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Transported to Europe

Bowden and others v Tuffnells Parcels Express Limited EAT 6/4/2000

REGULATION 18 of the Working Time Regulations excludes various sectors from the scope of the Regulations altogether. These sectors include air, rail, road, sea, inland waterway and lake transport, work at sea, doctors in training and 'where characteristics peculiar to certain specific services such as the armed forces or the police, or to certain specific activities in the civil protection services, inevitably conflict with the provisions of the Regulations'

It has always been a vexed question as to whether or not Regulation 18 applies a blanket exclusion to all workers in these sectors or whether the sectors could be divided up so that, for example, clerical and auxiliary workers in the sector would not be excluded.

The Employment Appeal Tribunal had to address precisely this question in the context of the road transport sector exclusion in Bowden v Tuffnells Parcels Express Limited, EAT 6/4/2000. Ms Bowden and her colleagues worked in clerical jobs in the office of a parcel delivery firm. The van drivers were not allowed in the office and Bowden and her office colleagues did not, and could not under their contracts, work with any transport. The Employment Tribunal held that as Bowden and the office workers were engaged in the road transport sector, they could not rely on the Working Time Regulations and claim paid holidays. Bowden and her colleagues appealed to the EAT.

The EAT tried to construe Regulation 18 in accordance with the EU Working Time Directive. However, the Directive gave no assistance as to the interpretation of 'sector of activity'.

The EAT was reluctant to adopt a literal construction so as to exclude all workers engaged in road transport. The EAT failed to understand why a clerical worker in, for example, a solicitor's firm, should get paid holidays under the Regulations but a clerical officer in a shipping office would not.

But the EAT also took into account a number of the European Community papers post-dating the Working Time Regulations. For example, in November 1998, the European Commission proposed a Council Directive to amend the Working Time Directive, noting that the Directive 'should be applied to non-mobile workers in the sectors and activities currently excluded'. From this and other European sources, the EAT inferred that, in the opinion of the Community bodies, non-mobile workers in the road transport sector probably were still excluded from the benefit of the Working Time Directive and a formal amendment was required before the Directive would cover them. The EAT was not prepared to adopt a literal interpretation of the legislation and arrive at a conclusion that was 'devoid of any supporting economic, social, political or common sense terms'.

So, the EAT decided to refer two main questions to the European Court of Justice. Are all workers employed in the road transport sector of activity necessarily excluded from the Working Time Directive? If not, what test should the national court apply to determine who is covered, and who is not? The answers to these questions should apply not only to road transport, but also to the other sectors excluded by Regulation 18.

BSE: Blame someone else for industrial disease

Holtby v Bringham & Cwan (Hull) Ltd April 6/2000 (Court of Appeal)

Wicks v Wilton Cobley Limited and Others 12th May 2000 Southampton County Court.

WHAT HAPPENS where an employee suffers an occupational disease due to the negligent conduct of more than one employer? At first sight, the common sense answer might be that the various negligent employers should share the burden and each contribute a fair proportion of the compensation payable, according to the relative contribution made by each employer to the injury suffered. That is the decision of the Court of Appeal in Holtby. **A decision which may seen unremarkable, but results in injustice to injured workers in practice.**

What happens when the disease does not manifest itself until decades after the relevant employment? In many cases the employers may no longer exist or cannot be traced nor their insurers identified. Are the victims of crippling industrial diseases to be left under-compensated with insurers evading their responsibilities?

The Court of Appeal considers that fairness between insurers ranks higher than the proper compensation of industrial disease victims. They rejected a proposal which would provide for both proper compensation for victims and fair apportionment between insurers. Their decision is morally and politically wrong,. Mr Holtby spent 41 years as a marine fitter. He was exposed to asbestos dust for much of his employment, including 12 years with the Defendants. He developed asbestosis which is an accumulative condition, ie the seriousness of the condition is dependent on the extent of exposure.

The Court of Appeal reiterated the long established principle that an employer is liable where the relevant exposure for which that employer is responsible has either materially contributed to causing the injury or has materially increased the risk of injury. But the Court of Appeal state that the principle is only the starting point, namely, whether there is any liability on the Defendants. However, if the Defendants then argue that their liability should be restricted to the extent of their contribution, it is for the Court to determine whether the Claimant has proved that the Defendant is responsible for the whole or a quantifiable part of his disability. The Court should make the best estimate which it can, in the light of the evidence, making the fullest allowance in favour of the Claimant for the uncertainties known to be involved in any apportionment. This approach was necessary because:

"…the Court must do the best it can to achieve justice, not only to the Claimant but the Defendant, and among Defendants.".

