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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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Asbestos claims killed

Fairchild v Glenhaven Funeral Services and five related appeals (Court of Appeal) unreported

THE CAMPAIGN to have the disgraceful Court of Appeal ruling on Fairchild overturned has been boosted by the House of Lords granting the petitions for leave to appeal in two of the mesothelioma causation cases, Fox and Matthews. They will be heard in April.

The court's decision to uphold **Fairchild** last December meant there can be no compensation for victims of the terminal asbestos cancer - mesothelioma - if, as is usually the case, the individual was exposed to the deadly dust by more than one employer.

Although the House of Lords has refused leave to appeal in **Fairchild** itself, **Fox** and **Matthews** are both strong cases which, if overturned by the Lords, will restore the right to compensation.

The six related appeals to the Court of Appeal decided the issues of causation, occupiers liability and provisional damages which arise in mesothelioma cases where the claimant or deceased was exposed to asbestos by two or more employers or where the occupier of the premises rather than the employer was pursued as a defendant.

In **Fairchild, Fox** and **Matthews** the court ruled that it could not be proved which asbestos fibre, or group of fibres, were responsible for causing mesothelioma. Because the development of mesothelioma has nothing to do with the extent or duration of exposure to asbestos, proof of causation could not be established against any of the defendants, despite each of them having admitted substantial and/or negligent exposure.

As a result the court distinguished these appeals from that of **Holtby v Brigham & Cowan (Hull) Limited** (LELR issue 49, August 2000) which looked at injury resulting from the cumulative effect of negligent exposure by multiple employers.

In the **Babcock, Fairchild** and **Dyson** cases the court looked at whether the defendants, who were occupiers of premises on which the claimant's asbestos exposure occurred, were in breach of duty under the Occupiers Liability Act 1957. It was held that the 1957 Act imposes a duty on an occupier only in respect of the static condition of the premises, and not in relation to activities which are carried out on the premises. As the claimants in each case had sustained injury due to asbestos exposure generated by the activities of independent contractors, and not due to the condition of the premises, none of the occupiers were in breach of the 1957 Act.

And because the occupiers had engaged competent contractors to carry out work on their premises, and had no actual knowledge of the danger to which lawful visitors were exposed, the occupier was not negligent.

In terms of common law, it was the duty of the employer to ensure the safety of a worker.

In the **Pendleton** case the claimant sought an award of provisional damages for his development of asbestos-related pleural plaques. The court considered whether a provisional damages order could contain provision should the claimant develop mesothelioma in the future, even though causation could not be established. The court upheld the claimant's right to an order for provisional damages and that the question of causation only becomes relevant in the future if the condition should materialise.

The Lords have refused the defendants' petition for leave to appeal the **Pendleton** ruling. It also refused leave to appeal in the occupiers' liability cases. Campaigners now look to the government for legislative changes to ensure that victims of asbestos exposure are fully compensated.

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Individual contractors left out in the cold

Hewlett Packard Ltd v O'Murphy [2002] IRLR 4 EAT
Professional Contractors Group and Others v Commissioners for Inland Revenue [2001] EWCA Civ. 1945, Court of Appeal

INDIVIDUAL CONTRACTORS who hire out their services are in a no-win situation when it comes to deciding what their status is for employment and tax purposes. Two recent cases show that these groups of workers continue to receive a raw deal gaining neither the tax benefits associated with self-employed status nor the employment rights of an employee.

In **Hewlett Packard** the question for the Tribunal was whether an independent contractor who was hired out by an employment agency to a third party was an employee of the third party.

Under the Employment Rights Act 1996 (ERA) the ability to claim unfair dismissal very much depends on being able to establish that they are an employee. Section 230 of the ERA defines an employee as someone who works under a contract of employment.

Mr O'Murphy was a computer specialist who formed a limited company, Circle Technology. Mr O'Murphy described himself as an employee of that company. Circle Technology then entered into a contract with an employment agency, Eaglecliff Ltd. who then entered into a contract with Hewlett Packard to provide computer services. The contractual arrangements were that Hewlett Packard paid a fee with VAT added to Eaglecliff who, in turn employed Circle Technology to carry the work for a fee. Mr O'Murphy received payment for the work as an employee of Circle Technology.

