Published by Thompsons Solicitors

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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 56 March 2001

Part timers win at last

Preston and Others v Wolverhampton Healthcare NHS Trust and Others: Judgement of the House of Lords; 8 February 2001

ON 8 FEBRUARY, the Lords finally gave judgment in the long-running part-time pensions test cases, known as Preston and others v Wolverhampton Healthcare NHS Trust and others. Even now, the ruling only relates to preliminary issues. Nonetheless, the tide has now turned after the successful trip to Luxembourg, and many part-timers now have a realistic expectation of compensation.

The preliminary issues decided were as follows:

- part-timers can count service back to April 1976 for pension purposes;
- the six month time limit for presenting a claim to an employment tribunal under the Equal Pay Act does not contravene EU law;
- for those employed under a succession of contracts within a "stable employment relationship", notably teachers and lecturers, the six month time limit does not begin to run until the end of the last contract.

Many claims will not now be able to proceed because they were not lodged within six months of the applicant leaving employment. However, all claims lodged within the six month time limit will now go on to the next stage of the Tribunal process. This is the determination of issues common to individual pension schemes. The third and final stage will then be the determination of individual cases.

The Tribunal Chair with overall responsibility for these cases, now based in Nottingham, will call a directions hearing, probably in London, shortly. At that hearing he will set a timetable for the determination of the scheme-specific points at the second stage of the process.

We know that unions have many thousands of these cases lodged with tribunals nationally. We appreciate that their administration stretches resources. But now is the time when unions should ensure that they have accurate logs of their cases, broken down by reference to pension scheme, dates of employment and hours worked. It is possible that the Chair of Tribunals in Nottingham will require the selection of test cases and the processing of the second stage within a tight timetable.

Two important points to remember. First, because of the way the time limit works in the Equal Pay Act, the six months does not actually start to run until the end of employment. This means that part-timers who are still employed (or who left employment less than six months ago) can still lodge Tribunal claims, even though the period of exclusion from the pension scheme on grounds of part-time status came to an end a number of years ago.

Secondly, in contributory schemes, part-timers who win their cases will still have to pay the employees' contributions if they want to take up their rights to back-dated pensions.

This is a major triumph for part-timers throughout the country. It is also a tribute to the determination and commitment of the test case unions under the coordination of the TUC.

■ A fuller briefing is available from the Employment Rights Unit, Thompsons Solicitors, Congress House, Great Russell Street, London

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There will be another one along in a moment

Oy Liikenne Ab v Liskojarvi (Case 172/99) ECJ 25 January 2001
Cheesman and others v Brewer [2001] IRLR (EAT)

THE EUROPEAN Court seems determined to cause maximum confusion in the case law on the Acquired Rights Directive. Its conclusions are increasingly unpredictable and difficult to reconcile with previous cases.

The latest case of **Liskovarji** is a shocking decision: shocking in its outcome and its reasoning.

The case concerned the operation of seven bus routes in Helsinki. The Council ran a tendering exercise. The existing contractor was unsuccessful and a new contractor was appointed to operate the routes for three years.

The routes had been operated with 45 drivers and 26 buses. Thirty three of the drivers applied for jobs with the new contractor and all 33 were appointed, but on worse terms and conditions. The new contractor bought some of the uniforms for the existing drivers but did not use the same buses.

The first question the Court had to answer was whether the Acquired Rights Directive applied to a contract awarded following a tendering exercise under the Public Procurement Directives. The Court reached the sensible conclusion that the Public Procurement Directives are not intended to exempt contracting authorities and service providers from laws and regulations in the social sphere: they must still comply with those laws and when bidding must take into account the possible applicability of the Acquired Rights Directive.

Equally, the award of a public service contract in this instance did not fall outside the Acquired Rights Directive as the operation of passenger transport by bus does not involve the exercise of public authority. The absence of a direct contractual link between the two contractors did not prevent the Directive applying.