Holtby had argued that, once he had established a material contribution as against one employer, that employer is liable to pay full compensation. It would then be that employer's problem (in practice the insurer's problem) to trace the other employers and their insurers and pursue claims against them for their proper contribution. That was an entirely pragmatic suggestion as it is the insurance industry who have access to the relevant records and can establish who insured the employers concerned at the relevant times. If insurers are not prepared to open their books, they cannot complain if they are left having to sort out apportionment between themselves.

Of course, the employers like to have their cake and eat it and, in this case, the Court of Appeal have given them that. In so doing, there is added impetus to the campaign for legislation requiring a detailed register of insurers.

This decision also leaves open the position in cases where the

industrial disease is not cumulative, ie additional exposure does not necessarily result in additional disability. Exposure to asbestos gives rise to the risk of physical mutation and cancers such as mesothelioma and pleural thickening developing. These conditions are not related to the degree of exposure: just one asbestos strand can start the cancer. Up till now it has always been understood that, whilst apportionment may apply in cases of industrial deafness, asbestosis etc because they are cumulative and depend upon the level and duration of exposure, that rule did not apply in all conditions. If a worker can show that an employer materially contributed to the risk of contracting the disease, that employer would be 100% liable for the consequences.

The Holtby case has already been considered in a mesothelioma case at County Court level: Wicks v. Wilton Cobley Limited and Others May 12 2000 Southampton County Court.

In that case the employers sought to argue that apportionment should apply relying on Holtby. Thankfully, the Court rejected an argument that apportionment should apply and as Wilton had materially contributed to the risk of Wicks contracting mesothelioma the company ws 100% liable.

The Wix case is being appealed. It is to be hoped that the appeal will uphold the decision of the County Court. In the long run, these cases underline the need for insurers to open their books only then can victims effectively trace and pursue insurers who, for far too long, have managed to evade their responsibilities.

Privacy and freedom of reporting

Chief Constable of the West Yorkshire Police v A [2000] IRLR 465

RESTRICTIVE Reporting Orders (RROs) can be made by Employment Tribunals to prevent the identification of any person affected by or making allegations. RROs are only available in cases which appear to "involve allegations of the commission of a sexual offence" (Rule 13(6) of the Employment Tribunals Rules of Procedure). In this case the applicant won an argument that the Equal Treatment Directive could be relied on to grant a RRO although her case did not involve a sexual offence.

A is a male to female transsexual who was turned down for a job with the Police on the grounds that she was still legally male and could not conduct searches of female suspects and prisoners that went beyond outer clothing. She brought an employment tribunal claim of sex discrimination. From the start of the proceedings A sought anonymity and the Employment tribunal made an RRO after hearing evidence from the applicant and her representative. They decided to grant an RRO otherwise it would deter the applicant from seeking a remedy for sex discrimination. The police are bound by the Directive itself as an emanation of the state. A has a right under the Equal Treatment Directive not to suffer discrimination in access to employment. Article 6 requires the UK to ensure that she has effective remedies, without an RRO she could not exercise her right.

The EAT supported this conclusion. The EAT and by analogy the Tribunal has an inherent jurisdiction under the Equal Treatment Directive to make a restrictive reporting order. There was evidence that without an RRO the applicant would be deprived of an effective remedy.

There may be other cases where it may also be appropriate for RROs to be made. Cases which concern very private matters like sexual orientation or personal medical details in disability claims are just two examples, where applicants may be deterred from pursuing their remedies because of fear of publicity or personal details being made public. There must be a balance however between matters such as freedom of expression, freedom of the press and the right to a public hearing have also to be taken into account.

More recent cases on the Transfer of Undertakings (Protection of Employment) Regulations 1981

2 TUPE loops the loop

IN the second of our two part feature on recent cases we examine the latest decisions on the crucial issue of whether there has been a transfer covered by the TUPE regulations. This aspect is often the most fiercely contested by employers and is one of the most frequently raised defences when workers seek to rely on TUPE to preserve their employment rights

Is there a transfer?

Lightways (Contractors) Limited v Associated Holdings Limited [2000] IRLR 247 (Court of Session)

Whitewater Leisure Management Limited v Barnes [2000] IRLR 456 (EAT)

Willer v ADI (UK) Limited, IDS Brief, EAT

RCO Support Services Ltd v Unison and others (EAT 28/6/00, unreported)

In our October 1999 edition we welcomed the decision of the Court of Appeal in ECM v Cox which took a progressive approach to the application of TUPE, consistent with the purpose of the Acquired Rights Directive of safeguarding the rights of employees.

