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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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Court of Appeal rules on DDA justification defence

Mr CS Jones v The Post Office Court of Appeal [2001] IRLR 384

THE LAW on Disability Discrimination continues to develop. A cautious note was sounded by the Court of Appeal in this recent decision.

Mr. Jones was a postman. He drove a delivery van in a rural area. He developed diabetes which was controlled by insulin injection.

His employers removed him from driving duties on the grounds that it was their policy that all professional drivers receiving insulin treatment should cease driving duties because of the risk of a hypo attack. His employers then reviewed him and allowed him to return to limited driving duties, not exceeding two hours in any twenty four. Mr. Jones was unhappy with this decision and went to Employment Tribunal.

The Tribunal accepted that there was discrimination and said that the two hour driving time limit was not justified .

The employer successfully appealed to the EAT against this decision. Mr. Jones in turn appealed to the Court of Appeal. They agreed with the Employment Appeal Tribunal.

In an important decision the Court considered Section 5 of the DDA. This is the section which an employer relies on when discrimination has occurred but it is argued that it is justified and is "both material to the circumstances of the particular case and substantial". In this case it was accepted that by reducing his driving hours to two hours in twenty four the employer had discriminated against Mr. Jones. However the employer said that this treatment was justified.

At the original Tribunal hearing three medical witnesses were called to the Tribunal – one for Mr. Jones and two for the Post Office. The Employment Tribunal assumed the responsibility for themselves of deciding on the basis of the various medical reports whether it was reasonable of the employer to limit Mr. Jones driving to two hours in twenty four.

The Court of Appeal said that this was not the correct approach. The Tribunal should not have substituted its own view of the medical evidence for that of employer.

Instead they said the only issue the Tribunal should consider is whether the less favourable treatment (i.e the reduction in driving to two hours per day) could properly be described as "material to the circumstances" and "substantial".

In this particular case a risk assessment had been done by the employer incorporating medical evidence.

The Court of Appeal said that by doing a risk assessment, based on the medical evidence, the employer had shown that its conduct was reasonable, and that the treatment of Mr. Jones was material to the particular circumstances and substantial.

The Court of Appeal went on to say that where a properly conducted risk assessment provided a reason, that on the face of it was both material and substantial and was not irrational, the Tribunal could not substitute its own decision.

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Material means a reasonably strong connection between the employer's reason and the circumstances of the individul case, and substantial means that it must carry real weight and thus be of substance.

The Tribunal in particular should not make its own assessment.

Only if no risk assessment was made by the employer or the decision which had been taken otherwise than on the basis of appropriate medical evidence or there was an irrational decision beyond the range of reasonable responses could the Tribunal say that the reason was insufficient and the treatment unjustified.

This is a cautious interpretation of Section 5 of the Act. It sounds very similar to the "range of reasonable responses" test in an unfair dismissal case.

It is likely to mean that in most cases where an employer does carry out a proper risk assessment and relies on appropriate medical evidence the justification defence is likely to be difficult to overturn.

If Tribunals are not going to consider additional evidence that was not available to employers at the time they made the decision to dismiss, then it is going to be essential for trade union reps to make sure that suitable medical/ergonomic or whatever evidence is available at that early stage since there will be little point in trying to get it after the decision has been made.

Victory on parental leave

THE TUC'S legal challenge to the parental leave cut off date has been successful. A few days before the case was due to be heard in the European Court of Justice on 3 May 2001, the Government climbed down and conceded that the right to parental leave should be available to parents of all children aged under five, regardless of whether the children were born or adopted before or after the 15 December 1999 cut off date.

The issue in dispute was Regulation 13(3) of the Maternity and Parental Leave etc Regulations 1999. Regulation 13(3) restricts parental leave to the parents of children born on or after 15 December 1999, or placed for adoption on or after that date. The TUC, represented by Thompsons, argued that Regulation 13(3) was in breach of the Parental Leave Directive. In judicial review proceedings last year, the High Court broadly agreed with the TUC but referred the matter for a decision to the European Court of Justice for a decision.

As a result of the Government's climb down, Regulation 13(3) will be abolished. From now on, parents who otherwise qualify for parental leave may take leave even if their children were born or adopted before 15 December 1999. In addition, transitional provisions will ensure that those parents who have lost out on their rights to take parental leave because their children have since reached the age of 5 or have been adopted for more than five years, will have a protected period in which to take the leave that they have lost.