In practice Mr O'Murphy essentially worked for Hewlett Packard as a contract systems manager at their premises in Bracknell from June 1994. At the end of October 2000 Hewlett Packard informed Eaglecliff that they were terminating the contract for Mr O'Murphy's assignment with immediate effect as they were unhappy with his performance.

The Tribunal found that there were certain factors in the relationship between Mr O'Murphy and Hewlett Packard which indicated that he was under their control and that there was a mutuality of obligations. As such, they held him to be an employee.

Hewlett Packard appealed. In upholding the appeal the Employment Appeal Tribunal considered that the tribunal had failed to ascertain whether there was a contract of any kind between Mr O'Murphy and Hewlett Packard. They considered that there were in fact two contracts: one between the agency (Eaglecliff) and the contractor (Hewlett Packard) and another between the agency and the applicant (Mr. O'Murphy) but there was no contract between Mr O'Murphy and the contractors.

So, if there was no contract there was no claim because the individual could not show that they worked under a contract of employment as per section 230 of the ERA.

In reaching their decision the Employment Appeal Tribunal commented on the financial benefits for both the individual who hires themselves out through an agency and the third party who is content to have the work provided the individual is not a permanent employee.

It is now more difficult to see what financial advantage there is for the individual contractor. In April 2000 the Government, in its desire to clamp down on tax evaders introduced legislation, known as IR35, to eliminate tax and national insurance avoidance by individuals who contract out their services via a company. The effect of these provisions is that remuneration paid by the client company to the contractor is treated as salary rather than company revenue so that the full income is subject to Schedule E income tax and Class 1 National Insurance contributions. A recent challenge to the IR35 legislation as being contrary to European law taken by the Professional Contractors group failed, leaving independent contractors without any tax benefits and no guarantee of employment rights.

Is ignorance bliss?

Garry v London Borough of Ealing [2001] IRLR 681

NO SAYS the Court of Appeal in Garry v London Borough of Ealing where they considered again the meaning of detrimental treatment in discrimination cases.

All anti-discrimination legislation has a catch-all provision which prohibits employers from subjecting their employees to "any other detriment". "Detriment" is not defined by the legislation, but the courts have held that it should be given it's broad ordinary meaning. In **De Souza v Automobile Association** [1986] IRLR 103, the Court of Appeal said that to establish detriment a worker must show that they had been disadvantaged in the circumstances in which they had to work, as a result of the acts being complained about.

In **Garry**, Mrs Garry, a Nigerian woman, had been employed by Ealing Council as a Housing Benefits Team Manager since 1991. In 1996 the Council discovered that she had been the subject of a fraud enquiry in a previous housing benefit job with another local authority. The Council then decided to investigate Mrs Garry and chose the more serious of the two possible procedures, which involved a special investigator, without restriction on time or money.

In May 1997 Mrs Garry discovered that she had been investigated and a month later she was interviewed. In August 1997 the Council's Director of Housing decided that there was insufficient evidence to warrant disciplinary proceedings. The Director failed to tell Mrs Garry of this and she eventually found out in July 1998.

An Employment Tribunal found that Mrs Garry had been discriminated against on grounds of race. The Tribunal noted that shortly before the investigation had commenced into Mrs Garry, another Nigerian employee had been dismissed following an investigation into housing benefit fraud. The Tribunal was of the view that there would have been an investigation irrespective of Mrs Garry's race, but it found that the decision to use the more serious investigative procedure was influenced by a stereotypical view of her Nigerian origin. The Tribunal held that the Council had assumed that because Mrs Garry was Nigerian the enquiry was likely to be on a much bigger scale. Although the delay in telling Mrs Garry of the resulting investigation was mainly due to incompetence and not discrimination, the Tribunal still found that discrimination had been proved. The Tribunal concluded that Mrs Garry had suffered a detriment as a result of the investigation being allowed to drag on without her being made aware of what was happening. This was related to the nature of the investigation, in that an ordinary investigation would have concluded much earlier.

