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Protecting the former employee

Relaxion Group plc v Rhys-Harper [2000] IRLR 810 EAT

WE HAVE previously reported the decision in Coote v Granada Hospitality (see LELR 38 September 1999, [1998] IRLR 656). In Belinda Coote's case the European Court of Justice held that the Equal Treatment Directive requires Member States to provide a remedy for ex-employees who are victimised by their former employer by not providing a reference to a prospective employer because they had brought sex discrimination proceedings.

When the case returned to the EAT ([1999] IRLR 452) they ruled that the Sex Discrimination Act allows an applicant to make a victimisation complaint in respect of events that occurred after the employment relationship had terminated. The EAT held that it could apply the ECJ decision in preference to the Court of Appeal decision in **Adekeye v The Post Office** (No 2) [1997] IRLR 105 which held that former employees have no protection as far of complaints of race discrimination victimisation are concerned.

Where does the decision of the ECJ leave ex-employees who believe they have been discriminated against on the grounds of their sex after the employment relationship has ended? The EAT in the **Relaxion** case deal with this question by saying that an applicant cannot bring a complaint under the Sex Discrimination Act in respect of an act of discrimination which takes places after the employment has ended, other than a claim of victimisation. Victimisation is defined as less favourable treatment based on a person bringing a complaint of discrimination or equal pay or raising the issue of discrimination. It was intended to enable people to raise discrimination complaints without fear of retribution.

This is an extremely narrow reading of the **Coote** decision, particularly as the EAT in **Coote** said that the words "woman employed by him" in section 6(2) of the SDA "as a matter of grammar, are capable of meaning "who has been employed" as well as "who is employed". They went on to say "Moreover the words "access to any other benefits, facilities or services" are apt to include both present and former employees as a present or former employee can be subjected to a detriment". Whilst the ECJ decision in Coote only dealt with the provision of references, Article 6 of the Equal Treatment Directive says that "Member States shall introduce into their national legal systems such measures as are necessary to enable all persons who consider themselves wronged… to pursue their claims by judicial process".

Surely an ex-employee who has been wronged by sex discrimination other than victimisation post employment should be covered? It seems that ex-employees discriminated against on the grounds of sex have no remedy unless they can show victimisation. Ex-employees treated less favourably on the grounds of race have no remedy at all. This appalling position can be changed in one of two ways – the Court of Appeal or a change in the law. The Department for Education and Employment is currently consulting on changes to the equal pay legislation and the vulnerable position of ex-employees. Unions can make their views known.

Thompsons' submission to the DfEE is available from the Employment Rights Unit, Congress House.

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Illegal contracts and sex discrimination

Hall v Woolston Hall Leisure Ltd [2000] IRLR 578

IN THIS case the Court of Appeal looked again at the impact of illegal contracts on an individual's right to claim in an employment tribunal. The general rule is that if a contract is illegal, then it cannot be sued on in the courts and is void, but as a claim for discrimination is not based on the law of contract, the rule does not apply.

This case concerned a woman who was successful in her claim for sex discrimination after she was dismissed on the grounds of pregnancy. At the remedies hearing the employers successfully argued that her contract of employment was illegal because she was not paying tax on her earnings and she was therefore not entitled to compensation. The EAT dismissed Mrs Hall's appeal on the grounds that to order compensation for loss of earnings based on an illegal contract would offend the basic principles of justice. As such the court would not enforce a contract involving a fraud on the Inland Revenue.

The Court of Appeal allowed Mrs Hall's appeal and in doing so upheld the EAT's decision in **Leighton v Michael** [1996] IRLR 67 that the fact that a contract was tainted with illegality did not disqualify someone from bringing a claim of sexual harassment against her employers.

In reaching their decision the CA considered that

- where the performance of a contract involves illegality, public policy does not bar an employee from recovering compensation under the Sex Discrimination Act.
- a complaint of sex discrimination is not based on any obligations arising from the contract of employment.
- as sex discrimination is a statutory tort, the correct approach is to consider whether the claim arises out of, or is so closely connected with, the illegal contract that the court could not allow someone to recover compensation without appearing to condone that conduct.

In this case the illegality related to the way the employers paid her wages. While Mrs Hall knew they were not making the proper deductions from her wages that was in no way causally linked with her sex discrimination claim.

Unscrupulous employers who think that they can defend sex discrimination claims on the basis that their employees don't pay tax and therefore have illegal contracts had better think again

Equal pay for doctor

Jorgensen v Foreningen af Speciallaeger and Sygiesikningens Forhandlingsudvalf [2000] IRLR 726

MS JORGENSEN is a Danish doctor specialising in rheumatology. The arrangements for the funding of doctors' practices is set out in an agreement between those practices and the Danish medical insurers. The level of funding depended on whether a practice was designated as full or part-time. To cut costs, the arrangements were revised and practices redesignated.