The Government has insisted on a short period of consultation before drafting amending Regulations. In the meantime, anyone wishing to take parental leave who has so far been prevented by reason of Regulation 13(3) should ask their employer to grant leave, and if they do not, should lodge a Tribunal application pending the introduction of the amending Regulations.

The TUC have prepared a full briefing document on the case.
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EAT rules on privacy

Wilson v Keyser (EAT Judgement 20/04/2001)

THE EAT in England has given its first ruling on the Human Rights Act. In Wilson v de Keyser, an issue arose as to the cause of Ms Wilson's stress. Her employer's legal representative sent a letter of instruction to a doctor asking him to prepare a report. That letter contained the employer's subjective view of Ms Wilson's condition, referred to her as "easy to disbelieve" and included references to her personal life, such as the death of her brother and an alleged adulterous affair.

The Employment Tribunal struck out the employer's notice of appearance on the grounds that the sending of the letter amounted to scandalous conduct on the part of the employer. On appeal, the EAT found that the Tribunal had not exercised its discretion to strike out properly, and in doing so had to analyse whether Ms Wilson's right to privacy under Article 8 of the European Convention on Human Rights had been breached.

The EAT gave short shrift to Ms Wilson's arguments. First, the letter was neither written nor received by a public authority. Secondly, the information contained in the letter was not confidential (as, for example, medical records would be). Thirdly, the recipient doctor would be bound, in any event by professional duties of confidence.

This was a difficult case. But it does touch upon the important issue of disclosure of medical records for the purpose of employers obtaining expert medical reports in personal injury, employment and discrimination cases.

Whilst acknowledging that a claimant's right to privacy may have to be balanced against an employer's ability to conduct its defence, there is authority from the European Court of Human Rights to suggest that the employer may not be entitled to disclosure if the claimant discloses her own expert's report first and that report contains an adequate synopsis of the relevant information extracted from the medical records.

Agency workers

Patefield v Belfast City Council [2001] IRLR 664

IN THIS important decision the Northern Ireland Court of Appeal holds that employers who replace contract workers on maternity leave may be in breach of sex discrimination legislation.

The case concerned a woman who worked for a recruitment agency which supplied Belfast City Council with clerical staff. She worked for the council as a clerical worker from February 1995. When she became pregnant three years later she wrote to the council giving them formal notice that she would be taking maternity leave and that she intended to return to work.

At the end of her maternity leave Ms Patefield wrote to the council stating that she could return to work on 17 August 1998. However the council said that they had filled her position with a permanent employee and that they wanted to postpone her return to work until 7 September 1998.

In the event she was offered an alternative post which she did not accept on the grounds that it was materially inferior. She brought a claim for sex discrimination on the grounds that it is unlawful for a principal to discriminate against a woman who is a contract worker (Article 12 of the NI Sex Discrimination Order – Section 9 of the Sex Discrimination Act 1975).

The Court of Appeal found that when Ms Patefield went off work for maternity reasons there was a job available for a contract worker. By replacing her with a permanent employee when it knew that she wanted to return to her post after the birth of her child the council had subjected her to a detriment by effectively removing the possibility of her returning to her post. Had she not gone off on maternity leave they would have kept her on indefinitely and as such they had treated her less favourable on the grounds of her sex.

This decision shows employers cannot avoid their duties to women who go on maternity leave even though they are temporary agency workers.

Personal pensions replaced or revamped?

THE GOVERNMENT'S proposals to arrange pension provision for all has finally come to fruition. Stakeholder pension schemes came on stream from 6 April 2001, and must be made available to all employees who don't have access to an occupational pension scheme[1] with effect from the 8 October. The Government's intention was "to strike a reasonable balance between a modest additional burden on employers and the need to ensure wider access to good-value pension schemes"[2] How well has this balance been struck?