On appeal, the question arose as to whether Mrs Garry had been subjected to a "detriment". The EAT held that there had been no detriment, as Mrs Garry had not been disadvantaged in her employment. The EAT thought that the adage "ignorance is bliss" applied. It said that "we consider that there would have to have been evidence before the Employment Tribunal from which it could conclude that the lack of awareness of Mrs Garry had actually caused her some disadvantage. There was no evidence of any".

The Court of Appeal disagreed with the EAT. Allowing Mrs Garry's appeal the Court held that the detriment was obvious. The investigation continued for much longer than it would otherwise have done because of Mrs Garry's ethnic origin. The fact that senior officers of the Council knew that Mrs Garry was the subject of a serious and lengthy investigation was detrimental to her in the sense that she was disadvantaged in the circumstances in which she had to work. The fact that for some time she did not know what was going on did not negate the detriment.

This is a very important case that establishes the principle that it can be detrimental to have things going on behind your back.

'...ch...ch...changes'

Lutak v William West & Son (Ilkeston) Limited IRLB 681 January 2002
Thompson v SCS Consulting Limited and others [2001] IRLR 801
Ralton v Havering FE College [2001] IRLR 738
TGWU v James [2001] IRLR 597

TUPE CONTINUES its regular presence in these pages. In February the Court of Appeal will hear the important case of RCO v UNISON, a public sector contracting case on the scope of TUPE.

The European Court of Human Rights has recently ruled non-admissible UNISON's complaint that UK law prevented industrial action over the Private Finance Initative TUPE transfer at University College London Hospital.

The consultation period on the government's proposals to revise TUPE concluded in December 2001 and draft Regulations are expected "in the Spring".

Meanwhile, litigation on TUPE continues unabated. The cases reported in this issue concerns changes in terms and conditions and dismissals for an economic, technical or organisational (ETO) reason.

The **Lutak** case concerned a transfer of a contract driving goods for a large chain of chemists. Mr Lutak transferred to the new company on the same terms and conditions, including a right to remain on his existing terms and conditions if redeployed. Mr Lutak had been breaking his journeys for a reason related to his health. His previous employer had condoned this. The chemists and the new employer were not prepared to do so. The new employer decided to find him alternative work and he was offered and accepted a job on new terms and conditions which were less favourable than his previous terms.

The Employment Tribunal found that this change was not transfer related, but gave no reason why.

The Employment Appeal Tribunal said that the new employers could have chosen to dismiss Mr Lutak and offer him new employment, but they chose not to do so. Mr Lutak remained employed following the transfer on the same terms, including the right to redeployment on existing terms.

The EAT said that it was not sufficient for the Tribunal simply to state that the change was not transfer-related without saying why, nor to say that Mr Lutak could have been dismissed for a reason which was not transfer-related and therefore the change in terms was not transfer-related. The case was remitted to a different ET to decide.

The issue of whether the transfer was the reason for a change in contract was a central feature of **Ralton v Havering FE College**. In this case, the employees worked on fixed term contracts which incorporated collective agreements. Some time after the transfer, shortly before their contracts expired, they agreed new permanent contracts which did not incorporate the collective agreements.

The EAT said that the test was whether the changes were motivated "solely" by the transfer. If not, they were permissible. Changes are permitted where the transfer is simply "the occasion" for the change, not the reason for it. This approach will make it very difficult for employees to prove that changes are unlawful because they are by reason of the transfer.

The EAT also rejected the argument that because the collective agreement transferred under the Acquired Rights Directive, the Directive required the employers to continue to employ the employees under the collective agreement even after the termination of the individual contracts which incorporate those terms. There was no obligation to do so prior to the transfer and the employees did not acquire such a right because there was a transfer. The new employer was under no greater obligation in this respect than the old employer.

Thompson v SCS Consulting is an example of the EAT taking a broad view of when an employer can justify a dismissal as for an "economic, technical or organisational" (ETO) reason.

The transferor company was insolvent. A receiver was appointed. There were discussions on the proposed transfer of the business. The proposed transferee identified which employees it wanted to take on. On the day of the proposed transfer, the unwanted employees were dismissed at the request of the purchasers. The transfer took place later that day.

