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More Stone Age than Space Age

Sidhu v Aerospace Composite Technology Limited (26 May 2000, unreported).

IN OUR July 1999 edition of LELR, we reported on the important and enlightened decision of the Employment Appeal Tribunal in the race discrimination case of Sidhu v Aerospace Composite Technology Limited. For this edition, we instead have the disappointing and retrograde conclusions of the Court of Appeal overturning the Employment Appeal Tribunal's decision in the same case.

Mr Sidhu had worked for a number of years for Aerospace. At a day out at a theme park for staff and their families Mr Sidhu and his family were racially abused by a white employee of the Company and Mr Sidhu was physically injured. He retaliated by wielding a plastic chair.

The Company accepted that the attack on Mr Sidhu was racially motivated, but in an attempt to be even-handed took the decision to dismiss both Mr Sidhu and the white employee involved in the attack. The Company considered both employees had been guilty of acts of violence and accordingly this amounted to gross misconduct.

Two main issues arose before the Court of Appeal. Firstly whether the incident in the theme park arose in the course of employment – a necessary finding if the Race Relations Act were to apply to the original racial abuse and attack. Secondly whether the failure on the part of the Company to deal with the incident as race-specific in itself amounted to unlawful race discrimination.

The original Tribunal decision had found that the incidents were not in the course of employment because they took place in a theme park and not at the workplace, because they did not take place during working hours, and because the majority of people there were friends and family and not employees. Acknowledging that other cases had reached different conclusions in not dissimilar circumstances, the Court of Appeal nonetheless decided that it was open to the Tribunal to reach this conclusion.

On the second point, the Court of Appeal held that the Company's failure to deal with the incident as race specific was not race discrimination in itself. This was not a case where the "very action complained of is in itself less favourable treatment", such as in a case of racial or sexual abuse or harassment. Instead, the Company's policy was to disregard the racial background to the attack for both employees.

The Employment Appeal Tribunal had focussed on the conduct of the employer in disregarding the racial element of a workplace racial attack to find there had been racial discrimination. It is not to suggest that violence should be condoned. In this connection the conclusions of the Report of Sir William Macpherson into the death of Stephen Lawrence are, as ever, significant. In addressing the issue of racism, the report refers to the failure to adjust policies and methods to the needs of a multi-racial society. ☛

Contracting and the DDA

Abbey Life Assurance Co Ltd V Tansell [2000]IRLR 387 Court of Appeal

SECTION 12 of the Disability Discrimination Act 1995 makes it unlawful "for a principal, in relation to contract work, to discriminate against a disabled person".

As more workers are engaged to work as contractors, agency workers and other sorts of non conventional employment relationships then the protection given by this section of the DDA and the corresponding provisions of the Sex Discrimination and Race Relations Acts becomes vital. In this case the Court of Appeal took a purposive approach to the wording of the DDA and held that the applicant was a contract worker who could present a claim under the DDA against the end user.

In the lead judgment Lord Justice Mummery said "The general purpose of the 1995 Act is to outlaw discrimination on the ground of disability. Employment is one of the fields in which it aims to achieve that goal. In order to achieve that result Parliament decided not to confine liability for discrimination in employment to the employer who discriminates against those employed by him under a traditional contract of service. Under section 12 liability is also imposed on those who, without entering into contracts of service with individual employees, make contracts for individuals employed by others to do work made available for them to do. It would not be consistent with the legislative object to withhold protection from discrimination by a person to whom an employee, who is entitled to protection from his employer, had been supplied to do the same work".

Mr Tansell was a computer specialist, he offered his services through a company in which he was the sole shareholder. He had his name with a number of agencies, one of whom provided his services by contract to Abbey Life. However there was no contract between Abbey Life or Mr Tansell or the company of which he was the sole shareholder.

Mr Tansell was diagnosed as having diabetes in February 1998 and his services with Abbey Life were terminated in March 1998. Mr Tansell brought claims under the DDA against Abbey Life and the agency, that Abbey Life had rejected his services on the ground of his disability.

The Employment Tribunal took the view that to bring a claim within section 12, a direct contractual relationship was needed and found that he was not a contract worker with Abbey Life. The Employment Appeal Tribunal found that he was a contract worker with Abbey Life because there was an unbroken chain of contracts between him and the end user, and the end user is the "principal" under section 12. The Court of Appeal agreed. Mr Tansell can now pursue his claims against Abbey Life.