Ms Jorgensen's practice was redesignated as part-time, leading to a lower level of funding, largely because of her reduced working hours whilst looking after her children. She claimed that she had been discriminated against under both the equal pay and the equal treatment directives.

Upholding her claim, the European Court of Justice made two important findings.

First, it is well established that, when comparing an applicant's and a comparator's pay, or other terms and conditions for the purpose of equal pay laws, the correct approach is to compare each individual component on a "line by line" basis, rather than adopting an "aggregate" assessment of the overall value of the two packages. In Ms Jorgensen's case, the ECJ found that this approach extends to cases of less favourable treatment not based on pay.

Once an applicant has established that her pay is lower than a male colleague, and that she does similar work or work of equal value, it is then up to the employer to explain away the pay difference. If they cannot, the woman will be entitled to the higher pay both backdated and for the future.

The ECJ also confirmed in this case that budgetary considerations alone are not sufficient to justify discriminatory pay practices. This much is helpful. But the ECJ went on to distinguish "budgetary considerations" from measures which have the effect of ensuring "sound management of expenditure" on healthcare provision, and which ensure access to healthcare facilities, which they said are capable of justifying pay discrimination. Unfortunately, it is highly debatable whether a real distinction between these two categories really exists!

Sick of not being paid

Beveridge v KLM UK Ltd [2000] IRLR 765 EAT

THERE HAS been an interesting decision in the EAT where the question of whether an employee presenting themselves fit for work, following a period of sick leave, is contractually entitled to be paid.

Ms Beveridge, a member of the cabin crew, had been a long standing employee of KLM when she went off sick. Ms Beveridge was paid for her sickness absence as per her contract which entitled her to payment for the first 26 weeks of sickness only. Ms Beveridge exhausted that sick leave and remained unfit for work until the beginning of 1999 when she presented her employer with a certificate signed by her GP, advising them that she was fit to return to work on 1 February 1999. KLM refused to allow her to return to work on that date as they wanted to check out her fitness to return to work for themselves. It was another six weeks before KLM agreed Ms Beveridge was fit and let her return to work. KLM did not pay her for the six weeks from 1 February until her return to work. So she made a claim to the tribunal for unlawful deductions from her wages for this period.

Ms Beveridge lost her case in the Employment Tribunal, but was successful in her appeal to the EAT. She submitted that an employee had a contractual right to payment of wages when presenting him or herself for work unless the contract in a specific situation expressly denied that right for a particular reason. There was no such provision in her contract. The EAT accepted this submission, stating that Ms Beveridge could have done no more than she had done and thus it was for the employer to show in this context the contract expressly entitled the employer to withhold payment. The decision sits with the background common law authorities namely

O'Grady v M Saper Ltd [1940] 2 KB 469,
Mears v Safecar Security Ltd [1981] IRLR 99 and
Miller v Hamworthy Engineering Ltd [1986] IRLR.

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Positively equal

Abrahamsson and Anderson v Fogelqvist [2000] IRLR 732 ECJ

Application by Badeck [2000] IRLR 432 ECJ

Marschall v Land Nordrhein-Westfalen [1998]IRLR 39 ECJ

Kalanke v Freie Hansestadt Bremen 1995 IRLR 660 ECJ

"POSITIVE ACTION may be regarded as any action, legislative or administrative, that provides instruments to secure equal opportunities for a specific, naturally or historically disadvantaged group": so the Advocate General summarizes the meaning of the politically sensitive concept of positive action in the recent European Court of Justice decision of Badeck. What is remarkable about this decision and also the other recent European Court decisions dealing with the same issue (Abrahamsson and Badeck), is not just the subtlety of the distinction between unlawful discrimination and lawful positive action, but also how progressive the policies are that many European countries are advancing to address the under-representation of women in the workplace.

The **Badeck** case concerned a local German equality law designed to ensure equal access for men and women to public sector posts. Where women were under-represented in a particular post or grade, then a women's advancement plan would provide a target for half the posts to be filled by women. This did not mean automatic selection of female candidates. Instead where a woman and a man were equally qualified for a job vacancy, then the woman would be chosen unless there were social factors which pointed in favour of the man. The advancement plan also provided for a minimum percentage of female academic posts equal to the percentage of female graduates in the relevant academic discipline. Likewise half the training places would be allocated to women where they were under represented, and there was a type of quota on employee representatives to various administrative bodies in the workplace.

