ISSUE 46 May 2000

Sex harrassment: EAT goes further

THOMPSONS
SOLICITORS

☛ In relation to the Tribunal's assessment of the pre-interview comments of Mr Huss, the fact that his remarks were intended to be flippant "entirely misses the point. What is relevant is that by this remark (flippant or not) he was undermining her dignity as a woman, when, as a heterosexual, he could never similarly have treated a man."

It did not matter that Mr Huss had made similarly explicit comments to his male colleagues. Sexual banter by a heterosexual male to another heterosexual male cannot be equated to similar comments made to a woman. "Prima facie the treatment is not equal: in the latter circumstance it is the sex of the alleged discriminator that potentially adds a material element absent between two heterosexual men."

Likewise, Ms Driskel's initial failure to register her objection to Mr Huss' comments was not of overriding significance. It is for the Tribunal to reach an objective assessment as to whether there was sexual harassment or not. The Applicant's expressed objections, or lack of expressed objections, are only one factor. In cases of serious harassment, whether or not objections have been expressed is of little significance.

In cases where the acts complained of might not be obviously discriminatory, then any expressed objections may be very relevant in reaching a finding of harassment. In this case, however, the EAT took the view that Mr Huss' comments were potentially highly discriminatory, and accordingly Ms Driskel's failure to object should not have been an issue.

Watch your mouth

TSB Bank plc v Harris [2000] IRLR 157

THE HOUSE of Lords majority decision in Spring v Guardian Assurance in 1994(see LELR 38) that an employer who provides a reference is under an implied contractual duty to use skill and care in preparing the reference has been developed further in the case of Harris v TSB. The Spring case established the duty owed by a former employer to an ex-employee. In Ms Harris's case she was still working for the TSB when they supplied a reference about her to the Prudential.

Ms Harris, an Investment Advisor, had performed consistently with the TSB. She knew of two complaints which had been made against her, one of which resulted in her being given a final written warning for forgery. (She had corrected an entry on a form and initialed it with the customer's own initials to save time.)

She applied for a job at the Prudential and explained both complaints at the interview. The Prudential then requested a reference from TSB.

The TSB provided a reference limited to the factual history of her employment. It recorded that there had been 17 complaints against her, 15 more than she knew of, and that four of them had been upheld and eight remained outstanding. The reference said nothing about Ms Harris' character nor ability to undertake her job.

The Prudential withdrew the job offer. Ms Harris resigned from TSB and claimed constructive dismissal on the basis that the reference provided on her behalf was in breach of the implied terms of mutual trust and confidence.

The Employment Appeal Tribunal upheld the Tribunal's decision that Ms Harris had been unfairly dismissed. The TSB's use of unrevealed complaints which blocked her progress amounted to a fundamental breach of the implied term of trust and confidence. It should have made Ms Harris aware of the complaints before the reference had been given in order to allow her the opportunity to address the damaging information which was on her file. The reference supplied was unfair and misleading and not prepared with due skill and care.

Although the reference complied with the financial industry's guidelines, the duty of the TSB to it's regulatory body was not the measure of the duty of the TSB to it's employees. The minimum reference demanded by Industry Practice meant the TSB had misled the prospective employer as to the ability and character of the employee.

This decision strengthens employee rights and puts employers at considerable risk if they pass on negative information contained in an employee's personal file of which the employee has not been made aware before the giving of the reference, even if this is the industry Standard.

Best of both worlds

Stark v The Post Office (Unreported Court of Appeal 28/02/2000)

THE EUROPEAN health and safety framework and so-called daughter Directives came into force in the United Kingdom in 1992 with the six pack of health and safety regulations.

Some eight years later the case law is beginning to emerge as cases make their way up the appeal courts. This month we report the first Court of Appeal judgment and a high court judgment on the regulations.

In this CWU backed case, Mr Stark, a postman, was injured at work when his cycle front brake snapped in two, the front wheel locked and Mr Stark was thrown over the handlebars. The bicycle was supplied by the Post Office.

The brake had snapped because of metal fatigue or manufacturing defect and the defect would not and could not have been discoverable on any routine or rigorous inspection. The court found the Post Office had done their best to maintain the bike and had done everything they could to check for faults.

The question for the court was whether the Post Office had breached their statutory duty under regulations 6 of the Provision and Use of Work Equipment Regulations 1992 that says that "Every employer shall ensure that work equipment is maintained in an efficient state, in efficient working order and in good repair". Was that an absolute duty, or a duty just to take reasonable steps to keep the equipment in good order?

