhofer's reduced responsibilities affected the issue.

It has been noted that in the European Court's summary of the structure of equal pay cases, they make no mention of there being any burden on an Applicant to raise an inference of discrimination before an employer is obliged to objectively justify a difference in pay. Whether this is a signal that the House of Lords decision in Glasgow City Council v Marshall [2000] IRLR 272 will need to be revisited remains to be seen. This point will also be explored in the next stage of the Preston v Wolverhampton Healthcare NHS Trust part time pension test cases to be heard in the Tribunal later this year.

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Stressed Out?

Chair of Governors at St Thomas Becket R.C. High School v Hatton; Somerset County Council v Barber; Sandwell Metropolitan Borough Council v Jones; Baker Refractories Ltd v Bishop. Court of Appeal 5 February 2002 EWCA Civ. 76

THE COURT of Appeal's overturning of three work-related stress cases in February was not a revolution. It did not, as some sections of the media crowed, mean the end of employees' rights to take their employers to court for causing psychological injury.

To some extent the court has clarified the law, which has been a minefield. But in others it has muddied the water on stress claims still further, while placing the onus on employees to complain or find a new job.

But by setting out 16 "practical propositions" relevant in determining liability in stress claims, including an employer's obligations, the court has put flesh on the bones of the existing approach.

The landmark case of John Walker, the director of social services at Northumberland County Council who settled in 1996 for £175,000, established that the basic principles of employers' liability apply i.e. duty of care, breach of duty, injury caused by the breach of duty and whether an injury is foreseeable.

Stress cases, the court said, require particular care in deciding because they give rise to the difficult issues of foreseeability and cause. In turn, deciding whether there has been a particular breach of duty that led to the psychiatric illness may prove difficult.

All of the defendants appealed on the basis that the original court rulings had set too low the trigger for when an employer has to take action. As a consequence the respective courts had found the psychiatric injury to be foreseeable and that the employer was in breach of duty.

Another important aspect of the Court of Appeal ruling is that it made clear there is a distinction between psychiatric ill health and occupational stress. A claimant cannot recover compensation for stress unless it develops into psychiatric ill health as a result of stress at work.

Some of the key propositions set out by the Court of appeal were:

- An employer was entitled to assume that an employee can withstand the normal pressures of the job unless that person is known to be vulnerable. The employer is entitled to take what an employee says at face value.
- There are no occupations that should be regarded as intrinsically dangerous to mental health and to trigger a duty to take steps. The warning of impending harm to health must be plain enough for any reasonable employer to recognise.
- An employer need only take steps which are reasonable in all the circumstances and which are likely to do some good, but if they have a confidential advice service they can escape liability.
- The employee must show that the harm done has been caused by what the employer has failed to do and will succeed only to the extent they can show the employer has contributed to their condition and this will require an assessment of vulnerability.

In each of the Court of Appeal cases the employee suffered from a psychiatric illness. But in the case of Penelope Hatton, a comprehensive school teacher suffering from depression and medically retired, she said as a result of stress and overwork, the court did not accept that it was directly attributable to her work or that the employer was in breach of their duty.

The court said that she had a previously unrelated history of depression, her pattern of absence was easily attributable to causes other than stress at work, that her work load was not excessive in

comparison with others' and, crucially, that she did not complain so her employers could not reasonably have foreseen the development of her condition.

There are parts of the decision that do not sit easily with the Management of Health and Safety at Work Regulations 1999 (MHSWR and the HSE's approach to safety management set out in its publication 'Successful health and safety management', HSG 65.

Regulation 3 of the MHSWR requires employers to carry out risk assessments of the hazards in their business and put in place appropriate preventative and protective measures to deal with health and safety risks. Regulation 5 requires employers to have in place arrangements for the "effective planning, organisation, control, monitoring and review of the preventative and protective measures".

Regulation 13 MHSWR states that an employer shall take into account an employee's capabilities with respect to the work they are asked to do. Paragraph 80 of the Approved Code of practice to MHSWR states:

"When allocating work to employees, employers should ensure that the demands of the job do not exceed the employees' ability to carry out the work without risk to themselves or others… Employers should review their employees' capabilities to carry out their work, as necessary"

Paragraph 55 of Tackling Work-related Stress by the HSE (2001) states in relation to paragraph 80 of the ACOP:

"This includes making sure that employees' mental health is not put at risk through the work they are required to do. Providing adequate training for the job is an important ingredient"

There are sweeping generalisations in the Court of Appeal's decision and many stress cases are much more complicated and stronger than those considered. But the onus is clearly on employees to make their problems known to their employers. Employees should complain and complain early and frequently and seek medical help. Despite the prevalence of stress in the workplace, health and safety guidance and risk assessments, the Court of Appeal's view is that there is no obligation on an employer to do anything unless the problem is thrust in their face.

