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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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The devil in the detail

Anya v Oxford University 2001 IRLR 377

THE EXTENT to which Applicants (and Tribunals) must devote attention to the detail of the evidence in race discrimination cases is clearly illustrated in this new Court of Appeal landmark ruling in a "textbook example" of a race discrimination case.

Dr Anya was a black academic employed by Oxford University. Dr Roberts was one of a panel of three interviewing for a vacant academic post. Dr Anya had been shortlisted together with another academic, who was white. The other white candidate was successful.

Dr Anya led evidence to the Tribunal of various facts which he argued enabled the Tribunal to draw an inference of discrimination. He pointed to the serious shortcomings in the recruitment process. In addition, Dr Roberts had expressed his reservations about Dr Anya to one of the other members of the interviewing panel prior to the interview, and had in the past been obstructive towards Dr Anya's career when they had worked together.

The Tribunal made no findings of fact regarding this evidence. Instead, they moved straight to a finding that Dr Roberts' evidence as to why he had found Dr Anya a less convincing candidate (expressed in entirely acceptable terms relating to his scientific ability) was credible and truthful. Without more ado, the Tribunal concluded that Dr Robert's evidence was accepted, and therefore the explanation for Dr Anya's lack of success at interview was not connected with his race. His case failed.

The Court of Appeal reiterates the point that direct race discrimination will often be established by the drawing of inferences from facts. Those facts may well be background facts, and they may predate or postdate the acts which are the subject of the Tribunal claim. It is unlikely that the specific facts which constitute the substance of the Tribunal complaint will in themselves be sufficient to enable a Tribunal to draw a conclusion of discrimination. It is likely to be the background facts which will enable the inference to be drawn. Therefore in focussing solely on the explanation given by Dr Roberts as to why he preferred the white candidate rather than Dr Anya, and finding that explanation truthful, the Tribunal had in effect ignored the background facts. They had therefore ignored precisely those background facts which would normally enable a Tribunal to draw an inference of discrimination.

This case is a useful reminder of how essential it is for Applicants to provide Tribunals with a detailed account of all the evidence that might enable the Tribunal to draw an inference of discrimination. That evidence is unlikely to be limited to just the act which triggered the Tribunal application and is likely to go well beyond that. In a case where the Applicant has worked for the Respondent for some time, the evidence may well stretch back over a number of years.

The case is also a reminder of how there may well be unlawful discrimination in spite of an apparently plausible explanation from a respondent. Extensive investigation of all the facts may be necessary to enable the Tribunal to draw the appropriate inference of unlawful discrimination.

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The never ending story

TUPE and labour-intensive contracts

ADI (UK) Limited v Firm Security Group Limited [REF] (CA)
Rossiter v Pendragon plc [2001] IRLR 256 (EAT)

THE TUPE regulations continue to cause uncertainty and controversy. The longevity of this saga is perhaps caused by the courts perceiving a conflict between logic and policy. This dilemma is certainly apparent in the latest pronouncement on the scope of TUPE: the ADI case.

Once again it is a case concerning contracting out, in this instance security services in a shopping centre. ADI terminated the contract with the client. The contract was awarded to Firm Security. Despite initial discussions, Firm Security did not take on the staff stating "it is not our intention to take on the existing staff and [from the cases of **Suzen** and **Betts**] … it is apparent that the transfer of undertakings is not an issue in this situation".

The Court of Appeal accepted that the security service at the shopping centre was a discrete economic entity. The question was whether it transferred with the change of contractor.

The Court took the view that the **Suzen** decision did represent a shift in emphasis, reinforced by the recent European Court decision in **Oy Liikenne** [see LELR issue 56], which the Court of Appeal took as being in line with the unhelpful earlier Appeal Court decision in **Betts v Brintel** [1997] ICR 792.