The Court in ECM was concerned with a case where the new employer declined to take on staff from the old employer in an effort to get round TUPE. The Court decided that it was relevant to consider the reason why the employees were not taken on and, in doing so, decided that there was a transfer.

This positive approach appeared, at first, to find a warm welcome. Certainly this was true of the Court of Session in Scotland in the Lightways case. Here a company had tendered for and won a contract on the express basis that TUPE applied to the exercise. It took on seven staff, including a foreman. There was no transfer of assets, but the work carried on was largely the same.

Subsequently, Lightways denied that TUPE applied. The Employment Tribunal and the Court decided, following ECM v Cox, that it was legitimate to take into account that the company had bid for and won the contract on a TUPE basis. A declared intention by the contractor prior to the transaction that TUPE will apply is a statement to the effect that the character of the undertaking will remain substantially the same and may shed light on the true nature of the transaction.

This does not mean that a contractor will be legally bound by a statement that TUPE will apply, but it is a factor to be taken into account and will make it easier for the employees to establish that there has been a transfer.

However, the serene progress towards a universal acceptance of a broad and purposive approach post the ECM v Cox case has received a jolt in two EAT decisions delivered in April.

Whitewater Leisure Management Limited v Barnes and ADI v Willer and others.

In each case the Employment Tribunal had found there was no transfer. In the Whitewater case there had been a change in the contractor managing a leisure centre, but no transfer of ownership of assets, nor the transfer of a majority of the workforce. The ADI case concerned the contract for security at a shopping centre where the use of facilities transferred, but no staff were taken on.

The judgments are very similar in terms. The EAT correctly identifies that there are two separate questions to be answered: whether there was an identifiable economic entity and whether there was then a transfer of that entity.

The EAT formulates the first question as requiring there to be a

"stable and discrete economic entity". This appears an overly restrictive interpretation of the case law, with undue emphasis on the requirement for "stability".

On the second question, the EAT says that in labour-intensive transfers one is looking to see whether the workforce is "substantially the same". Again, this appears to refine the case law test in a way which makes it more difficult for employees to satisfy.

The EAT seems sceptical of the positive impact of ECM, focussing not so much on the Appeal Court's attempt to put the European Court's Suzen decision in context, but more on the limited extent to which the reason why staff were not taken on may be relevant.

In both of the cases, the EAT upheld the decision that there was no transfer even though the operation was carried on in much the same way, in the same place, using the same facilities.

So what will emerge from the apparently mixed messages from the EAT? Will these two decisions represent a trend towards a less expansive approach or will the purposive approach in the ECM case and cases such as Lightways will prevail?

Fortunately the negative trend appears to have been swiftly reversed by The President of the EAT in the case of RCO Support Services Ltd v Unison and others (EAT 28/6/00, unreported) a case handled for Unison by Thompsons.

The EAT made no reference to the two EAT judgments referred to above, but reviewed the decisions of the European Court and the Court of Appeal. They asked themselves the question: "can we still safely rely on Suzen?"

The EAT, relying on the Court of Appeal decision in ECM v Cox, rejected the "simple and inflexible summary view" that Suzen meant there could be no transfer when there was neither a movement over of a majority of the workforce nor any significant assets.

They recognised that there can be an undertaking and a transfer notwithstanding that neither significant assets nor the majority of the workforce move over. The decisive criterion is whether the business in question retains its identity. Of particular importance is whether its operation was continued by the new employer with similar activities. Assets and the transfer of staff are only two of the factors to be taken into account. The EAT focused also on the training, system and organisation that lay behind the activity.

The EAT concluded that there was a transfer and, in doing so, gave a ringing endorsement of the purpose and scope of TUPE. They emphasised the danger that giving Suzen unqualified force would mean employers could avoid TUPE by the simple expedient of refusing to take on staff and, in doing so, would deprive employment protection to workers – particularly in labour-intensive areas of employment such as cleaning and catering recognised by the EAT as "perhaps the most vulnerable of all classes of workers". The EAT rejected that approach and gave powerful support to the role of TUPE in protecting employment rights.

What you think about the LELR

Thank you, all 100 plus of you, who responded to our questionnaire.

You told us that you found it very helpful, informative and user friendly covering the areas relevant to your work. We aim to continue and your comments were extremely useful to us and it is gratifying to know we are hitting the mark.

Many of you asked for an 'index', listing issues and cases covered in all the previous issues of the LELR. So enclosed within the next issue will be an index listing, by case name and topic, all previous articles and reported cases from all past issues. We will produce an index annually from now on.