The Court said the duty was not breached as it required a reasonable level of maintenance. But the Court of Appeal have overturned the decision and ruled that the regulation imposes an absolute duty, and, since the bike broke, the employers must have been in breach. The Court had to interpret both European and UK law. Even though the Directive did not require an absolute duty, the Directive imposed minimum standards and specifically said that where domestic law provided for greater protection, the Directives did not seek to reduce that protection. Since the wording in the Regulation used words that in other UK health and safety law imposed an absolute duty, Regulation 6 could be interpreted in light of UK case law that where an employer "shall ensure", the duty imposed by the regulation is an absolute one. Parliament had written an absolute duty and it must be assumed that was intended. The employer was in breach and Mr Stark got his compensation.

Employer to foot privacy bill

Post Office v Footit [2000] IRLR 243

MR FOOTIT is an environmental health officer who served an improvement notice on the Post Office under the Workplace (Health, Safety and Welfare) Regulations 1992 requiring them to provide a changing cubicle for postwomen in addition to the women's lavatory and unisex changing area. The Post Office appealed the decision, eventually reaching the High Court.

The regulation states that an employer must provide suitable and sufficient facilities for changing when an employee has to wear special clothing for the purpose of work and cannot be expected to change in another room, for reasons of health or propriety.

The Court held that the postal workers' uniform was special clothing within the meaning of the Regulations. The fact that most staff wore their uniform to and from work, did not matter. The tribunal was entitled to find that for reasons of propriety, the facilities currently provided were not suitable and sufficient for the purposes of the Regulation. The concept of propriety is not just confined to gender separation and can include people of the same sex not having to undress in front of each other.

Totting it up: calculating co

Rae v Balmoral Group (Times, 25.1.00).

Khanum v IBC Vehicles (EAT/685/98, 8.2.99: IRLB Jan 2000

Dench v Flynn and Partners [1998] IRLR 653

Camdecca Resources v Bishop (EAT/1083/98, 24.6.99: IRLB Jan 2000 p.11)

Taylor v John Webster Civil Engineering [1999] ICR 561

AS REPORTED in LELR 43, the compensatory award for unfair dismissals has gone up from £12,000 to £50,000 for dismissals which took place on or after 25th October 1999. This article reviews the recent case law and legal principles used in calculating the compensatory award. The theme of recent cases is to highlight the tribunal's discretion to look at the award in the round, to assess what it is just and equitable to award, and not to be side tracked by technical arguments about causation or the burden of proof.

First work out what the applicant would have earned from their employer if he or she had not been dismissed. Employers often argue that bonuses, commissions and the like should be ignored because they are discretionary. That misses the point, which is what, in practice, the applicant would have got. The best guide to that is what the remaining workforce received, or what the employee tended to receive in the past. Tribunals are entitled to take a broad brush approach, as notably demonstrated in Leonard v Strathclyde Buses [1998] IRLR 693 (LELR 38), where a tribunal awarded the loss in share value which the applicants had suffered when the shares they were forced to sell back on dismissal tripled in price in the subsequent months. The Court of Session held that the tribunal was entitled to do so: its function was to assess what was just and equitable, and not to introduce technical legal concepts like foreseeability or remoteness of loss.

The same approach underlies and has been confirmed in the recent case of Rae v Balmoral Group. An employee had an altercation with a colleague. He refused to go back on shift out of fear; he was dismissed. After his dismissal he was signed off sick with stress, and the employer argued it should not have to pay compensation for that period. After all, it did not pay sick pay so the employee would have got no money even if he had not been sacked. The tribunal rejected this argument, finding that it was impossible to say what would have happened if he had not been sacked. The employer appealed, arguing it was for the employee to prove his loss. The EAT disagreed: it was quite legitimate for the tribunal to give the employee the benefit of the doubt, and a very broad test should be applied to issues of causation.

The next step is to give credit for the employee's earnings elsewhere since dismissal. Where dismissal was summary, the notice period needs to be considered separately. In unfair dismissal cases there is normally no need to give credit for sums earned elsewhere during the notice period, on the basis that good industrial practice usually favours a lump sum of payment in lieu of notice up front (Norton Tool v Tewson [1972] IRLR 86). The same may also apply even in wrongful dismissal cases where there is a contractual provision entitling the employer to dismiss summarily with pay in lieu of notice: in Cerberus Software v Rowley [1999] IRLR 690 (LELR 40) the EAT held that the employee can claim the full notice pay as monies due under the contract. It is in any case as well to claim wrongful dismissal or breach of contract as well as unfair dismissal in the IT1 in cases of summary dismissal; the employee may be entitled to notice pay even if the dismissal was fair, and any award is "ring-fenced" from deductions for contributory fault.