Very little in the way of assets transferred in the ADI case. The transferee accepted that if the employees had transferred, there would have been a TUPE transfer. The Court agreed that this was a labour intensive transfer and consequently that if the employees had transferred, TUPE would have applied and that as they did not transfer, TUPE would generally not apply.

The Court of Appeal then turned to the issue raised by the ECM case [1999] ICR 1162. Where employees are not taken on by the new contractor, can the court take into account the reason why staff were not taken? A 2:1 majority of the Court decided that this could be taken into account and there would be a transfer if the reason for not taking on the employees was in order to avoid TUPE.

To that extent, the decision is to be given a limited welcome. However, its overall emphasis on the importance of **Suzen**, **Betts** and **Oy** and on the transfer of assets in non-labour intensive contracts suggests a generally restrictive approach to the application of TUPE that may re-ignite some of the disputes that plagued the early 1990s.

The government should urgently bring forward its consultation on revisions to TUPE, which should have been implemented by the European deadline of 17 July 2001.

TUPE, changes in terms and conditions and constructive dismissal

THERE IS better news to report in relation to the issue of TUPE, changes in terms and conditions and constructive dismissal.

In Rossiter, the employee resigned in February 1999 following a transfer in October

1997 stating that his position had become untenable.

Regulation 5(5) of TUPE provides that the automatic transfer of the contract of employment under TUPE is "without prejudice to any right of an employee arising apart from these Regulations to terminate his contract if a substantial change is made in his working conditions to his detriment". In other words, the right to resign and claim constructive dismissal is preserved.

The Employment Tribunal said that this meant that, in keeping with the cases on constructive dismissal, there was only a dismissal where the employee resigned in response to a fundamental breach of his or her contract.

The EAT disagreed. It said that in the context of TUPE there does not need to be a fundamental breach to trigger a resignation giving rise to a constructive dismissal. It is enough for there to be a substantial change in the employee's working conditions to his or her detriment.

This is a welcome decision, in line with the purpose of the Directive. It will assist workers bringing claims where the transfer involves a change in their working conditions, including for example a change of job or work place, and potentially may assist claims for employees who resign and claim constructive dismissal when their employer does not offer a comparable pension, although this remains to be tested, with Tribunal cases in the pipeline.

Mixed messages

Derby Specialist Fabrication Ltd v Burton
[2001] IRLR 69 EAT
Commissioner of Police of the Metropolis v Harley
[2001] IRLR 263 EAT

IN MANY cases of harassment and discrimination, it is often alleged that the employer has failed to take any action to tackle the discrimination over a long period of time. Such cases come to fruition after an extensive and unsuccessful appeal and the employee has resigned. Then it is too late, more than three months will have past since the last act of discrimination. The employee can only claim constructive dismissal.

Can the employer claim that constructive dismissal is discrimination and therefore in time for a discrimination claim ?

Apparently not in disability cases, according to the EAT in **Harley**. The words of s4(2)d of the DDA does not include constructive dismissal. Besides, reasoned the court, constructive dismissal is an act of the employee not a detriment imposed by the employer. As for the time limit, it would in any event run from the last act of the employer rather than the date when the employee decided to resign.

Apparently yes, in race claims according to the EAT in **Derby**. The Sex Discrimination Act expressly includes constructive dismissal as being a discriminatory act and so should it also be in race discrimination cases even though the wording of the RRA does not contain the same words as the SDA. Furthermore the Court held that if the employer fails to act to address the discrimination that itself can be a discriminatory act which continues until the employee resigns. So the time limit runs from the resignation.

So two different conclusions depending whether it is race or disability discrimination that is complained of. **Derby** is a very important decision. Applicants will want to claim constructive dismissal if they are out of time on the last specific act of discrimination. This will enable them to obtain compensation for losing their jobs.

The lesson from **Harley** is that as it is not possible to see the constructive dismissal as an act of disability discrimination, any tribunal claim must be lodged within three months of the employer's conduct which led to the applicant's resignation.

The loss of employment would flow from the act of discrimination and is recoverable on normal common law principles applying to discrimination claims.