These rules were challenged on the basis that they were in breach of the fundamental principle of equal treatment set out in the Equal Treatment Directive 76/207. At issue was the effect of the basic discrimination provision of Article 2(1) which states that "there shall be no discrimination whatsoever on grounds of sex either directly or indirectly…" How could this basic principle fit with positive action initiatives, and did the initiative in this case fall within one of the exceptions specifically referred to in for example Article 2(4) of the Directive? Article 2(4) states that anti-discrimination provisions shall be without prejudice to "measures to promote equality of opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities…"

"there shall be no discrimination whatsoever on grounds of sex either directly or indirectly…"

The European Court in **Badeck** concluded that the women's advancement provisions which were the subject of the case were not unlawful. The Court broadly restated its position as set out in the previous similar cases of **Marschall** and **Kalanke**. Where women are under-represented in a particular sector, and a male and female candidate have equal qualifications, then there is nothing unlawful about a rule which prefers the woman so long as the individual circumstances of the man and women are taken into account, and the decision in favour of the woman is not absolute and automatic. The point about it not being an absolute and automatic provision is essential. It is by retaining a discretion that the employers can

take into account the individual candidate's circumstances. This might cover circumstances where for example the male candidate had specific family responsibilities or was in a social situation just as difficult as those frequently faced by women.

The need for employers to retain a discretion and avoid an automatic quota system was again emphasized in another recent European Court decision, **Abrahamsson**.

In this case, which concerned an appointments system in a Swedish university, a rule provided that a candidate from an under-represented sex who possessed sufficient qualifications must be granted preference over a candidate of the opposite sex who would otherwise have been chosen, unless the difference between the qualifications of the man and the woman were so great that there would be a breach of objectivity in appointing the woman. This rule, held the European Court, was unlawful: the male candidate might be the better candidate but despite this might not be appointed. This lacked proportionality, and in any event the rule contained no provision for taking account of the candidates' individual situations.

The European Court's judgements therefore suggest, that absolute quotas are unlikely to be lawful, but suitably qualified quotas may be acceptable. So although positive action is welcomed and indeed recommended as a principle of European law, it must not be implemented in a way that is out of proportion to the qualities of the candidates and ends up making stereotypical assumptions about the men women and ignoring their own personal circumstances.

These debates in the European Courts read strangely in the British context. Our sex (as well as race) discrimination law is unsympathetic to positive action, and little allowance is made for it. All we have in the Sex Discrimination Act is sections 47 and 48 which allow for training for women or men if they are underrepresented in the workplace, and section 49 which allows a limited number of reserved seats for women in trade union elections. Apart from these two limited exceptions, any action which favours one sex rather than the other is unlawful, regardless of any background circumstances of under representation.

The case of **Jepson v Labour Party** (1996 IRLR 116) is evidence of the rigidity with which Tribunals may interpret positive action. This is a far cry from the sort of positive action which was being sanctioned and indeed approved of in the Badeck case.

For example, one of the provisions under scrutiny in Badeck, startling from the British perspective, was the law which stated that when candidates were being considered for a job, capabilities and experience which had been acquired by looking after children had to be taken into account in so far as they were of importance for the suitability, performance and capability of the candidates.

The extent to which the Sex Discrimination Act is out of step with European law in this respect is also apparent from the recent amendment to the EC Treaty following the Treaty of Amsterdam.

The amended Article 141 provides that "the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers".

"The European Court's judgements therefore suggest, that absolute quotas are unlikely to be lawful, but suitably qualified quotas may be acceptable."

In addition, as far back as 1984, the Council Recommendation of 84/635 acknowledged that "existing legal provisions on equal treatment, which are designed to afford rights to individuals, are inadequate for the elimination of all existing inequalities unless parallel action is taken .. to counteract the prejudicial effects on women in employment which arise from social attitudes, behaviour and structures."

Member States are thereby encouraged to adopt a positive action policy to encourage women candidates, particularly as regards positions of responsibility. The UK provisions on training and reserved seats look paltry in this context.

At a time when the pay gap between men and women in Britain is still much in evidence and statistics continue to show women clustered in lower grade jobs, positive action measures along the lines of those adopted elsewhere in Europe and sanctioned by the European Court should perhaps be considered more closely as a way forward in this country.