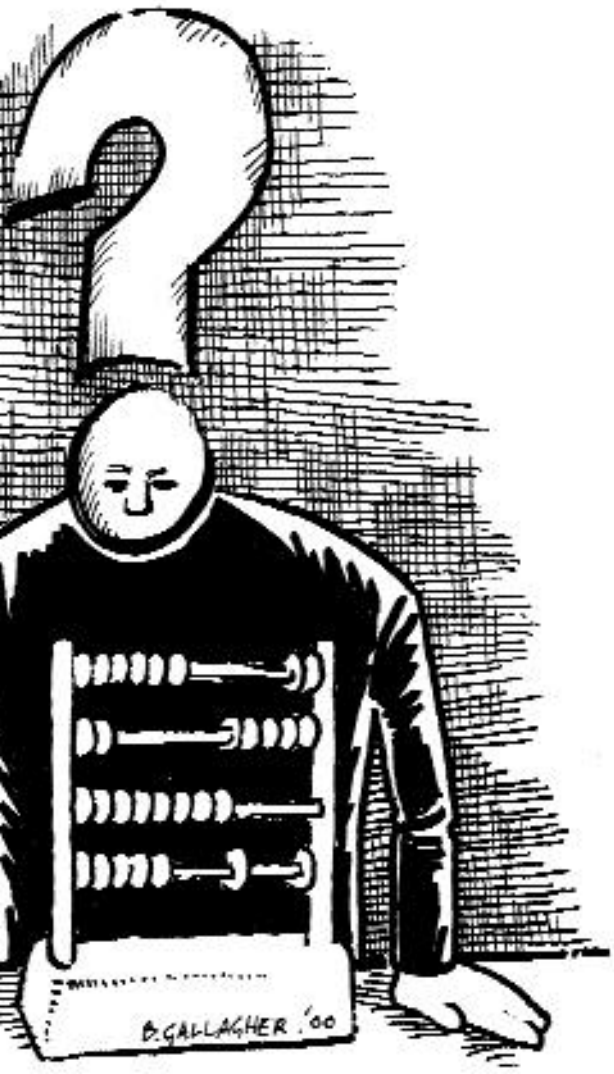
The applicant may be out of work, or earning less than before the dismissal. Tribunals often limit continuing future loss with a "cut off" point at three or six months or at most a year from the hearing date, but in reality it may take a lot longer to achieve previous earnings. With the higher "cap", it makes sense to devote some effort to finding evidence to support a longer period of future loss – such as a letter from the new employer about prospects for promotion and

This month's guest author is Nick Booth, barrister at Old Square Chambers specialising in employment law.

mpensation

pay increases, or evidence about the state of the local employment market for someone in the applicant's position. Try the job centre for information.

Sometimes an employer argues that the employee's actions have "broken the chain of causation" so that it is not responsible even for ongoing losses that an employee can prove. For instance, the employee may have chosen to retrain for another career rather than seeking a job in the same field; or he or she may have taken another permanent job that came to a premature end. Again, the cases show that a flexible approach is required.



In Khanum v IBC Vehicles an apprentice technician in the motor industry was dismissed, and thereafter blacklisted so she could not find work. She started to study full time towards a computer systems engineering degree. The tribunal found that she had in reality little choice but to take up a degree course and that it was a sensible decision for her to take, but the chain of causation was broken and so it would not be right to award compensation beyond that time. The EAT disagreed. The proper question was whether the decision to attend university was a direct result of the dismissal. In the light of the tribunal's findings, it had erred in not making an award of future loss. The EAT stressed the special factors in the case, notably the blacklisting by an employer who held a dominant market position in a specialised field.

In Dench v Flynn and Partners a solicitor felt obliged to take a job at another firm after her dismissal, subject to a probationary period and against the advice of one her former bosses. She was dismissed at the end of a three month probationary period. The tribunal took the view that the new permanent job (although subject to "the usual" probationary period) automatically broke the chain of causation from the original dismissal. The Court of Appeal disagreed and sent the case back to the tribunal to reconsider. Each case had to be considered on its own facts.