Information and consultation: The final stage

Proposed Draft Directive for Informing and Consulting Employee in the European Community.

THE BACKGROUND

THE DECISION by the French car manufacturer Renault in February 1997 to close its factory at Vilvoorde in Belgium, announced without warning to the 3,000 workers employed there, triggered a political storm which revived long-standing demands for EU legislation. Despite the strong encouragement of the European Commission, the European organisation of employers (UNICE) twice explicitly refused to enter in negotiations (social dialogue) with the European Trade Union Confederation with a view to reaching a framework agreement. Consequently, on 11 November 1998, the European Commission published a proposal for a private Council Directive establishing a general framework for informing and consulting employees in the European Community.

LEGISLATIVE MANOEUVRES

From November 1998 the United Kingdom government successfully mobilised a blocking minority of Member States. However, the persistence of the Swedish Presidency of the Council, which began in January 2001, finally led to political agreement on a draft directive on 11 June 2001, with the UK abstaining. The EU's legislative procedure then engages the European Parliament, which proposed a series of amendments to the Commission's draft of 1998. The Commission adopted a number of these amendments in a revised draft proposal of 23 May 2001. The next step in the procedure is for an attempt, through a Conciliation Committee, to reach agreement on a compromise text which can be approved by both the Council and the Parliament. If so, it will become the new directive legally binding on all Member States, including the UK.

THE BATTLEGROUND ISSUES

Two of the most important and innovative aspects of the original Commission proposal of 1998 concern the need for information and consultation prior to a decision being made, and the need for sanctions when management violates the requirement of information and consultation. These are potentially serious defects in the Council draft agreed on 11 June 2001.

CONSULTATION PRIOR TO DECISION-MAKING?

Article 1(1) states that the purpose of the directive is to establish a general framework for information and consultation of employees. This statement, however, does not make it clear whether the information and consultation process is obligatory before, or only after the employer makes the decision.

However, in "decisions likely to lead to substantial changes in work organisation or in contractual relations", the Commission's proposed draft of 1998 did make it clear that the mandatory information and consultation must include "an attempt to seek prior agreement on the decisions" (Article 2(1)(e), 5th indent).

Unfortunately, both the revised Commission draft of 23 May 2001 (Article 4(4) 5th indent) and the Council's approved draft of 11 June 2001 (Article 3(3b), 4th indent) delete the word "prior". This would appear to indicate a shift towards the view that information and consultation only concerns decisions already taken.

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Nonetheless, the Preambles to all three drafts justify the directive on the grounds that "serious decisions affecting workers" were taken "without adequate procedures having been implemented beforehand to inform and consult them". In Community law, the Preambles provide an interpretative framework for the directive. The ambiguity caused by the absence of the word "prior" may still be interpreted to promote the objectives of the directive: that information and consultation take place before the decision is made.

The negotiations in the Conciliation Committee will determine the outcome of this central question: are employees' representatives to be informed and consulted prior to decisions being made, or only to react to decisions already made? The resolution of this issue in EU law will have fundamental implications for trade union policy in the UK and Europe.

SANCTIONS FOR "SERIOUS" FAILURE TO INFORM AND CONSULT

Experience, such as that of the Renault case, shows that Member States often fail to provide adequate remedies where employers violate their obligations to inform and consult. This led the Commission, in the 1998 draft, to propose special sanctions for the case of "serious breach" by the employer of the obligation to inform and consult over certain decisions. The decision by the employer "shall have no legal effect on the employment contracts or employment relationships of the employees affected... until such time as the employer has fulfilled his obligations…". This provision would also have reinforced the sanctions available for breaches of the Collective Dismissals and Acquired Rights Directives, and would have required the amendment of the national legislation implementing them.

None of this careful attention to special sanctions for serious breaches survived the Council's approved draft of 11 June 2001, which proposes to delete the whole of this provision for a special sanction for serious breach.