This is a common sense decision by the Court of Appeal in which it stresses the importance of giving the wide ranging provisions of the discrimination legislation a generous interpretation. It would clearly be inequitable if ultimate employers could deny liability because of a confusing contractual relationship.

☛ "Such failures can occur simply because police officers may mistakenly believe that it is legitimate to be "colour blind"... Such an approach is flawed. A colour blind approach fails to take account of the special features which such crimes and their investigation possess... It is no longer enough to believe "all that is necessary is to treat everyone the same..."."

It is hard to see how the Court of Appeal can legitimately endorse this "colour blind" approach in the context of the workplace, when it has been so clearly and recently rejected by the Macpherson report in the context of the standards to be expected of the police. However, that is precisely what the Court of Appeal appears to do. As the law now stands it would appear to be legitimate for employers to treat their employees in this "colour blind" way. Racial and sexual abuse that is gender specific will still be discriminatory without the need to provide evidence of a comparator. But conduct motivated in response to racial or sexual abuse may not be protected by the discrimination laws.

Time on my side?

Drage v Governors of Greenford High School [2000] IRLR 314

IN ANY case of dismissal it is crucial to work out the "effective date of termination" as that is the date from which time runs in calculating Employment Tribunal time limits for lodging claims. Generally speaking the date will be the last day worked and it is safest to work from this date. But sometimes the date can be later. Mr Drage had exercised his right to appeal against a disciplinary finding of dismissal and lodged his claim to the Tribunal more than three months after his dismissal but less than three months after his appeal was unsuccessful. Which was the effective date of termination of his employment?

The Court of Appeal considered that where there is contractual provision for an internal appeal against an employer's decision to dismiss an employee, the critical question is whether during the period between the initial notification of dismissal and the outcome of the appeal an employee is:

(a) dismissed with the possibility of reinstatement, or

(b) suspended with the possibility of the proposed dismissal not being confirmed.

Mr Drage was a teacher who was suspended on full pay pending a disciplinary hearing. On 17 February 1996 he was notified of a finding that he was guilty of gross misconduct and should therefore be dismissed.

His contract provided for an opportunity to appeal against the staff committee's decision "before any action is taken to implement it." He exercised his right of appeal and on 13 March 1996 was told of the decision of the appeals panel to dismiss him with immediate effect. He also received a letter from the clerk to the governing body confirming that his employment would terminate on 13 March 1996.

In deciding which was the "effective date of termination" the Court considered that the initial letter of dismissal must be considered in its contractual context.

Mr Drage had also continued to receive full pay up until his appeal was dismissed, which suggested his continuing suspension from duty pending the result of his appeal. Therefore the effective date of termination was 13 March 1996 when he was told of the decision to dismiss after his appeal.

His unfair dismissal claim was therefore allowed to proceed. The case is helpful where advisers and applicants fear they may have missed a time limit. But had Mr Drage lodged his claim within three months of 17 February 1996, it would not have taken him four years to establish his right to have his case of unfair dismissal heard by a Tribunal.

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

1 TUPE loopy

THE FLOW of decisions from the courts and tribunals on all aspects of TUPE has continued unabated. This is the first in a two part feature on recent cases.

Next month's issue will examine the latest decisions on when there has been a transfer covered by the TUPE regulations including the Employment Appeal Tribunal case of RCO Support Services v UNISON, where judgment was given as we were going to press.

TUPE DISMISSALS AND ECONOMIC REASONS

DJ Collins v John Ansell & Partners Ltd, IDS Brief 659, EAT/124/99

A dismissal for a reason connected with a transfer is automatically unfair, but if the reason for dismissal is an economic, technical or organisational reason (ETO) entailing changes in the workforce, it is possible for the dismissal to be fair.

The courts have had some difficulty working out the relationship between TUPE as the principal reason for dismissal and an ETO reason for dismissal, as discussed in LELR of September 1999 and the Court of Appeal decision in **Whitehouse v Blatchford.**

The EAT in the **DJ Collins** case adopts the view that where a dismissal is for a reason connected with the transfer, the automatically unfair dismissal provisions are disapplied if the reason counts as an ETO reason. Therefore, an ETO reason may itself be connected with the transfer.

The EAT was satisfied in this case that the reason was both connected to the transfer and economic or organisational, but was unable to determine whether that economic reason entailed changes in the workforce involving a change in the overall numbers and functions of the employees looked at as a whole, even if there had been changes in the identity of those employees who make up the workforce.