Stress cases are extremely difficult to prove. For a claim to succeed the worker must show:

1. **They have a psychiatric illness or injury**
2. **The claimant's work posed a real risk of causing psychiatric illness and the employer knew (or ought to have known) that the claimant was exposed to that risk.**
3. **Given the foreseeable risk, the employer failed to take reasonably practicable or adequate steps to prevent or reduce the risk of psychiatric harm to the claimant.**
4. **The claimant's psychiatric harm was caused, or materially contributed to, by the work and the employer's breach of duty.**

View from the Disability Rights Commission

THE DISABILITY Rights Commission was launched in April 2000 in response to the clear need for an authoritative body to represent the interests of disabled people. It's duties are to work towards the elimination of discrimination against disabled persons, promote equalisation of opportunities and encourage good practice in the treatment of disabled people.

There are over 6.6 million disabled people of working age in Britain, accounting for nearly one fifth of the working age population, and yet until the introduction of the Disability Discrimination Act in 1995, disabled people were afforded no protection whatsoever from discrimination.

Some interesting statistics

The Commission monitors the impact of the Disability Discrimination Act and the news on use is mixed. Some 8,908 cases have been commenced in England, Scotland and Wales under the employment provisions in Part II of the DDA, of which 1,757 have reached a hearing.

The most common impairments which form the basis of claims of disability discrimination are those connected with the back or neck (19.5%), mental health (18.2%) and the arms or hands (14.3%).

The most common occupations are clerical and secretarial (15.9%), plant, vehicle and machine operatives (15.7%), and managers and administrators (13.6%).

The most common sectors are public administration (20.9%), and manufacturing (18.8%), both of which remain strongly unionised sectors. Disabled applicants have been unrepresented in 21.4% of tribunal cases.

The importance of representation to the prospects of success is illustrated by the fact that unrepresented applicants were successful in just 13.7% of such cases, as opposed to an overall success rate of 19.5% in all cases decided by a tribunal.

Remedies

The average award for pecuniary loss in 2000 in the employment tribunal was £13,046 and the average award for injury to feelings was £5,802. Both figures represent a significant increase from the year before. Interestingly, these figures are higher than the average awards for pecuniary loss and injury to feelings in discrimination cases, in general, which were £11,193 and £4,889 respectively.

What cannot be so easily measured is the extent to which employers alter their behaviour as a result of an award being made against them.

SOME SIGNIFICANT CASES

Justification

Justification has become the key defence for employers. In 21.9% of all Part II cases commenced, an employer has sought to justify its unfavourable treatment of a disabled employee, most frequently on the grounds of health and safety considerations, or sickness absence.

In Jones v The Post Office (2001 IRLR 384 the Court of Appeal held that where an employer has undertaken a properly conducted risk assessment, which provides a reason, which is both material and substantial and is not irrational, the employer is entitled to rely on that reason to justify less favourable treatment. Providing the risk assessment meets those criteria, the Court of Appeal held that it is not open to the Employment Tribunal to substitute its own appraisal because it prefers the evidence of the applicant's expert presented to it at the hearing itself. However, as the Court of Appeal made clear, it remains incumbent on the employer to reconsider their assessment in the light of any evidence or proposals put forward by the disabled employee or his or her medical advisers.

Although Jones is generally perceived to be of advantage to employers, a note of caution should be sounded. Employers would be well advised to take care when seeking to rely on the opinion of their own medical advisers to justify their actions. Crucially, the

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risk assessment must be properly conducted, taking into account all the relevant evidence reasonably available to the assessor, and if medical issues are raised, based on appropriate medical evidence from a sufficiently well qualified expert. For employee representatives, the key is to be as proactive as possible in pressing for proper assessments to be done.

In the earlier decision of Fu v London Borough of Camden (2001 IRLR 186), the Employment Appeal Tribunal made a similar point; a failure by an employer to give proper consideration to suggestions as to reasonable adjustments made by a disabled employee meant that the employer could not justify his actions. Fu emphasises the importance of the disabled person and their employee representative engaging in the process of assessing what adjustments are appropriate to accommodate the individual's disability. An employer will find it difficult to justify a failure to make a particular adjustment if it had been suggested to them by the individual or employee representative and ignored. It is usually helpful to involve Access to Work in considering adjustments. The disabled person themselves must contact Access to Work who can then offer funding for adjustments to be made, such as specialised equipment, meeting the cost, partially or in full, of a support worker and so on. Again, if the employer is presented with a sensible adjustment which Access to Work have agreed to support, it makes it more difficult for them to justify a refusal to put the adjustment in place.

Ex post facto justification

The extent to which an employer can rely upon "ex post facto" reasons, after the event, to justify less favourable treatment has also created real difficulties. The Employment Appeal Tribunal dealt with the question in Quinn v Schwarzkopf Limited (2001 IRLR 67) and held that the employer in that case was precluded from claiming a justification ex post facto that had not featured at the time of the discriminatory act. The approach adopted in Quinn was that Parliament did not intend to permit employers to think up hypothetical justifications for their discriminatory acts after the event to try to establish that there was nothing that they could have done.