So far, so good. One would then have expected the Court to accept the arguments of the workers, supported by the Commission and by an intervention from the UK government, and decide that the Directive applied. Not so.

The Court recited the previous cases. The Court said that "bus transport cannot be regarded as an activity based essentially on manpower, as it requires substantial plant and equipment". The Court decided that there was no transfer in the absence of a transfer to a significant extent of assets necessary for the proper functioning of the entity.

This is an extraordinary conclusion when the majority of staff transfer and the activity carries on in the same way following the transfer.

In particular, the Court failed to take on board that the right to operate the bus services on those routes for a period of time is a valuable intangible asset, akin to goodwill. The Court discounted this approach. It asserted that the value of the contract fell to nil on the expiry of the contract and that there was no "transfer of customers" because the new contractor did not take over the existing contracts with customers and the customers were not "captive".

This is a very narrow approach. It fails to take account of the fact that the grant of an exclusive right

Sex discrimination compensation

The EOC have produced a useful sex discrimination compensation pack. This can be accessed from their website at the address below.

http://www.eoc.org.uk/html/compensation_in_sex_discrimina.html

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to operate certain bus routes is a valuable commodity and that if passengers want to travel by bus on those routes, they will now have to do so on the new contractor's buses. The fact that the contract is for a finite period does not negate this, any more than it would if someone purchases a shop with the goodwill of its customers but with a lease for a finite period.

The decision is poorly reasoned and inconsistent with the approach in earlier cases. It causes further confusion and undermines the efforts of UK courts to reconcile previous cases and achieve a stable and understandable position.

Particular sympathy on this point must be given to the Employment Appeal Tribunal in **Cheesman** which attempted to pull together all the principles from the previous ECJ and UK cases. The EAT correctly emphasised the need to consider separately whether there was an undertaking and whether it had been transferred and carefully set out the factors identified in previous cases, in doing so it attempted to reconcile **Suzen** with the previous cases and concluded that there was a relevant transfer of a local authority housing maintenance contract when none of the existing staff were taken on by the new contractor and no assets were transferred, only the contract itself.

The latest ECJ decision leaves the situation in a mess. It encourages employers to resurrect old issues and attempt to find ways around TUPE. We have waited long enough for the government's draft regulations to reform and simplify TUPE. The government should act now.

Calculating holiday pay

Taylor v East Midlands Offenders Employment Consortium [2000] IRLR 760

THE NEED to calculate holiday pay due on termination of employment has become more frequent since the implementation of the Working Time Regulations 1998. Regulation 14 gives a worker a statutory entitlement to be paid in lieu of annual leave on termination of employment. The regulations also set out how such a payment is to be calculated.

Mr Taylor was employed full time, he worked a five day week and received an annual salary paid monthly in arrears. His contract of employment entitled him to 20 days annual leave in addition to bank holidays. Mr Taylor's employment terminated and he still had 10 days leave outstanding. He and his employers disagreed as to how the outstanding holiday should be calculated.

Mr Taylor said that his monthly or annual salary should be divided by the number of working days and he should receive that rate for the days due to him. The employers divided his annual salary by 12 to give his gross monthly salary, divided that by the number of calendar days in the month of termination to give a day's pay and multiplied that by 10.

The Employment Tribunal Chairman concluded that the employer's calculation was correct. The EAT said that was wrong and that the Tribunal should have "grossed up" the entitlement to 10 days holiday based on two working weeks to 14 calendar days to take into account the two weekends. The contract of employment was not suspended between Friday and Monday although the obligation to work did not arise. The amounts should be grossed up to a seven day week and they referred in particular to the calculation of holiday pay in Regulation 16 in The Working Time Regulations and a week's pay under the Employment Rights Act. They also disapproved of a method of calculation which varied with the length of a particular calendar month.