In addition to awarding net loss of earnings, the statute allows tribunals to award expenses incurred in looking for work. In Camdecca Resources v Bishop the EAT confirmed that the tribunal was also entitled to include an award to reflect the time and effort the employee had put in to finding alternative work thus mitigating his loss. In this case the EAT awarded £500 under this head. The case reinforces tribunals' powers to compensate roundly for all loss flowing from a dismissal on a "just and equitable" basis, even those not precisely measurable in money terms (just as in the common case where a sum of £250 or thereabouts is awarded for loss of statutory rights).

Taylor v John Webster Civil Engineering is a useful reminder that Polkey reductions affect the compensatory award only. They should not be taken off the basic award or any redundancy payment; nor should they go to reduce any sum awarded in respect of the notice period. This is because, whether or not the employee would have been dismissed under a fair procedure, he or she was entitled to receive full pay throughout the notice period. It is also always worth remembering the case of King v Eaton (No. 2) [1998] IRLR 686, LELR 30) which held that where it is too speculative for a tribunal to work out the percentage chance of an applicant keeping his job if a fair redundancy procedure had been followed, no percentage deduction need be made.

Swedes and Germans in penalty shoot out

Jamstalldhetsombudsmannen v Orebro lans landsting Case C-236/98 Deutsche Telekom AG v Lilli Schroder Case C-50/96

WE REPORT below on two encouraging decisions of the European Court of Justice on equal pay. Some of the names may be unpronouncable to non-linguists, but the principles in both cases are loud and clear.

The Deutsche Telekom case deals with issues related to retroactive entitlement to membership of pension schemes for part-timers and sets the scene for the eagerly awaited judgment in the UK cases referredon the same issues (Preston and Fletcher).

The Jamstalldhetsombudsmannen case deals with whether or not different elements of the pay package should be treated separately for the purpose of deciding whether or not an Applicant is paid less than her comparator, or whether the overall pay packet should be used for comparative purposes.

In the Deutshe Telekom case, Ms Schroder worked from 20 May 1975 to 31 march 1994 for Deutsche Telekom on a part-time basis. She then retired and became entitled to a pension. Up until 1 April 1991, she had been excluded from membership of the pension scheme because of her part-time status. She therefore claimed a pension relying on her service from 20 May 1975 onwards, on the basis that the relevant collective agreement in Germany contained no restriction on retrospection.

Before the ECJ, Deutsche Telekom tried to reopen the already settled debate as to whether the effects of the Barber decision and the Protocol to the Maastricht Treaty meant that only periods of service after May 17 1990 (the date of the ECJ judgment in Barber) could be taken into account for the purpose of retrospective entitlement to membership of pension schemes. Predictably, the ECJ spelled out again the difference between discriminatory benefit provision (covered by the Barber limitation) and discriminatory access provisions (which are not). Accordingly the Barber limitation did not apply.

However, the ECJ, then went on to consider a further, related question. It is generally assumed that the cut-off point for relying retrospectively on the direct effect of Article 141 of the Amsterdam Treaty (previously Article 119 of the Treaty of Rome) is 8 April 1976 – the date of the decision of the ECJ in Defrenne v Sabena (No.2). In the Deutsche Telekom case, the ECJ went on to examine whether that cut-off date applied where relevant domestic anti-discrimination law applied prior to that date, even if at that stage it was interpreted in a manner inconsistent with EU law.

Interestingly, the ECJ did not allow Deutsche Telekom to rely on the date of the judgment in the Defrenne case as the right cut-off point. It confirmed that 8 April 1976 was the right cut-off point for claims relying solely on the direct effect of Article 141. However, that limitation on claims relying solely on Article 141 did not affect Ms Schroder's ability to rely on separate domestic law applicable to periods before 8 April 1976.

Deutsche Telekom also tried to define limits to the operation of Article 141 by reference to the possibility that its operation may lead to distortion of competition between employers resident in different members states, some of whom may respect the provisions of Article 141 more rigidly than others. Quite rightly, the ECJ gave this argument short shrift. The ECJ acknowledged that the purpose of Article 141 is twofold - both economic and social. However, the very purpose of Article 141 is to secure a degree of conformity of standards across

member states. In addition, the European Union is not just an economic union, it is also a social union, one of the aims of which is to improve workers' living conditions. The economic aim of Article 141 is secondary to the social aim, that is the removal of discrimination, which is itself a fundamental human right.