The origins of the stakeholder proposal was the Partnership in Pensions white paper published in 1998. For employees with earnings below £9,000 per annum, the solution proposed was a reform of the State Earnings Related Pension Scheme, and the introduction of a minimum income guarantee for all pensioners. Stakeholder pensions are aimed at those with earnings between £9,000 and £18,500 per annum: so-called "moderate earners" who could be expected to save something for their retirement. What was needed was a reform of the personal pension system which has been around for many years. Stakeholder pensions should be secure: operated by trustees and not the pensions industry. They should be low-cost: a cap on charges would be put in place, made possible by reducing the administrative burden on the provider by advertising through the workplace. They should be flexible: there should be no penalty for changing jobs or taking a career break. They could not be final salary schemes however, and benefits would have to be defined in terms of the contributions paid, and not the earnings of the investor.

The requirement for a trustee board was an early sacrifice. Stakeholder pension schemes can be administered by a stakeholder manager, with proper accreditation from the Financial Services Authority. These schemes can have trustees, and some unions have created their own stakeholder schemes which do have a trustee board. The actual provider of the pension is inevitably one of the large insurance companies, but unions can negotiate for a proper trustee board or advisory committee, charged with selecting and overseeing the insurer. The TUC has set up its own trust based scheme available to affiliated unions.

The reduction in charges has been the big success story for stakeholder pensions. Charges must be kept below 1% of the sum invested, and there must be no exit charges for those who leave early. The bigger insurers have undercut each other even below this 1% cap, and applied the same charging structure to their other personal pension contracts.

More dramatically, non-earners are allowed to contribute to a pension for the first time: anyone under 75 years old will be able to pay up to £3,600 to a stakeholder scheme. The tax arrangements are the same those for personal pensions except that the contributor does not need to have any taxable earnings. Those who are in employment can contribute the same amount. [3]

And the other side of the equation: what of "The modest additional burden on employers"? That is the big failing of stakeholder pensions: there is no compulsion on an employer to contribute. It must consult its employees and recognised trade unions before choosing a stakeholder scheme for its employees, and then point its employees in the direction of the selected provider. It must offer a payroll deduction facility, pass contributions on to the provider within specified time limits, and keep proper records. But that is about it. Given that the employer does not need to contribute, that the scheme need not have trustees, and that the tax regime is the same, it is difficult to see a great difference between this and ordinary personal pensions with limited charges and a facility for non-earners to contribute.

There are two big risks in the

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new world of stakeholder schemes. The first is the damage they could do to good quality final salary pension schemes. The government has recognised this and emphasised that it sees occupational schemes as the best arrangement for pension provision. It hopes to avoid the personal pension mis-selling scandal repeating itself by allowing employees to contribute simultaneously to an occupational scheme and a stakeholder scheme.[4] There is no way of knowing at this stage, however, whether the availability of stakeholder pensions will encourage employers who are already thinking about it, to close final salary schemes and go for money purchase.

The second is the risk of giving and getting bad advice. The giving of advice is still carefully regulated, and the risk is to union officials: they risk committing a criminal offence if they give personal advice to members about the investment options available to them. General advice about the nature of stakeholder schemes and the attraction of occupational schemes is permissible, but if a member needs to know which choice to make, the only safe course is to point him or her in the direction of an independent financial adviser or the representative of the stakeholder scheme insurance company.

1 With some exceptions: see the side panel.

2 Stephen Timms, Pensions Minister, 11 March 1999

3 Note that this limit includes employer contributions if any, and the tax rebate. If an employee has earnings over £30,000 per annum, they can only contribute to a stakeholder arrangement for five years. There is no need to contribute regularly, but the minimum contribution is £20.

4 Unlike personal pensions. The same contribution limits outlined above apply

Visit www.opra.gov.uk

Occupational Pensions Regulatory Authority OPRA

DECISION TREE

Does your business have five or more employees?

YES

Do you have any relevant employees?
A relevant employees is someone who (1) has worked continuously for at least three months AND (2) has earned more than the National Insurance earning limit (£3.744 per year for 2001/2002) continuously over the last three months AND (3) is not prevented by an Inland Revenue restriction from contributing to a UK pension scheme – eg resident overseas

YES

Do you have an ocupational pension scheme your employees can join?

NO

Do you pay into a personal pension scheme for all relevant employees over 18?

YES

Is it in your employees' contracts of employment that you will pay the equivalent of at least 3% of basic pay into a personal pension scheme on their behalf?

NO

Can you offer written proof demonstrating that you are contributing an amount at least equal to 3% of basic pay to a personal pension on behalf of your relevant employees?

NO

You must offer access to a stakeholder pension scheme for ALL relevant employees.
You must offer to deduct contributions through the payroll for payment to the scheme provider

Who are you?