The EAT decide that the correct way of calculating holiday pay due to an applicant on termination of employment where 10 days holiday was owed is to divide gross annual salary by 365 to give a day's pay and then to multiply that by 14. In this case increasing the amount of money owed to the Applicant by £200. This case is of considerable assistance to those calculating amounts due on termination and shows the financial significance of getting the calculation right.

Sex, race and equality

Equality Framework Directive (2000/78/EC) European Race Directive (2000/43/EC)

FOR MANY years Applicants in sex discrimination and equal pay cases have had a distinct advantage over Applicants in race and disability cases. Whenever the Sex Discrimination Act or Equal Pay Act was drawn so narrowly as to deprive an Applicant of a claim, reliance could usually be placed on the underpinning European Equal Treatment or Equal Pay Directives to achieve the desired end. With race and disability on the other hand, there has been no equivalent European Directive to fill the gaps. And as for age, religion or sexual orientation, there has been no law at all preventing discrimination, whether at domestic or European level.

All that is set to change. Under the new **European Race Directive** (2000/43/EC), all Member States including the United Kingdom will have to introduce laws by 19 July 2003 to outlaw discrimination on the grounds of race. Under the new **Equality Framework Directive** (2000/78/EC), Member States including the United Kingdom will have until 2 December 2003 to implement laws outlawing discrimination on the grounds of sexual orientation and religion, and until 2 December 2006 for discrimination on the grounds of disability and age. These two new Directives represent the most significant and far reaching change to equality law since Britain joined the European Community.

The Race Directive was sped through the European statute books in part as a response to the rising tide of racist violence in Europe combined with the impending enlargement of the Community and the rise of the far right in countries such as Austria.

The Directive covers both direct and indirect discrimination. The definition of direct discrimination is broadly in line with our existing Race Relations Act. Indirect discrimination however has a different definition. It is defined as occurring "where an apparently neutral provision, criterion, or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified…" The significant difference here from the terms of the Race Relations Act is that the test of "particular disadvantage" is a broader test, and suggests that there may be different ways of proving the disadvantage as opposed to just the narrow workplace statistics normally required by Tribunals which can be so difficult to produce.

There is also a definition of racial harassment: "unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment." Racial harassment will no longer be the nameless "any other detriment".

'The Race Directive was sped through the European statute books in part as a response to the rising tide of racist violence in Europe combined with the impending enlargement of the Community and the rise of the far right in countries such as Austria'

The Equality Framework Directive applies the same broad definitions of direct and indirect discrimination and harassment in relation to religious belief, disability, age and sexual orientation. Direct discrimination follows the standard formula of contrasting how one person is treated in comparison with another in similar circumstances. Indirect discrimination follows the definition in the Race Directive.

In terms of impact on the workplace, it is the provisions of the Framework Directive relating to age which are likely to have the most impact. It will apply to discrimination against both younger and older workers. Although

under Article 6 Member States are allowed to provide for age criteria in relation to access to jobs, training or retirement, these conditions must be objectively justified. Therefore any age criteria must have some objective foundation. For example the criteria can provide that the person must not be so old as to be infirm and incapable, or so young that they cannot have the maturity or qualifications to do the job in question. But the criteria must relate to the person, and not just consist of arbitrary qualifications for example of a fixed retirement age. Again, service related increments will be permissable, provided they can be justified.

Otherwise, the age provisions are drawn in the widest terms. There is no limit at either end of the age scale, at which the Directive ceases to apply. Nor are any particular job types excluded, though there is provision for excluding the operation of the Directive from the armed forces (likewise with disability as well).

Occupational pension schemes are however given a let-out. Ages can be fixed for admission or entitlement to retirement or invalidity benefits, and age criteria for actuarial calculations are not unlawful.