DISMISSALS, INSOLVENCY AND TUPE

Honeycombe 78 Limited v Cummins and other and the Secretary of State for Trade and Industry, IDS Brief 657 EAT/100/99

Maxwell Fleet and Facilities Management Limited (in administration) [2000] IRLR 368 (High Court)

Euro-Die (UK) Limited v Skidmore and Genesis Diesinking Limited, IDS Brief 655, (EAT)

Honeycombe 78 Limited got into financial difficulty. An insolvency practitioner advised that the only likely purchasers were the directors. The company went into administration on the basis this was more likely to lead to a sale as a going concern. All staff were dismissed by the administrator, but the majority were then offered jobs by the directors in the new company to take effect when the transfer took place a few days later.

The EAT reached the rather surprising conclusion, overturning the Employment Tribunal, that in those circumstances the reason for the dismissal was an economic one, so it came within the ETO category (see above) and that consequently the transfer-related reason was displaced. This meant that the staff who were not re-employed were not entitled to be transferred as they were not "employed immediately before the transfer" because they had been validly dismissed. The EAT thought that the dismissals were despite of the potential sale, not because of it.

If that decision may be taken as an encouragement by some insolvency practitioners or directors to dismiss in an attempt to avoid TUPE, the **Maxwell Fleet** decision is welcome as sounding the death-knell for the "hiving down" provisions in TUPE.

Maxwell Fleet, an insolvent company dismissed its employees,

transferred the business into a wholly owned subsidiary company who in turn transferred the business to another company which offered employment to most of the employees, but without the benefit of TUPE.

This transparent device appeared to be allowed by the express "hiving down" provisions of Regulation 4 of TUPE. However, the EAT accepted that this was a situation where an intermediary was inserted purely in an attempt to defeat the TUPE regulations and therefore the transaction should be treated as one transaction with the employees' rights transferring under TUPE.

The **Euro-Die** case also concerned a company in financial difficulty. Mr Skidmore was told that the company was closing, that a new company would be formed but that if he took up employment with the new company his continuity of employment would not be preserved. He refused to work for the new company on that basis. The Employment Tribunal found that this amounted to a dismissal and that the transfer was the reason for the dismissal. In those circumstances, he was treated as employed immediately before the transfer and succeeded in a claim for unfair dismissal against the new employer.

OBJECTING TO TRANSFER

University of Oxford v Humphreys and Associated Examining Board [2000] IRLR 183 (Court of Appeal)

What happens when an employee objects to transferring on a TUPE transfer was considered by the Court of Appeal in **Humphreys**.

The Regulations say that where an employee objects to transferring simply because they do not wish to work for the new employer, they do not transfer, but they lose any right to claim unfair dismissal or redundancy. However, the Regulations also say that if the objection is because the transfer would involve a substantial change to an employee's working conditions to his detriment, he can treat his contract as terminated by the employer and claim unfair dismissal. In Humphreys the Court of Appeal held that this is so whether the employee leaves before or after the transfer.

The same point arose in the **Euro-Die** case where the objection was not to the transfer per se, but to the transfer without continuity of employment.

THE EFFECT OF A DISMISSAL

Clutterbuck and others v MOD, IDS Brief 662, (EAT)

In this case the EAT reaffirm the decision in Wilson v St Helens and Meade and Baxendale v British Fuels Limited that a dismissal on transfer is effective. The employee re-employed on different terms is not able to argue that his old contract continues and that there has been an unlawful, ineffective variation. The employee can only argue that the dismissal is unfair.

This leaves open the question of the appropriate remedy. We remain of the view that the appropriate remedy is reinstatement under the terms of the old contract, not merely compensation for the financial loss suffered.

WHAT TRANSFERS? PERSONAL INJURY LIABILITY

Bernadone v Pall Mall; Martin v Lancashire County Council [2000] IRLR 487 (Court of Appeal)

There have been conflicting cases on whether a new employer under TUPE inherits liability for workplace accidents or diseases occurring before the transfer to staff who transfer.

The Court of Appeal's answer is a resounding "yes". Liability in tort transfers under Regulation 5(2)(a) of TUPE as it arises in connection with an employee's contract of employment.

There was a danger this may leave employees in a worse position. The old employer would cease to be liable. That employer would have employer's liability insurance covering the accident. The new employer would become liable, but his insurers would not be liable to indemnify for accidents arising before they became "on risk".

Fortunately, the Appeal Court conclude that the benefit of the old employer's indemnity under the insurance policy in respect of liability for the accident also transfers.