BBC v Souster [2001] IRLR 150
British Airways v Boyce [2001] IRLR 157
R v White, Times Law Report
13 March 2001

DIPPING THEIR toes into the topical and contentious debate as to what national identity means, the Scottish Court of Session in BBC v Souster conclude that the English do have separate "national origins" to the Scots. As a consequence, the Race Relations Act 1976 does apply to discrimination between the Scots and English.

Mr Souster, an English television presenter, claimed that he had lost his job as a presenter for "Rugby Special" for BBC Scotland because he was English and BBC Scotland wanted a Scottish person in post. He lodged a Tribunal claim for race discrimination. As a preliminary point the Tribunal had to decide whether the Race Relations Act covered discrimination between the Scots and English. The Tribunal, and also the Employment Appeal Tribunal, held that it did, following the previous Employment Appeal Tribunal authority of **Northern Joint Police Board v Power** 1997 IRLR 610. The BBC appealed, and the matter was heard by the Scottish Court of Session (the equivalent of the English Court of Appeal).

The issue before the Court of Session was the meaning of the words "on racial grounds" in section 1 (1) (a) of the Act ("… a person discriminates against another ... if on racial grounds he treats that other less favourably than he treats or would treat other persons…"). "On racial grounds" is defined in section 3(1) of the Act as meaning colour, race, nationality or ethnic or national origins.

Mr Souster argued that being English was a matter of national origins. The BBC's response was that nationality and national origins should be defined by reference to citizenship and nationality in the legal sense. Given that both the Scots and English share a British passport, according to the BBC they belonged to the same nation and therefore there could be no unlawful discrimination between sub-groups of the one nation.

In these days of devolution and complex analyses of racial identity, such simplistic arguments were unlikely to succeed, and indeed they did not succeed. The Court of Session decided that national origins should be given a broader and more flexible interpretation than just a reference to a passport: "What has to be ascertained are identifiable elements, both historically and geographically, which at least at some point in time reveals the existence of a nation." Given that England and Scotland were once separate nations, the Court held that the test was satisfied.

On the related question of whether the English or Scots are part of a "racial group", the Court quoted with approval the authoritative House of Lords decision in **Mandla v Dowell Lee** 1983 IRLR 209 : "Provided a person who joins the group feels himself or herself to be a member of it, and is accepted by other members, then he is, for the purposes of the Act, a member…In my opinion, it is possible for a person to fall into a particular racial group either by birth or by adherence, and it makes no difference, so far as the Act of 1976 is concerned, by which route he finds his way into the group." Referring to this passage, the Court of Session observe that it may be the perception of the discriminator which defines the racial group. If the discriminator's treatment arises from their perception of the victim's national or ethnic origins, then the victim's actual national or ethnic origins, let alone their passport nationality, are irrelevant.

This broad and flexible definition of racial grounds properly takes into account the complex reality of national identity, where a person may change their nationality by marriage or geographical migration or indeed simply by association. Likewise it takes into account the complexity of racial prejudice, where a person who discriminates may do so in complete ignorance of the victim's actual nationality or national background. A flexible definition of race is essential to reflect these circumstances.

Although the Souster case was just concerned with discrimination between the Scots and English, the decision potentially affect the Irish and Welsh, and indeed any person needing to bring themselves under the protection of the Act.

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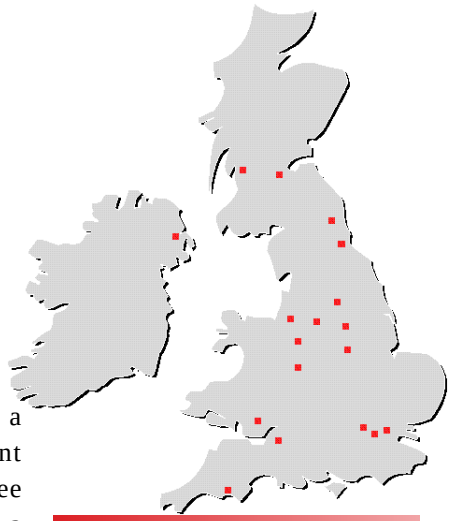
Mr Souster's case was heard at the same time as another English and Scottish discrimination dispute. In **British Airways v Boyce**, Mr Boyce had previously been unsuccessful in pursuing a Tribunal application for race discrimination on the grounds of his English "ethnic origins". Two years later, he lodged a further Tribunal claim arguing discrimination in relation to the same facts but on the grounds of his English "national origins". The Court of Appeal dismissed his application. Although he could have succeeded in his claim that being English was a question of national origins, because he had previously brought a similar claim he could not now seek to bring the same issue before the Tribunal. Referring to the principle set out in the Court of Appeal decision of **Divine-Bortey v London Borough of Brent** 1998 IRLR 525, the Court of Session held that all legal arguments arising out of the same facts should be heard before the one Tribunal. It is not possible to seek to argue different legal points in a later Tribunal, if those arguments should or could have been argued before the first Tribunal.