Entitlement to damages for "stress"

Rorrison v West Lothian College and Lothian Regional Council (IDS Brief 655)

Fraser v State Hospitals Board for Scotland (2000) IRLR 672

Penelope Hatton v Terence Sutherland, Chairman of the Governors of the St. Thomas Beckett Roman Catholic High School 7 August 2000 (unreported)

DAMAGES ARE only recoverable for stress-related illnesses in a personal injury claim where there is a recognised psychiatric disorder. An employer's duty to take reasonable care to prevent psychiatric harm to its employees does not extend to the prevention of common place negative emotions or normal human conditions such as anxiety, stress, resentment or anger.

Furthermore, the employers' duty to prevent psychiatric harm or injury is not a general one but will only arise if it is reasonably foreseeable that negative emotions or human conditions such as stress or anxiety are liable to be suffered to such a degree as to constitute a psychiatric disorder.

The above confirmation of the law was given by the Court of Session in Scotland in both the cases of **Rorrison** and **Fraser**

Rorrison was a nurse employed at West Lothian College with welfare duties and in charge of first aid. A new personnel officer became her line manager. Soon afterwards she and two other colleagues marched Rorrison to the first aid room. One colleague stood by the door and the other paced up and down shouting at Rorrison. Although the new personnel officer had no experience in first aid she criticised and humiliated Rorrison for keeping asthma inhalers in the cabinets, something that had previously been authorised by the College Registrar. Rorrison felt trapped, threatened and embarrassed. The new personnel officer then took charge of the first aid cabinet, removed other of Rorrison's duties without warning or explanation and generally undermined her. Her GP diagnosed her as suffering from anxiety/depression and signed her off work for six weeks. She was referred to a community psychiatric nurse.

When Rorrison returned to work, the new personnel officer placed her to work in personnel and gave her clerical and secretarial tasks and treated her as an office junior. Rorrison complained to her Line Manager who excused the personnel officer on the basis that she was "new" She began a campaign of criticising Rorrison and regularly harassing her in her work. This pattern of behaviour continued so that eventually Rorrison's first aid tasks were reduced to supplying sticking plasters. When Rorrison complained a second time nothing satisfactory was done. Rorrison suffered further psychological distress, anxiety, panic attacks, depression, loss of self confidence and self esteem. She was prescribed a beta-blockers. However the Court held that there was no evidence that she was suffering from a condition recognised by a psychiatrist or body of psychiatric opinion as constituting a psychiatric disorder. Rorrison's depression was not clinical depression but rather a low mood.

Rorrison had made no reference to any disorder recognised in the two main diagnostic classificatory systems used by the psychiatric profession: DSM-IV and ICD-10 and she had not been treated by a psychiatrist.

An employer's duty to take reasonable care not to damage an employee's physical health extends to damage to mental health but the Court held that the question of foreseeability of psychiatric injury/disorder is critical to the existence of the duty of care. Rorrison had complained to both the personnel officer and her manager that she was off work because she was anxious, upset and angry and felt pressure and frustration in her work.

However the Court held that this did not mean that the employer ought to have foreseen that Rorrison was at a material risk of suffering psychiatric illness or injury in consequence of their behaviour towards her.

Although the employer might have foreseen that she was dissatisfied, frustrated, embarrassed and upset "this is a far cry from suffering a psychiatric disorder". Suffering such emotions as well as stress, anxiety, loss of confidence and low mood because of problems at work was a normal part of human experience and the Court concluded that a duty of care to protect against psychiatric disorder can only arise if there is some specific reason in a particular case which would make the occurrence of a psychiatric disorder reasonably foreseeable "by an ordinary bystander rather than by a psychiatrist". Therefore, the claim failed not only because there was no proper psychiatric injury but also because it was held that a duty of care did not arise as a proper psychiatric injury could not have been reasonably foreseen.

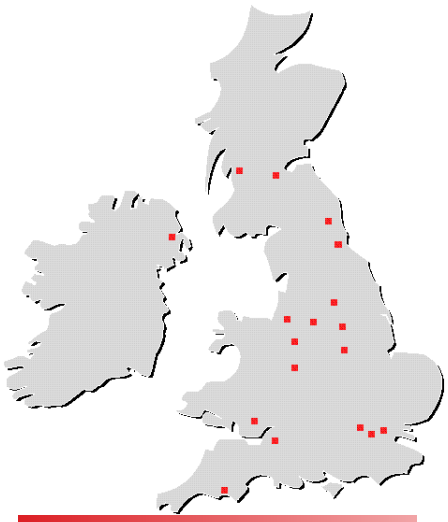
In **Fraser** it was alleged that the employer's management style (resulting in suspension from a ward, disciplinary procedures, demotion and renewed accusations) had caused a psychiatric illness. In this case there was no dispute that Mr. Fraser, a nurse, had developed a depressive disorder and clinical depression had been diagnosed (for which compensation would have been recoverable), but the claim failed because the employer could not have foreseen that its conduct might produce such a reaction.