Also, some back copies of previous issues are available on request. Please write, giving issue number/s, to: LELR Back Issues, Communications & Marketing Department, Thompsons Solicitors, Congress House, Great Russell Street, London WC1B 3LW.

A postcard from the EU

The Posting of Workers Directive 96/71/EC came into effect on 16 December 1999. Employers who post workers temporarily to work in other EU Member States must observe certain terms and conditions of employment.

Workers affected

The Directive defines a "posted worker" as "a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works" (Article 2(1)). The key word is "posted". The Directive does not cover migrant workers working abroad in the EU on a temporary basis. Only workers who are "posted" are covered.

Employers affected

The Directive applies to "undertakings [employers] established in a Member State which... post workers... to the territory of a Member State" (Article 1(1)). An undertaking is covered which (a) posts workers "under a contract concluded between the undertaking making the posting and the party for whom the services [of the posted worker] are intended"; (b) posts workers to work in its own establishment in another Member State (intra-company postings); or (c) is "a temporary employment, undertaking or placement agency" hiring out workers to user undertakings (Article 1(3)). In each case, there must be an employment relationship between the sending employer (posting undertaking) and the posted worker.

For example, under (a), workers sent by their employer to another Member State to perform work on a contract will be covered only if the workers are employees of the posting employer, and their employer has a contract for the provision of services, including those of the worker, with another party in the host State.

A worker will not be covered by the Directive if hired directly by the party in the other Member State. The Directive does not cover "temporary migrant workers" in the EU, unless they have been "posted".

Workers excluded

The Directive may not apply to skilled or specialist workers doing initial assembly or first installation in the case of contracts for the supply of goods, but even there the Directive applies if the period of posting is more than 8 days (Article 3(2)). When adopting the Directive, the Commission and the Council of Ministers attached a statement which purported to exclude transport services and travelling staff of press, radio-television or the entertainment business from the scope of the Directive. This statement is not part of the text of the Directive and has no legal effect.

The Directive does allow Member States (or collective agreements) not to apply minimum pay provisions in some cases where the duration of the posting is less than one month (Article 3(3,4)). Member States may also exclude minimum pay and holiday entitlements "on the grounds that the amount of work to be done is not significant" (Article 3(5)). However, neither of these exemptions applies to workers posted by a temporary employment undertaking or placement agency.

Which terms apply and where are they to be found?

The Directive does not lay down EU terms and conditions of employment. It requires each Member State to ensure that employers observe national terms and conditions (including minimum pay and holidays, maximum hours, health and safety, maternity, young workers' protection, etc.) for posted workers.

However, since each Member State can make exemptions, the terms and conditions applied depend on whether, and, if so, how much the exemptions have been used. These exemptions cut both ways. A Member State may extend the list of terms and conditions applicable to posted workers beyond those specified in the Directive (Article 3(10)).

The mandatory terms and conditions are those laid down "by law, regulation or administrative provision". Terms laid down "by collective agreements or arbitration awards which have been declared

This month's guest author is Professor Brian Bercusson of Manchester University,

universally applicable" only apply to building works, which are widely defined. However, Member States may apply collective agreements also to other activities (Article 3(10)). Posted workers need to know whether the Member State to which they are posted has used this option to apply collective agreements also to other activities.

Minimum terms or comparability?

The Directive guarantees posted workers only terms and conditions laid down "by law, regulation or administrative provisions". These are usually minimum standards. Article 3(7) provides that this "shall not prevent application of terms and conditions which are more favourable to workers" – in other words, posted workers are not entitled as a general principle to equal treatment to other workers in the country where they have been posted. But rights can be derived from other Directives. For example, the Fixed-Term Work Directive provides that "fixed-term workers shall not be treated in a less favourable manner than comparable permanent workers" (Clause 4(1): Principle of non-discrimination) which will protect posted workers when it comes into force in July 2001. Similarly, the non-discrimination principle already applies to sex equality and part-time posted workers under the Part-Time Workers' Directive.

The Posting Directive requires Member States to guarantee "provisions on non-discrimination" (Article 3(1)(g)). This means that posted workers who qualify as fixed-term or part-time workers are guaranteed terms and conditions not less favourable than comparable workers in the host State and that posted workers have the full benefit of European protection from sex discrimination.

Better terms at home than in the host Member State?

The Directive prescribes standards of terms and conditions applicable in the host Member State which override any less favourable conditions in the posted worker's contract (Clause 3(1)). Any more favourable conditions in the posted worker's contract will continue to apply, for example when the contractual rate of pay is higher than the national minimum rate in the host country. So the workers can have the benefit of the minimum standards set out in areas set out in the Directive where the specific provision is better than their contract, but where their contract is better than, for example the paid annual leave provisions of the country to which they have been sent, they can rely on the contractual term.