The connection with the transfer could not be clearer, however the Employment Tribunal found that the dismissal was for an ETO reason, was not automatically unfair and therefore liability did not transfer to the purchaser. This was upheld by the EAT.

The EAT said that Tribunals must consider whether the reason or principal reason for dismissal is the transfer or an ETO reason. In considering whether it is for an ETO reason the Tribunal must consider whether it was connected with the future conduct of the business as a going concern. The Tribunal was entitled to take into account any collusion between transferor and transferee and whether the transferor had any funds to carry on the business at the date of the decision to dismiss.

The EAT concluded that it was open to the Tribunal to decide that the business could not have survived and that the only way that it could continue as a going concern was to cut the workforce. The Tribunal had found there was no collusion. All of the employees would have been dismissed if no purchaser was found.

The case contains interesting guidance on the proper approach to the issue of whether there is an ETO reason. It also leads to the conclusion that in the majority of cases the purchaser of an insolvent business will be able to establish an ETO reason for dismissing staff. In view of this, the proposed changes to TUPE relating to insolvent transfers seem unnecessary. They would provide for non-transfer of pre-transfer debts and the ability to agree cuts in terms and conditions. This would unnecessarily diminish protection which is already weak.

The EAT said that as the dismissal was for an ETO reason, any liability for unfairness of a pre-transfer dismissal (even only a few hours before) would not transfer to the transferee. The issue of transfer of liability in a different context was considered by the EAT in Scotland in **TGWU v James McKinnon Junior (Haulage) Limited.**

The liability in question was for a failure to consult with the union prior to a transfer. The EAT disagreed with an earlier decision of its English counterpart, **Kerry Foods v Creber** (reported in LELR 42, January 2000). The EAT in the TGWU case took the view that liability for a failure to consult did not transfer because it was not "liability under or in connection with any contract of employment". The EAT also took a policy view that it was better for liability to stay with the old employer because it was that employer who failed to consult and the best way to encourage compliance was to ensure that liability stayed with the employer who was under the obligation to consult. However, this overlooks the fact that the same could be said of inflicting personal injury or discrimination, where in both cases liability does transfer.

The decision does not, however, deal adequately with the argument that the failure to consult may be something "done before the transfer… in respect of a person employed in the undertaking" and therefore treated under Regulation 5(2)(b) as done by the new employer. This does raise difficult issues on whether a failure to consult amounts to something "done" by the old employer, but the issue was not addressed by the EAT in this case.

Going up

Increase in compensation limits in Employment Tribunals
The Employment Rights (Increase in Limits) Order SI 2002 No.109p

Employment Tribunal award limits have been up rated in line with the rise in the Retail Price Index from September 2000-01.

The maximum amount of 'a week's pay' for the purpose of calculating basic or additional award of compensation for unfair dismissal and redundancy has increased from £240 to £250. This new limit also applies to cases under the insolvency provisions in calculating debts in respect of any one week.

The limit on the amount of compensatory award for unfair dismissal has gone up from £51,700 to £52,600 but it is depressing to note how rarely tribunals actually award the maximum in unfair dismissal cases.

For the automatically unfair categories of trade union membership or activity dismissals, dismissal for health & safety reasons, working time dismissals, occupational pension scheme trustee dismissals and employee representatives (for TUPE and redundancy purposes where there is no recognised trade union) the minimum basic award has increased from £3,300 to £3,400.

Can they fix it?

The Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (draft)

THE FIXED Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 will become law on 10 July 2002. The Regulations are supposed to transpose the European Union Directive on Fixed Term Work (1999/70/EC) and make additional provisions in UK law in relation to pay and pensions. This is a welcome development as the Government's first draft of the regulations excluded pay and pensions.

This second government consultation on the regulations is due to conclude on 15 April 2002 and the regulations have to be in force by 10 July 2002 to comply with EU law.

The regulations apply to "employees" as defined in the Employment Rights Act 1996 only, bucking the trend in recent legislation which has extended rights to the wider category of "workers", for example the minimum wage, the working time and part-time workers regulations. Arguably, the failure to extend rights to fixed term workers improperly implements the Fixed Work Directive. The Directive refers to an "employment relationship" as well as "employment contract". These words should give both the Directive and national legislation broad coverage.