THE BATTLE AHEAD...

A major political struggle is imminent over the content of the proposed draft directive. The coming struggle in the Conciliation Committee will focus on compromises based on the revised Commission draft of 23 May 2001 and the Council approved draft of 11 June 2001. The concessions made in the Council draft in order to overcome the UK's opposition in principle to the directive severely weaken the core objective of the directive. It is in the trade unions' interest to persuade the European Parliament to resist the Council's draft. The task is to identify amendments that will muster the qualified majority in the Council needed to approve the Commission's revised directive.

A number of specific differences will be the focus of attempts at compromise. The most important is perhaps the special sanctions for serious breach. But there are other differences relating to the possibility of information and consultation of individual employees, extension of the new requirements to other directives, the extent to which national law and practice can determine the scope and nature of the new obligations, the definitions of "establishment" and "undertaking", the freedom given to the negotiation of agreements providing for different obligations and the extent of the prohibition on disclosure of confidential information.

Trade union strategy should aim to achieve the requisite majority in the Council to support at least some improvements. Trade unions in the UK have perhaps the most at stake in the negotiations over the final content of the draft directive. The UK government's role in the forthcoming Conciliation Committee should be strictly monitored and pressure brought where possible to mitigate any further effort by the UK government to weaken the directive.

The final directive will inevitably include compromise provisions raising questions of interpretation. Not least the two highlighted above: must trade union representatives be informed and consulted prior to decisions being made, and does national implementing legislation include penalties which are adequate, effective, proportionate and dissuasive?

After the directive has been approved, a careful strategy of targeted litigation can identify cases which may produce interpretations from the European Court of Justice, as in earlier cases on the Working Time Directive, which are more sympathetic to the objectives of the EU directive than to the domestic policies of the UK Government.

This month's guest author is Brian Bercusson, Professor of Law at King's College London and Director of the European Law Unit at Thompsons Solicitors

Pay on the door

DTI Consultation Document on Work place Dispute Resolution

ON 20 July 2001, the Government announced proposals "to radically reform Employment Tribunals". The proposals are contained in a Consultation Document which invites responses by 8 October 2001. Most interest has rightly focussed on the plan to introduce charges for bringing a Tribunal case. Thompsons will be submitting a formal response. Here we summarise the Government's main proposals and offer some initial comments.

RESOLVING DISPUTES AT WORK

Only allowing applications to Tribunals once work place disciplinary or grievance procedures have been completed

Comment: *Employers should be required to adopt discipline and grievance procedures which comply with the existing ACAS code. Tribunal time limits should be extended to enable them to be completed. It would be wrong to prevent applicants from bringing claims until the procedure is exhausted.*

Increasing or reducing awards where the employer or the employee had unreasonably failed to take a set of minimum procedural actions in respect of a disciplinary or grievance issue

Comment: *It should be automatically unfair dismissal to dismiss without following a proper procedure complying with the ACAS code, or attract a financial penalty. The procedures to be followed by employers need to go beyond the bare minimum specified in the consultation paper. The emphasis should be on requiring employers to have procedures. Employees should not have their compensation reduced where they commence tribunal proceedings whilst procedures are ongoing where the employer has delayed or failed to follow a proper procedure.*

Awarding additional compensation to an employee to reflect the absence of a written statement

Comment: *This is a welcome proposal. There should also be a fixed sum payable for failing to issue a written statement.*

Removing the current 20 employee threshold for including details of disciplinary or grievance procedures in the written statement

Comment: *We agree that this is a good idea.*

Allowing Tribunals to disregard procedural mistakes beyond a set of minimal procedural actions if they made no difference to the outcome of the case

Comment: *This would be a retrograde step. It would encourage employers not to follow procedures. It contradicts the stated wish to ensure matters are resolved through proper procedures in the work place.*

PROMOTING CONCILIATION

Removing ACAS' duty to conciliate in cases, such as disputes over pay, breach of contract and redundancy payments