In terms of the disability provisions, it is likely that our Disability Discrimination Act will in large part satisfy the requirements of the Directive. However, the Directive admits of no exception for small employers and the government has already signalled its intention to remove the current exclusion for employers of less than fifteen staff. Further, the general definitions of direct and indirect discrimination in the Framework Directive do not fit easily with the broad definition of discrimination in the Disability Discrimination Act ("for a reason which relates to the disabled person's disability"). Although this test is generally regarded as covering both direct and indirect discrimination, it does not equate directly with the definitions in the Directive. Cases of direct disability discrimination will not be capable of being justified under the Directive, unlike the broad ranging justification defence built into the very definition of all types of disability discrimination in the UK. There is specific allowance made in the Framework Directive for national laws requiring an additional obligation to carry out adjustments to accommodate disability.

'There is no explanation in the Directive as to what discrimination on the grounds of sexual orientation will involve'

The most obvious consequence of the provisions outlawing discrimination on the grounds of religion or belief is that discrimination against the 15 million Muslims in this country will soon be unlawful. This will avoid the clumsy mechanism often currently adopted of having to fit such religious discrimination into the structure of an indirect Race Relations Act case. Article 4 of the Framework Directive preserves a genuine occupational qualification for churches and other religious organisations which will be allowed to require people working for them to share the same religious beliefs: to act in "good faith and with loyalty to the organisation's ethos".

The effect of introducing laws prohibiting discrimination on the grounds of religion will broadly bring Great Britain into line with Northern Ireland where discrimination on the grounds of religious belief has been unlawful since 1976.

There is no explanation in the Directive as to what discrimination on the grounds of sexual orientation will involve. Because of the current lack of protection against sexuality discrimination in the United Kingdom, temporarily halted for the moment at least by the EAT in **MacDonald v MOD** 2000 IRLR 748, it can be hoped that the Government will choose to implement this part of the Directive sooner than the 2 December 2006 deadline.

In relation to all the forms of protected status in the Framework Directive (namely age, religion, sexual orientation and disability) positive action is expressly catered for and is not to be regarded as conflicting with the basic principles of equality. Article 7.1 specifically provides that specific measures may be adopted by Member States to prevent or compensate for the disadvantages suffered by certain social groups. It remains to be seen if the Government will change the long standing position of this country not to encourage positive action measures (see LELR 55 February 2001)

The Directive is only a Framework Directive. It will be up to the Member States to decide on the detail of how to implement the laws in a manner that is appropriate. What is sure is that the provisions of the Framework Directive will result in dramatic changes to employment law and industrial practice in the workplace.

Experiences of political discrimination

Fair Employment (Northern Ireland) Act 1976
McKay v NIPSA 1995 IRLR 146
Whyed Gill v NICEM FET Dec1999
Paisley v Arts Council of NI & An Comhairle Ealaion FET July 1998
Treacy & Barry McDonald, In the matter of 2000 NIEHC 6

AMONG THE changes brought about by the Human Rights Act 1998 is the limited protection provided against discrimination on the grounds of political opinion. Experience and cases in Northern Ireland will be of assistance in considering the scope of the term political opinion.

Political Discrimination – only Northern Ireland politics need apply!

In Northern Ireland the Fair Employment legislation was introduced in 1976 outlawing discrimination on the grounds of "religious belief or political opinion". The background was the existence of long-term and pervasive discrimination on religious grounds. This context, and the related government report and parliamentary proceedings, indicated that the inclusion of political opinion was because of the close correlation in NI between religion and politics – most catholics being nationalists and most protestants being unionists.

Thus, it was initially considered that the type of political opinion which was protected was that which related to the constitutional status of Northern Ireland.

A broad definition

A 1993 tribunal decision in an application against the union NIPSA by a member who had unsuccessfully applied for a post led to a broader interpretation of the term political opinion. The member alleged discrimination based on his membership of the 'Broad Left' which was opposed to "the right wing approach and tendencies of the union leadership". The tribunal dismissed the application finding that the term political opinion related solely to the particular political affairs of Northern Ireland. In 1994 the Court of Appeal overruled the tribunal and found that the term should be broadly interpreted stating:

"There can be no difficulty as to the meaning of the word 'opinion' and none as to the word 'political". When they come together in the phrase 'political opinion' it means, in broad terms, and without attempting any exhaustive definition, an opinion relating to the policy of government and matters touching the government of the State".