Fraser was undoubtedly known to have been upset by the actions of management but at no time prior to his stopping work did he show any signs of being likely to suffer any psychiatric harm. He did not complain of excessive stress and he was not seen by management to be operating under excessive stress. It was re-affirmed that for the duty to take reasonable care to avoid unnecessary risk of psychiatric harm to arise, there had to be a situation where there was a foreseeable risk of some form of recognised psychiatric illness and not simply general anxiety or depression. There is no duty to prevent an employee from unpleasant emotions such as grief, anger and resentment or normal human conditions such as anxiety or stress which does not involve any form of "injury" at all, and were too remote from the concept of injury. The question of foreseeability of psychiatric illness was one of fact to be resolved in the circumstances of each case. This would be determined by the Judge putting himself in the place of the employer and deciding whether he, as a reasonable employer, would have foreseen the risk. If there were a foreseeable risk, then it was for the employer to address that problem and determine what could be done to minimise the risk.

Since these two cases there has been one success. In **Hatton v Governors of the St. Thomas Beckett High School** the Liverpool County Court stated that "the effects of increasing pressures in the professional work place is or ought to be as well recognised as the dangers of seriously defective paving stones in an busy thoroughfare for pedestrians". Particularly in the professional work place, increasing and renewed demands are made on workers day by day and "the fact that one person may be able to absorb such a degree of stress does not in itself absolve the employer from being liable where another person performing similar work succumbs to such stress".

The case of **Hatton** is under appeal and although the case is welcome news for Claimants, it does not alter the burden the Claimants have of proving that they have sustained a proper recognisable psychiatric injury or disorder which the employer could have reasonably foreseen. Each case will turn on its own, individual facts.

Interested chief can't sit



R v Chief Constable of Merseyside ex parte Bennion [2000] IRLR 726

THE ROLE of Chief Executives and Chief Officers in internal disciplinary proceedings will come under increased scrutiny after the High Court's decision in the case of Bennion. Officers who "have an interest" in the outcome of disciplinary proceedings should not preside over them. In addition, following the Woolf reforms to the legal system, judicial review may be more readily available to challenge defects in disciplinary proceedings.

Mrs Bennion was a police officer. Disciplinary proceedings were started against her - she claimed because she had previously brought a complaint that she had been sexually discriminated against. She therefore lodged a Tribunal claim for sexual discrimination and victimisation, naming the Chief Constable as her employer as required in the police force. The case was stayed to await the outcome of the disciplinary proceedings. A new Chief Constable was then appointed and he upheld the disciplinary charges against Mrs Bennion. She claimed that the Chief Constable should not have heard her discipline case because of his interest in its outcome by virtue of his "inherited" role as respondent in the Tribunal proceedings.

The law recognises two key principles:

- no one should be the "judge" of a dispute if they have an interest in the outcome of that dispute; and
- no one should act as "judge" where "there is a real possibility of partiality".

The High Court gave a wide definition to the term "judge": it included the Chief Constable, and will certainly include Chief Executives and Officers hearing disciplinary proceedings. But did the Chief Constable (and would other Chief Officers and Executives) have a sufficient interest in the outcome of the proceedings so as to be disqualified from "judging", or is there "a real risk of partiality" if he or she does?

Much of the argument referred back to the House of Lords decision last year in the Pinochet extradition proceedings where one of the judges was a director of a subsidiary of Amnesty International. The High Court found that the Chief Constable did have a sufficient interest in the outcome of the disciplinary proceedings because he was not "merely involved in", but was actually the head of an organisation being sued by Mrs Bennion, and the outcome of the proceedings he had to "judge" could well impact upon Mrs Bennion's Tribunal proceedings.

Courts have often refused to hear these type of cases directing the claimants to the internal appeal procedure first. Helpfully, the High Court found that, under the new rules of procedure, the over-riding objective of the Court was to deal with cases "justly", taking into account factors such as expense, the importance of the case and the amount of money at stake. Applying this principle, the Court felt that it should decide the case rather than require Mrs Bennion to pursue an internal appeal first.

If an employee brings a case in a court or tribunal and is then subjected to disciplinary proceedings, then the Chief Executive or Officer should not decide the discipline case. This should also apply to other senior officers. There may also be other circumstances in which a Chief Executive or Officer could have a sufficient "interest" in the outcome of the disciplinary proceedings without the member actually have issued proceedings.

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