This case is a useful reminder of the need to argue all the relevant points before the Tribunal. If a party fails to do so, they will not have a second chance. In the context of pursuing race discrimination cases, it is therefore particularly important to consider with some care the nature of the racial grounds on which the Applicant is relying.

A recent criminal case from the Court of Appeal – **R v White** – concerned a defendant, Mr White. Mr White was black, and his offence was to call a bus conductress a "stupid African bitch". The questions which the Court had to answer was whether "African" was a term which described a "racial group" or a "race", and whether a person can discriminate on racial grounds if they are of the same racial group as the victim. The answer given by the Criminal Division of the Court of Appeal was yes to both. The Court held that this was "racially aggravated" conduct. "Racial group" and "race" had to be broadly defined and given a broad, non-technical meaning. Therefore the word "African" could describe a racial group. Further, the Court held there is no reason why people from the same racial group cannot discriminate against people of the same group. This is a criminal decision, but the same conclusions would undoubtedly be reached by Tribunals in the employment context.

A rock of mutuality and a hard place



Montgomery v Johnson Underwood Limited (9.3.01) Court of Appeal [2001] IRLR 269

ANOTHER CASE on what the Court of Appeal describes as "the troublesome question whether an individual was employed under a contract of employment". Whilst the introduction of European Community legislation like the Working Time Regulations, and Part time Work Regulations has extended some employment rights to "workers", the central employment right – not be to unfairly dismissed – still only applies to "employees" as defined by section 230 Employment Rights Act 1996: "Employee means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment".

Mrs Montgomery approached Johnson Underwood, an employment agency, looking for work. They placed her with a local company O&K Ltd. Hours of work and the rate of pay were discussed and agreed. Mrs Montgomery received a letter of confirmation from JU Ltd together with their printed terms and conditions, she sent in her P45 and bank details. She was paid direct into her bank account on the basis of her time sheets which were approved by O&K. Mrs Montgomery worked for O&K for two years, they became unhappy about the amount of time she was spending on personal telephone calls and asked JU Ltd to terminate her assignment. A director of JU Ltd visited Mrs Montgomery and told her it was over.

Mrs Montgomery claimed for unfair dismissal. She named both JU Ltd and O&K Ltd as Respondents. Both Respondents denied that she was their employee. At a preliminary hearing the Employment Tribunal decided that she was an employee of JU Ltd. Their decision was upheld by a majority of the Employment Appeal Tribunal and the appeal went to the Court of Appeal.

The Court of Appeal decided that she was not employed by JU Ltd. The Employment Tribunal had not properly considered the three elements of a contract of service which are (i) That she agrees to provide her own work and skill in the performance of some service for the employer in return for pay, (ii) That she agrees, expressly or impliedly, to do that service subject to the other's control in a sufficient degree to make that other master; and (iii) That the other provisions of the contract are consistent with its being a contract of service.

The three tests are described as "an irreducible minimum of obligation on either side".

The Employment Tribunal had not given sufficient weight to the issue of control and had accepted that there was little or no control by JU Ltd of Mrs Montgomery and had said that "the absence of mutuality of obligation appears to us to be largely irrelevant to the specific engagement". The Court of Appeal were satisfied that the approach of the Employment Tribunal to these two essential ingredients of a contract of employment was wrong in law.

The Court of Appeal went on to say that they were not surprised that the lower tribunals tried to give Mrs Montgomery the rights under modern employment law but stressed that the remedy lies with Parliament. The Employment Relations Act 1999 gives Parliament the right to extend employment rights to workers. They should use it.

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