A very broad definition?

The extent to which this definition is capable of (or indeed requires) a very broad interpretation was highlighted by a 1999 tribunal decision. That case concerned an applicant for the top post with the Northern Ireland Council for Ethnic Minorities (NICEM) who claimed that he had been discriminated against because he advocated an anti-racist approach rather than the culturally sensitive approach favoured by NICEM. The tribunal found that he had a view which sees anti-racism as involving obtaining power, and applying the definition above found that ".. it is impossible to say that an attitude to racism which involves obtaining of power for effectiveness is not a political opinion".

The tribunal made it clear that on the legal authorities and facts they were reluctantly compelled to find that there had been political discrimination. This is being appealed to the Court of Appeal on grounds including the issue of whether anti-racist and culturally sensitive approaches are political opinions.

This case law supports the view that political discrimination cases can be brought in a wide variety of situations. For example, Thompsons McClure (Belfast) has commenced a case on behalf of a union activist who claims that he was discriminated against because

of union activities and that this is political discrimination. His argument is that union activities amount to a political opinion as they relate to government policy in regulating industrial relations and the rights of workers. It is likely that the employer (while pointing to the existence of a separate statutory remedy) will argue that any relevant union activities were concerned with workplace matters and did not relate to wider government policy and thus were not a political opinion.

Justification

In a different context, the issue of union activities provides an example of the use of justification as a counterbalance to a wide definition of political opinion. Thus, if unions or those working with unions make it a requirement that employees have a commitment to the union movement, could this be the basis of a claim of political discrimination? Hopefully not. Insofar as this could be seen as political discrimination, the employer could rely on an exception which allows such discrimination "..where the essential nature of the job requires it to be done by a person holding, or not holding a particular political opinion".

A 1998 tribunal decision in an application brought by Rhonda Paisley, who had been a councillor for the Democratic Unionist Party (led by her father Reverend Ian Paisley) considered the issue of justification. The case concerned her application for the post which involved co-operation between Northern Ireland and the Republic of Ireland in arts activities. While the tribunal found that she had been discriminated against during her job interview on the basis of her political opinion, it also stated that the matter of her political opinion and its relevance to her suitability for the post was a matter which could have been lawfully pursued.

Thus, in relation to her association with the DUP, and the fact of "…a perception that the Democratic Unionist Party would not be in the business of fostering closer contacts between Northern Ireland and the Republic of Ireland…", the tribunal stated that this could have been directly addressed "…insofar as the essential nature of the post required it to be done by a person holding or not holding such beliefs or opinions".

A different type of discrimination?

Comments by a leading judge in recent judicial review proceedings differentiating political discrimination from other discrimination suggest that the courts will seek to limit the scope of the former.

The central issue was whether the requirement to make the declaration discriminated against the applicants as nationalists.

The case involved two junior barristers who had successfully applied to become senior barristers, Queen's Counsels (QCs). Before they could become QCs they were required to make this declaration:

"I do sincerely promise and declare that I will well and truly serve Her Majesty Queen Elizabeth II and all whom I may be lawfully called upon to serve in the office of one of Her Majesty's Counsel learned in the law according to the best of my skill and understanding".

The central issue was whether the requirement to make the declaration discriminated against the applicants as nationalists. While the case was ultimately successful on other grounds, the court found that there was no political discrimination. It found that the Applicants were not required to declare allegiance to the Queen and were merely required to undertake to render the same service to the Queen as they would to any other client.