This means that the new employer is sued in legal proceedings, but the insurance company for the old employer remains liable to pay out. Where there is any doubt as to whether there has been a transfer or whether the employee concerned was employed in the part concerned immediately prior to the transfer, the safest course is to sue both the old and the new employer.

Part 2 appears in the next issue

New Part-Timer Regulations

WE REPORTED on the consultation draft (Issue 44 March 2000 LELR), and now we have the finished final product: The Part-time Worker (Prevention of less favourable treatment) Regulations 2000 which came into force on 1 July.

As well as being able to rely on indirect sex discrimination and equal pay law to gain parity with full time colleagues, the Part Time Workers' Regulations can also be used.

For the first time in UK law the concept of non-discrimination is introduced by reference to the characteristics of the work relationship, and not characteristics to do with the worker. Free standing rights for part time workers without the need to prove sex discrimination.

That is not to say that the new laws will solve all the problems faced by part-timers. As always the devil is in the detail. Sadly only limited numbers of part time workers will benefit because the rights are hedged with restrictions and limitations which will make the rights difficult to achieve in practice.

SOURCES

The Regulations implement the EU Framework Agreement on Part-Time Working which is contained in the EU Directive of 1997 on Part-Time Working. The Framework Agreement was originally made under the EU Social Chapter which the UK signed up to after the last election.

COVERAGE

Consistent with other recent employment legislation and after a battle with the CBI, the Regulations apply to "workers", rather than the more restrictive definition of "employees". The Regulations apply both to pay and contractual inequalities (including access to pension schemes, and treatment under a scheme's rules), as well as inequalities of treatment in the workplace.

LESS FAVOURABLE TREATMENT

A part-time worker has the right not to be treated less favourably as regards the contract of employment or being subjected to any other detriment where:

- the treatment is on the ground that the worker is a part-time worker; and
- the treatment is not justified on objective grounds.

To decide whether or not there has been less favourable treatment, the pro-rata principle applies "unless it is inappropriate". This means that a part-timer is entitled to receive the same pay and benefits as a full-timer, but reduced by a percentage which reflects the difference in hours worked. For this purpose "weekly hours" will be taken as the usual hours of work in a week where there are no absences, and where hours vary according to cycles, an average of those hours.

One situation is expressly

Part-timers rights
Something to smile about?

defined as not amounting to less favourable treatment. That is where, over a given period, a part-timer actually works in excess of her basic hours, but does not exceed a full-timer's hours in the same period. The part-timer is not entitled to claim the same rates of overtime for her/his extra hours as the full-timer would be able to claim for exceeding her/his hours.

REMEDIES AND ENFORCEMENT

A part-timer who considers that she/he may have been treated less favourably than a "comparable full-time worker" on ground of part-time status may request a written statement of the reasons for less favourable treatment. The part-timer is entitled to a response within 21 days. If the employer fails to respond within that period (without reasonable excuse), or if the reply is evasive or equivocal, an Employment Tribunal may draw an inference of infringement of the Regulations.

The Regulations provide for protection against victimisation on account of having carried out defined protected acts, similar to the provisions contained in Sex Discrimination and Race Relations Acts. Requesting a written statement of the reasons for less favourable treatment is protected. The protection does not apply where the allegations are "false and not made in good faith".

Complaints must be made to Employment Tribunals within three months of the treatment complained of. Terms of a contract are to be treated as less favourable on each day of the period during which the term is actually less favourable. In the case of less favourable treatment by way of an omission to act, the time limit will start to run from the day on which the employer decided not to act. Unless proved to the contrary, this will be when the employer does something inconsistent with the "failed act" or the time expires during which the employer might reasonably have been expected to do the "failed act".

Where a Tribunal upholds a complaint, it can:

- make a declaration;
- award compensation; and/or
- recommend that the employer takes specified action within a specified period.

Where a successful complaint relates to access to a membership of a pension scheme or to treatment within that scheme, only the two years preceding the presentation of the claim can be taken into account in any Tribunal award.

DEFINITIONS

The regulations operate by way of a comparison between the pay/treatment of a "part-time" worker and that of a "comparable full-time worker".

A "part-time worker" is:

- paid wholly or in part by reference to the time she/he works;
- having regard to the custom and practice of the employer, works under the "same type of contract"[as the comparable full-time worker]; and
- is not identifiable as a full-time worker.