While the TUC, trade unions and others will continue to make submissions that the regulations should be given wide coverage to include workers, the regulations are in sufficiently final form for LELR to produce this guide to the draft regulations.

The Regulations will prohibit employers from discriminating against fixed term employees. They also try to prevent abuse arising from the successive use of fixed term contracts and improve access to permanent jobs for fixed term employees. The Government estimates that up to 120,000 employees will benefit from the regulations.

The regulations will amend the Employment Rights Act 1996. The redundancy waiver clause will be abolished so that employees will no longer be able to sign away their right to a redundancy payment. As soon as the Regulations are in force on 10 July 2002, no waiver clause or any extension or renewal of the contract made after that date will be effective to waive the right to a redundancy payment.

The Regulations will also introduce a new concept of a "task contract" into the ERA 1996. Where a contract automatically terminates on the completion of a particular task or on a particular event, the termination will be regarded in law as a dismissal, entitling the dismissed employee access to the usual unfair dismissal etc provisions.

'The Regulations will prohibit employers from discriminating against fixed term employees'

Draft Regulation 2 defines who is the comparator for the purposes of the regulations. A Fixed Term Contract (FTC) employee is only able to compare themselves with a comparable employee employed by the same employer. The Regulations do not allow for a hypothetical comparator as permitted by the sex and race discrimination legislation. The comparator has not only to be employed by the same employer but also to be "engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualifications skills and experience". The comparator should also be based at the same establishment unless there is no one who meets those requirements in which case the comparator can be employed elsewhere, although still needs to

work for the same employer.

Regulation 3 establishes the principle that a FTC employee has the right not to be treated by their employer less favourably than the employer treats a comparable permanent employee in relation to contractual terms nor subjected to any detriment. The right only applies if the treatment is on the ground that the employee is a fixed term employee and the treatment is not justified on objective grounds. The Regulations also give rights to FTC employees to have the opportunity to receive training and be informed by the employer of available permanent vacancies.

'The regulations introduce provisions to prevent the abuse of the use of successive fixed term contracts'

The ability of employers to justify their treatment raises issues common in the field of indirect discrimination and disability discrimination. Regulation 4 gives details of how objective justification will work in the context of these Regulations. A novel approach is taken whereby "the treatment in question shall be taken to be justified on objective grounds for the purpose of regulation 3(3) if the terms of the fixed term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment". So if, for example, a FTC gets paid more but gets less holiday and no access to the company's pension scheme it is open to the Tribunal to find that the terms balance out and the disparity is justified. This will be a tricky exercise for Tribunals to embark on and a quite different one to the principles established in equal pay cases.

Another new right is that if an employee considers that they may have been treated in a manner which contravenes the Regulations their employer must give a written statement giving particulars of the reasons for the treatment if the employee makes a written request for the information (draft regulation 5). It is proposed that the time limit for the employer to respond is 21 days – seven days longer than is allowed to employers to give a statement of reasons for dismissal under section 92 of the ERA 1996. The statement can be used in subsequent proceedings.

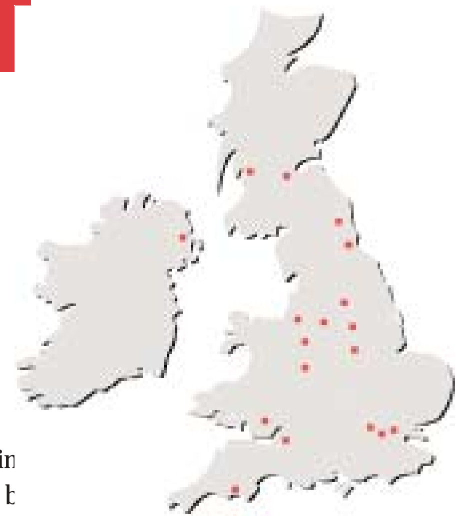
Being dismissed for bringing proceedings under the regulations, exercising rights under the regulations or alleging that an employer has infringed the regulations or for refusing to forego rights under the regulations amounts to an unfair dismissal. Employees also have the right not to be subjected to any detriment on the same grounds (regulation 6). The time limit for bringing a complaint to an Employment Tribunal is the usual three month period from the act complained of with the possibility of a just and equitable extension (regulation 7).