On the issue of political opinion the judge stated:

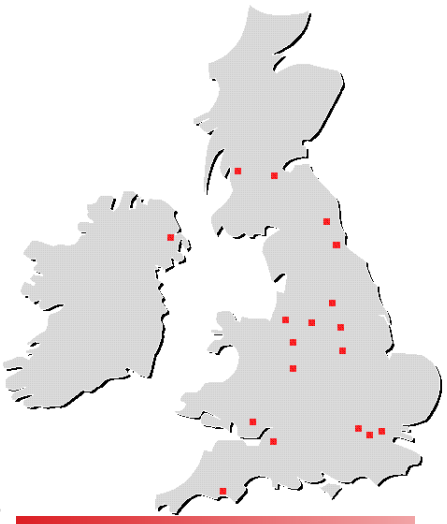
"In the field of discrimination, a different approach must be taken to the question of political opinion from that which is appropriate to deal with the immutable conditions of life such as race or gender. If it were otherwise, an unscrupulous person, claiming to be the victim of discrimination on the grounds of political opinion, could adjust his professed belief in order to accuse the decision maker of inequality of treatment".

In considering established case law in the field of sex discrimination he drew a distinction in relation to political belief stating:

"Any decision with political implications is virtually certain to be opposed by some members of the community and welcomed by others. Simply because such a decision is opposed does not mean that it discriminates against those individuals who are against it. It is impossible to cater for every brand of political opinion by anything other than the most bland political decisions".

The forthcoming appeal in the NICEM case will lead to further consideration of this developing area.

Lord Chancellor scrapes home



Coker and Osamor v the Lord Chancellor and the LCD [2001] IRLR 116

LORD IRVINE'S appointment of Garry Hart as his special adviser after the 1997 General Election victory was controversial. Allegations of "jobs for the boys" were rife.

After the appointment, Jane Coker, brought a claim of sex discrimination at the Employment Tribunal and Martha Osamor brought a claim for both sex and race discrimination. Amid considerable publicity the Employment tribunal found in favour of Ms Coker, but Ms Osamor did not succeed. The Employment Appeal Tribunal has now ruled in the Lord Chancellor's favour, with the effect that both claims before the tribunal have been dismissed. The two women are likely to appeal to the Court of Appeal.

The EAT took the opportunity to revisit the law on indirect discrimination after the Seymour-Smith case. In so doing, it analysed the well-known components of an indirect discrimination claim:

- the application of a "requirement or condition";
- which is such that the proportion of women who can comply is considerably smaller than the proportion of men who can comply with it;
- which the employer can not justify; and
- which is to the woman's detriment.

The Lord Chancellor tried to argue that the "requirement" was not only that the successful candidate should be known to him, but also that they should have his trust. The EAT saw no reason to interfere with the Tribunal's formulation of the requirement.

On "disproportionate impact", the Lord Chancellor argued that a technical comparison is required which involves finding the total number of workers to whom the "requirement" applies and then assessing the proportion of men and women within that total who could comply. By a majority, the EAT decided that there was no actual evidence of "disproportionate impact" in this case and so allowed the appeal. Applicants can ask Tribunals to draw inferences, but usually there must be some evidence, however indirect to support that inference.

On justification, the EAT concluded that the standard an employer has to meet has been lowered by Seymour-Smith. The test now is whether the requirement reflects a legitimate aim, which is not itself discriminatory, and which the employer could reasonably consider as suitable for attaining that aim. The EAT decided that, in any event, the Lord Chancellor had failed to meet even this lower test.

Controversially, the EAT decided by a majority that neither applicant suffered a detriment. It was not enough that they could not comply with the "requirement". Instead there had to be some "physical" or "economic" consequence as a result of the discrimination. The minority view of the EAT was that Ms Coker had suffered a detriment – she met the criteria for the job except for the discriminatory condition of being personally known to the Lord Chancellor and therefore was denied the opportunity to apply for the post and be considered for it.

The Lord Chancellor is obviously pivotal to the development of the law – but not usually as a party in a case. With this case set to go to the Court of Appeal he may find himself making law in more ways than expected, and not necessarily to his liking.

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