Comment: *The role of ACAS should remain.*

Introducing a fixed period for conciliation

Comment: *Employers are likely to use this as a means of delaying the case. The early setting of a hearing date is more likely to encourage settlement negotiations.*

Broadening the scope of compromise agreements to match ACAS-conciliated settlements

Comment: *The existing provisions on compromise agreements are adequate.*

Enabling other organisations to provide conciliation services alongside ACAS

Comment: *The role of ACAS as the sole statutory body should be retained. It is open to the parties to involve the services of others if they wish to do so and no change in the law is needed.*

MODERNISING EMPLOYMENT TRIBUNALS

Introducing charges for applications to Employment Tribunals and when a case is listed for a hearing

Comment: *This proposal should be vigorously opposed. It is unfair to applicants. It penalises those who have lost their jobs or suffered a possible infringement of their rights, many of whom will not have the means to pay. A charge of "up to £100" has*

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been mooted. This would prove a significant deterrent to applicants enforcing legitimate rights, especially where the level of compensation is low, for example paid annual leave, unlawful deduction from wages, national minimum wage. It will also add to the costs of employers as the amount will be recoverable from the employer at the conclusion of the case. The cost of lodging multi-applicant cases on a generic issue (for example part-time pensions) will be prohibitive. The amount raised by the tribunal service will be outweighed by the additional administrative costs of receiving and paying out sums on every case. There are serious practical problems: how does an applicant pay a fee on a case which has to be lodged on the last day of the limitation period and which would currently be lodged by fax?

If there is any charge to be levied for the case proceeding to a hearing, it should be confined to the employer as the applicant has already paid a fee and the employer has chosen to contest the case.

The related proposal to cease paying witness expenses should also be opposed. It is often difficult for employees to get colleagues or former colleagues to attend.

Including in awards of costs compensation for the time a party has spent in dealing with the claim

Comment: This is intended to benefit employers. It would enable companies to seek to coerce applicants not to bring cases by threatening them with large administrative costs. It would encourage employers to rack up time and expense in conducting the case.

Changing the presumption on awarding costs in weak cases, so that Tribunals will have to give reasons why costs are not awarded

Comment: *Again, this is intended to benefit employers. A costs penalty on an individual applicant has far more impact than on an organisation. Moreover, an employee will often not know the eventual strength of her or his case when submitting a claim as all the necessary information is in the hands of the employer and there is no obligation on the employer to disclose information before tribunal proceedings are commenced. Employees have to submit claims within tight time limits to protect their position. The current costs provisions under the recent rule changes already enable costs to be awarded where a case is pursued when it did not have reasonable prospects of success.*

Enabling Tribunals to make orders for wasted costs directly against representatives who charge for their services

Comment: *This should be applied against the many "employment consultants" who often conduct cases in a way which adds to cost unnecessarily, as well as to solicitors and barristers. It is right that it should not apply to trade unions, CABx etc.*

Enabling Presidents of Tribunals to issue practice directions on procedural and interlocutory issues

Comment: *Consistency of practice would be welcome.*

Introducing a fast track for certain jurisdictions with either no or a short fixed period for conciliation. This could include a written determination if both parties agree

Comment: *All cases should be listed for a hearing expeditiously to encourage early resolution. A conciliation period would lead to additional cost and delay. Written determination would be acceptable where the parties are represented or have been independently advised as to the consequences.*

Registering applications publicly only once the claim has gone through the conciliation period and is going to a hearing and the Government invites views on whether to publish the particulars, the complaint and the response, on the public register

Comment: T*his should be seen in the context of the proposal to publish details of applicants on the internet. This is an infringement of rights which will lead to employers checking to see whether job applicants or employees have brought claims with no means of redress for the individuals concerned. There should be a record of all claims lodged and statistics kept. Names of individual applicants are unnecessary.*

The Government also asks what more can be done to ensure that weak cases are identified and dealt with at an early stage?