The regulations then list what are to be regarded as different "types of contract":

- "employee" as opposed to "worker status";
- fixed term as opposed to non-fixed term contracts;
- apprenticeship as opposed to non-apprenticeship contracts; and
- "any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract".

The definition of a "full-time worker" repeats the definition of a "part-time worker", save that the worker is "identifiable as a full-time worker".

A "full-time worker" is a "comparable full-time worker" *vis a vis* a "part-time worker" if:

(i) both are:

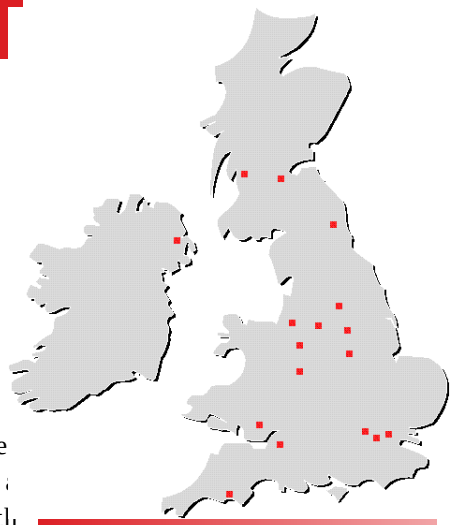
- employed by the same employer under the same type of contract; and
- "engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience"; and

(ii) they are based at the same establishment, or, where there is no full-timer at the establishment at which the part-timer is based who satisfies (I), the full-timer may be based at a different establishment.

There are two circumstances in which a "comparable full-time" full-time worker may be deemed to exist even if there is none in reality:

- where a full-time worker's contract is varied, or following t ermination, and they become a part-time worker; and
- where a previous full-time worker returns, after absence, as a part-time worker.

Comparisons are not all odious



Chief Constable of West Yorkshire Police & ors v Khan 2000 IRLR 324
TNT Worldwide Express (UK) Ltd v Brown (Court of Appeal)4.4.2000

VICTIMISATION IS the legal term for treating someone who has made a complaint of, or reference to discrimination, less favourably. It gives protection for people who, either for themselves or others, raise the issue of discrimination, which is referred to as a protected act. Initially confined to the sex and race discrimination legislation, it now appears as standard in most new rights under the Employment Relations Act 1999.

Until recently it was regarded as difficult to prove victimisation; difficult to show the victimisation was caused by the protected act. **Nagarajan** [1999] IRLR 572 changed that – you no longer have to show an intention or motive to victimise. There is a "but for" test, where, but for the complaint of discrimination, the victimisation would not have occurred.

So the Applicant establishes that he or she has done a protected act and as a result has been treated less favourably. But less favourably than whom? Who should the comparison be made with? The choice of comparison can be crucial to winning or losing a case.

Raham Khan, a police sergeant in the West Yorkshire force, took a complaint of race discrimination against his employer to the Employment Tribunal. A short time later he applied for a job with the Norfolk police who sought a reference from the West Yorkshire police. They said they could not comment because of the pending tribunal case.

Should you compare how an employe normally deals with a request for a reference, or make a comparison with someone who had also complained to a tribunal as Khan had, but of a different form of discrimination? Thankfully the Court took the sensible view that the proper control group is an ordinary reference request, enabling Khan to win the point.

The Court also said you did not have to prove racial motive for the victimisation only that it was "by reason of" the protected act. You do not impute into the comparison the employer's reason for the victimisation (or indeed the employee's racial or gender characteristics).

The Court of Appeal considered the same issues of comparison and motive in **TNT Worldwide Express (UK) Ltd v Brown** and reached the same conclusion. In that case the employee was found to have been victimised because he had sought and taken time off to see an advisor about his race discrimination claim. TNT said that he was treated in the same way as other employees who would have taken time off to see an adviser about a claim against them. The Court of Appeal said that Tribunals should ignore the reason for the refusal, the comparison is with all those who requested the absence, and not with those who did not get leave.

The law on victimisation has been strengthened by these two cases. Employers will find it harder to defend a claim if they do not treat complainants exactly the same as other employees.

Employees should now find it easier to prove victimisation if they can show less favourable treatment if they have performed a protected act.

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LELR AIMS TO GIVE NEWS AND VIEWS ON EMPLOYMENT LAW DEVELOPMENTS AS THEY AFFECT TRADE UNIONS AND THEIR MEMBERS. THIS PUBLICATION IS NOT INTENDED AS LEGAL ADVICE ON PARTICULAR CASES