Terms of employment of workers posted to the UK

The British Government's view is that most UK legislation on employment conditions (minimum wage, working time, health and safety, etc.) applies to posted workers working in the UK any way. Only minor changes were made to implement the Directive. First, the Employment Relations Act removed territorial limits from the Employment Rights Act 1996 so they apply to all employees in Britain, including temporarily posted workers. Second, the Equal Opportunities (Employment Legislation) (Territorial Limits) Regulations 1999 amended the law prohibiting discrimination on grounds of sex, race and disability so that it now applies to those employed mainly outside Britain.

Although the Directive offered Member States some options to restrict the scope of the Directive, the Government did not use them. On the other hand, the Government did not exercise the option to extend the scope of the Directive.

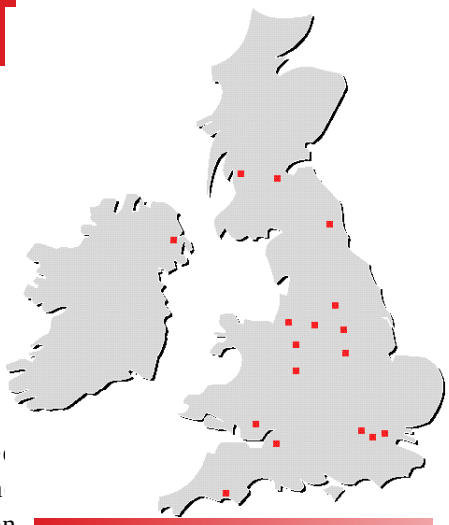
Mandatory collective agreements in the UK?

Although the Directive requires Member States to apply collective agreements in the building work sector, the Government rejected using collective agreements to set mandatory standards. If in future litigation the European Court was to interpret the Directive to make collective agreements mandatory labour standards, this could have a major impact on the UK law on collective bargaining (See Thompsons Labour and European Law Review, Issue 7, January 1997, pp. 6-7).

Enforcement

Legal enforcement is done in the country where the worker has been posted. So, EU workers posted in the UK can now bring a claim before the Employment Tribunal for, for example, unfair dismissal, non-payment of the minimum wage or disability discrimination as they have the same protection as non-posted workers in the UK. All member states have had to ensure that workers posted to their country, covered by the Directive, can bring judicial proceedings for enforcement in the territory where they have been posted

If you don't ask you don't get



Outram v Academy Plastics [2000] IRLR 499

WE REPORTED recently the High Court's decision in University of Nottingham v Eyett which considered whether an employer or administrator was obliged to inform a pension scheme member of the rights which he or she might have under a pension scheme. The same point has now being considered by the Court of Appeal and the same conclusion has been reached.

Mr Outram was a member of his company's pension scheme until March 1994 when he resigned from the company. He rejoined the company but did not rejoin the pension scheme. He had to resign on the grounds of ill health eight months later and died shortly after that. He had a period of membership of the scheme arising from his service up to March 1994 but when he left, he was treated as an early leaver: he therefore had a frozen, or deferred, pension. If he had rejoined the pension scheme when he rejoined the company he would have been entitled to an ill health pension, but he couldn't get that as a deferred pensioner. His widow claimed that the company should have told him that he should rejoin the scheme.

The case is slightly unusual in that the company was not only the employer, but it was also the trustee and administrator of the Pension Scheme. As a result of the Pensions Act 1995, that is no longer possible, but it meant that the Court of Appeal looked at the duties that are owe not only as an employer, but also as th trustee of the pension scheme, when an employee has a major decision to make (such as whether to join the pension scheme). The High Court has already ruled that a trustee has no obligation to give advice which is not requested and in the University of Nottingham case the High Court held that there is no such obligation on the part of the employer. Both points have now been supported by the Court of Appeal.

It is important to note that what happened here is that the employer/trustee failed to give any advice – the allegation was not made that the advice which was given was faulty. There are numerous cases where employers or pension scheme administrators have given advice which turns out to be wrong: the typical case is where an estimate of pension benefits is given and on the strength of the information provided, the employee decides to retire. Giving misleading information can give rise to a right to compensation. Failing to provide advice which is not requested does not.

The important point to learn from this case, and from the University of Nottingham case is that it is important for members to find out as much as they can about the pension scheme of which they are a member, or to find out about the consequences of joining, or of not joining a pension scheme which is made available. If in doubt, ask. The employer or the scheme administrator can be held to any advice which they give but cannot be held responsible if you do not ask in the first place.

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