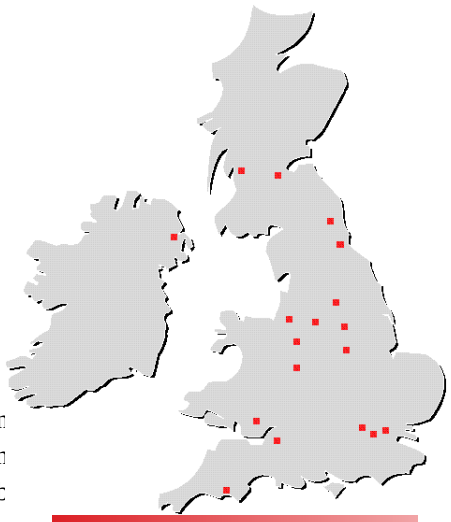
Comment: *The recently introduced rule changes appear to provide adequate protection and should be given time to operate.*

COMMENT

Overall the government's proposals are unacceptable. They represent an attack on unfair dismissal law itself as well as restricting accessibility to tribunals and undermining the role of ACAS. The proposals are an employers' oasis with little to benefit employee and trade union members.

Procedural safeguards are the most important remaining aspect of unfair dismissal and even that is now under attack it seems.

Come to my aid!



Anyanwu v South Bank Student Union and South Bank University [2001] UKHL 14
[2001]IRLR 305 HL
Hallam v Cheltenham Borough Council [2001] IRLR 312 HL

SOMEONE WHO helps another person to racially discriminate is as liable as the discriminator him or herself under s33(1) of the Race Relations Act 1976. You have to knowingly help the other person or organisation. This does not mean that the other person has to be cause of the racist action and you the secondary party. Both parties could be equal, lesser or greater contributors but one aids only if he knows the other is discriminating.

This is in addition to the vicarious liability provisions where employers are liable for the action of their own employees and sometimes third parties in discrimination cases.

In **Anyanwu** both applicants were union officers and were expelled and prohibited from entering the University premises by the University itself. Allegations of misconduct had been made. The student union dismissed them because they could not perform their duties if they could not enter the Union building owned by the University.

They sought judicial review against the University which was disallowed. They then claimed in the employment tribunal that the University had knowingly aided the dismissal which they said had amounted to race discrimination.

The tribunal struck out the claim against the University as a claim of discrimination had been raised before in the High Court and there is no right to bring the same claim twice. The Court of Appeal said the University could not have helped the Union to dismiss the union officers, they caused it. The House of Lords however disagreed. The word "aids" they said bears n technical meaning. It matters not that on begins or causes the act, as long as it can b shown a party knowingly assists another.

Of course, the assistance given to the discriminator has to be provided knowing that an act of discrimination will follow. If someone merely gives a person some information from which they will then decide to act then they have not assisted, or at least knowingly assisted a racist act.

A related point arose shortly afterwards in **Hallam v Cheltenham Borough Council.** Hallam, a romany gypsy, wanted to hire the Council's premises for a wedding. The police thought it might attract more gypsies from around about and they shared their thoughts with the Council. Then the Council told the applicant she could only use their premises on terms limiting numbers.

The County Court found the actions of the Council in limiting the numbers who could attend the wedding were racially discriminatory. The judge also held that police had been "helpful", indeed had aided the Council. But they did not knowingly aid in the discriminatory act. One police officer had attended and voiced concerns at the meeting where the Council decided to cancel the booking. Initially. the Court of Appeal said this amounted to "aiding" but that it had not been done "knowingly". Both sides appealed.

The Lords upheld the original County Court judge's view and expressed an appreciation of need for the police "to share" information.

Ayanwu is a crucial decision in establishing that it is not necessary to decide who caused the act. Both cases reassert the need to decide what the discriminatory act is and are a timely reminder of the usefulness of the little used aiding provisions of the RRA. All the culprits can be liable.

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