This view was contested by the EAT in British Gas Services Ltd v McCaull (2001 IRLR 60) which in turn was supported by the EAT in Bradley v Greater Manchester Civil and Fire Defence Authority (EAT/253/00). These cases dealt with the issue of s6 reasonable adjustments in the context of discrimination under s5(1), i.e. dismissal. In order to justify such less favourable treatment, the employer had to first overcome the hurdle of s6, as, if they were under a duty to make adjustments and failed to do so, contrary to s6, they would be precluded from justifying their actions under s5(4). In both cases the EAT held that ex post facto evidence can be material and admissible when seeking to establish that the employer has either taken all reasonable steps to comply with a s6 duty to make reasonable adjustments or that there were no further steps that he could reasonably have taken. The good news is and the EAT recognised this, that it might well be more difficult to establish that such reasons put forward after the event were material and substantial and therefore justifiable. This position has since been confirmed in a further case of Callagan v Glasgow City Council.

The Commission's legal team

The Commission's legal team, under Director, Nick O'Brien and headed by Pauline Hughes, is based in Manchester and consists of six legal officers, one of whom is based in Edinburgh, and a legal policy expert. The team focuses on cases of strategic legal importance, which raise questions of principle in the application of the Disability Discrimination Act 1995 and which have implications for a wide range of disabled people.

The team has well established links with expert advisers and the voluntary sector but our links with the Trade Union movement are less well developed, a concern that the Commission is keen to address. The Trade Union movement has often worked in conjunction with the other equality commissions, the Equal Opportunities Commission and the Commission for Racial Equality, and we are keen to pool expertise and engage in joint working on cases of strategic interest. We would welcome approaches from Trade Union legal officers or officials to discuss ways of working together.

The Legal team's contact details are laid out below. Initial contact should be with Pauline Hughes, Head of Legal Services. In respect of Scottish cases of interest, please contact Lynn Welsh, Legal Officer (Scotland) on tel. 0131 444 4321.

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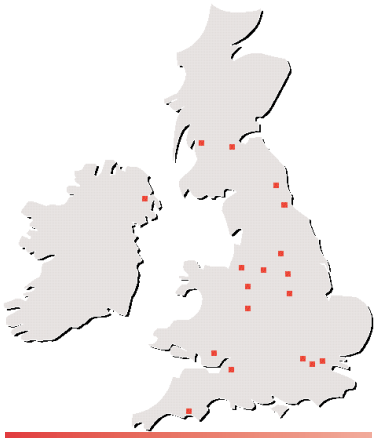
This month's guest author is Rebecca Howard, solicitor and DRC Senior Legal Officer

Need to know basis



Scott v Hillingdon London Borough Council IDS Brief 702 February 2002

THIS IS an important case which rules that knowledge of the protected act on the part of the discriminator is a pre-condition in cases of discrimination by way of victimisation.

Mr Scott, who is of Afro-Caribbean origin, had brought race discrimination proceedings against his former employers Ealing Council. During this period he also applied to Hillingdon Council for a job, and was one of three applicants short-listed for the post and interviewed by three councillors. The job was offered to a white male candidate, who refused it. The job was readvertised, with a note that previous applicants need not reapply.

Mr Scott then brought proceedings against Hillingdon alleging race discrimination and victimisation on the part of the authority. His claim for victimisation alleged that he had done a protected act within the meaning of s 2(1)(a) of the Race Relations Act 1976 in that he had made a complaint of race discrimination against Ealing Council, and that the decision not to further consider him for the post after the chosen candidate had dropped out was less favourable treatment by reason of his having done that protected act. The three councillors who had interviewed Mr Scott gave evidence before the employment tribunal and denied any knowledge of the complainant's race discrimination claim against Ealing Council at the time of the interview, or indeed until very much later. The tribunal dismissed the complaint of race discrimination, but decided that the claim of victimisation had been made out because, having rejected the discrimination claim, the only possible reason for the treatment of Mr Scott was because he had done a protected act. Therefore in effect the Tribunal inferred that the reasons why Mr Scott had been prevented from reapplying for the post was that his previous claim against Ealing Council had marked him out as a potential troublemaker. This was so even though the Tribunal admitted that there was a lack of hard evidence to justify this inference.

Hillingdon appealed to the Employment Appeal Tribunal, which held that the tribunal had erred in that it had not been entitled to draw the inference of victimisation in the absence of any findings to justify it. Mr Scott appealed.

The Court of Appeal dismissed the appeal. It was clear that in a claim for victimisation, knowledge of the protected act on the part of the alleged discriminator was a precondition. The situation in victimisation cases was not identical to that which arose in direct discrimination cases. In direct discrimination cases, knowledge by the alleged discriminator of the race of the complainant would rarely be in issue. When establishing a person's knowledge of a protected act a different issue was involved, and it was wrong for the tribunal to adopt an approach intended for cases of discrimination when considering the issue of the councillor's knowledge. The reality was that there was no positive evidence of knowledge on the part of the three councillors. The Tribunal had merely speculated that the councillors knew of the protected act.

This is an important case is likely to be equally applicable to victimisation in disability discrimination and sex discrimination cases.

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