The regulations introduce provisions to prevent the abuse of the use of successive fixed term contracts. The limit will be a maximum of four years, unless their use for a longer period is objectively justified. The statutory limit can be displaced by collective or workplace agreements which, in order to prevent abuse, specify a maximum duration of successive fixed term contracts, a maximum number of contracts and/or objective reasons justifying renewals of fixed term contracts. Agreements may provide for contracts to be renewed in excess of the limit where it is objectively justified to do so (regulation 8). If a fixed term contract is renewed in breach of the limitation, the term of the contract limiting it to a fixed term will become invalid. The contract will be regarded as a permanent one. Successive fixed term contracts will be affected by this provision where the employee has been continuously employed, as defined by the ERA 1996, throughout the series of contracts. There will be no limit on the length of a first, fixed term contract. Unfortunately service on successive fixed term contracts before the regulations come into force will not count. This means that it will be four years before Regulation 8 starts to bite.

The way in which rights under Regulation 8 are effected is for an employee who has been employed for four years on fixed term contracts to request in writing a written statement from their employer that their contract is varied and they are now employed on a contract of indefinite duration. Again a response must be provided within 21 days of the request and the statement can be used in proceedings (regulation 9).

The Regulations do represent a new era of rights for Fixed Term Contract employees and should prevent the wholesale discrimination that FTC employees have suffered. Although the use of FTC has become less widespread in certain sectors these employees' rights continue to be undermined by their status.

Promises, promises



Hagen and Ors. v ICI Chemicals and Polymers Ltd. [2002]IRLR 31

IT IS very commonly the case that when a business transfers under the TUPE regulations, both employers need the employees to agree to transfer. The transferring business cannot succeed without a skilled workforce. All sorts of promises are made to encourage a smooth transition, but are those promises legally binding?

ICI transferred its Central Engineering Resource Section to Redpath Engineering Services (later known as Kvaerner Engineering Services) in 1994. The employees transferring could have stopped the deal in its tracks by refusing to go. To persuade them, ICI and Redpath gave assurances that there would be no wholesale compulsory job losses and gave them a five-year guarantee of employment if they agreed to support the transfer. They also assured them that their terms and conditions of employment would be the same, and that their pension rights would be broadly similar: certainly no more than 0.5% inferior. In fact the new pension scheme was very different: 5% worse in some cases. The employees sued.

The Court held that ICI was under a duty to take reasonable care to ensure that any statements regarding the transfer were true. That was a contractual obligation where the transfer will have an economic impact on the employees concerned, the transfer would not proceed without the willing participation of the workforce, and the employer knows that its information and advice will be given great weight. It breached that duty, in relation to the pension scheme: the workforce had been promised pension benefits very closely aligned with the ICI scheme and having created that false impression they could not walk away from it by sayin the workforce could have found out b taking further advice.

It is important to note that ICI was not obliged to make any specific assurances at all. There is no general duty on the part of an employer to pass on information about pensions when none is asked for. But if information is provided and negligently so, then the employer will have to compensate.

Importantly, the obligation to compensate rested with ICI and did not transfer to Redpath under the TUPE Regulations. Redpath had its own, similar, obligation to take care what it said, but the Court held that on the facts of the case, this duty had not been breached.

How is compensation calculated in such a case? The proper approach is to see what the individual employees would have done if these assurances had not been given. They couldn't realistically say that they would not have transferred; they could realistically say, however, that collectively they would have made the two companies reconsider. The Court's best estimate is that they would have secured a 'broadly comparable' deal whereby no-one would be more than 2% worse off.

This is not just a pensions issue. In any TUPE situation the employers have a statutory obligation to consult the unions or employee representatives, but this case is concerned with specific assurances given to individual workers. Those assurances could concern any element of the employment package. Neither employer is obliged to say anything, but if they do, and are negligent in providing inaccurate information then they can be held to account.

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