This is all good stuff. The ECJ has neatly confirmed many of the principles relevant to the part-timer pensions access claims. Indeed, there may be some scope for the applicants in the part-time pension claims now to argue that their retrospective access should not be limited to April 1976. There are also no limits to the scope of Article 141, certainly by reference to purely economic factors.

The issue in the Jamstalldhetsombudsmannen case is very different. Two female midwives in Sweden claimed equal pay for work of equal value with a clinical technician. The mid-wives worked on a rota-based system, with unsocial hours attracting an additional allowance. The rota-system took account of public holidays by applying a reduction in the hours to be worked for any week in which a public holiday fell. The clinical technician worked fixed weekly hours. His basic wage was higher than the midwives', but he did not work unsocial hours and was not therefore entitled to an unsocial hours allowance.

The issue for the ECJ was how to calculate the midwives' and the clinician's pay for comparative purposes. Should the unsocial hours allowance be included in the mid-wives' pay and should the reduction in hours for public holidays be taken into account?

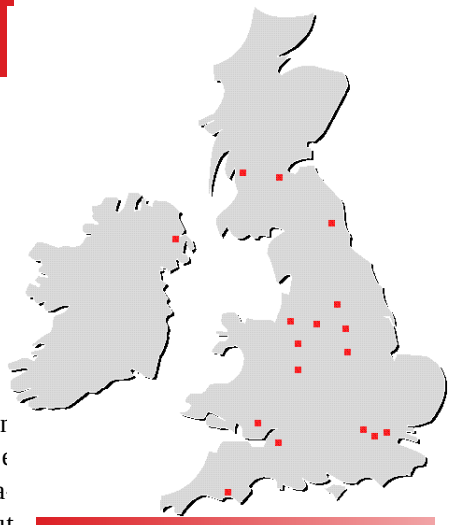
The ECJ is absolutely right to require an individual analysis of each element of the pay package - "…It follows that genuine transparency, permitting effective review, is assured only if the principle of equal pay for work of equal value applies to each of the elements of remuneration granted to the men or women". This meant that the unsocial hours allowance should not be included, even if it was pensionable, in the midwives' pay and no account should be taken, when comparing pay, of the hours reduction for public holidays.

In relation to the hours reduction, the ECJ correctly points out that a variance in hours may serve as an objective justification of a difference in pay. But that justification is for the employer to prove, after the applicant has established a difference in pay.

This decision is entirely consistent with established UK law. The House of Lords considered very similar issues in the Leverton v Clwyd case, with the same result.

Again, this is all good news. Where applicant groups receive pay comprising a number of different elements, the correct approach is to compare each element separately with the corresponding element in the comparator's pay packet. It is only possible for employers to set one element of an applicant's pay packet off against a different element of the comparator's pay where there is a unifying link which justifies that element of the comparator's pay by reference to the different element of the applicant's pay. A difference in hours may therefore justify a difference in monthly pay, but only if the hourly rate remains the same.

Adding insulting amount to injury



Heil v Rankin & Another, Reece & Another v Mabco, Schofield v Saunders & Taylor Limited etc Court of Appeal: 23rd March 2000 (unreported)

SEVEN CLAIMANTS brought their cases to the Court of Appeal on the issue of "general damages". General damages are the amounts awarded by a court that cannot be precisely calculated for the pain, suffering and loss of amenity in personal injury claims – in other words the injury alone. This is distinguished from "special damages" which are the pecuniary losses that can be calculated – loss of earnings after the injury, cost of nursing care and so on.

The Law Commission, whose task is to review legislation and suggest improvements, reviewed compensation in personal injury and industrial disease cases and reported in April of 1999 (Report no. 257). Included was the recommendation that the level of general damages should be substantially increased.

The Law Commission recommendations brought uncertainty with judges taking different views as to how courts should respond. Ultimately the matter had to be decided by the Court of Appeal and Thompsons brought one of the test cases for Mavis Schofield on behalf of her husband who died from Mesothelioma at 57. He worked for the defendants for about one year removing pipes from buildings. He was exposed to substantial quantities of asbestos dust. We asked the court that heard the case to uplift the damages for Mr Schofield's pain, suffering and loss of amenity in view of the Law Commission's recommendations. The court refused on the basis that the matter had to be first dealt with by the Court of Appeal.

The Court of Appeal have now ruled in these test cases. The level of damages in certain personal injury cases needed to be increased in order to produce compensation which is fair, reasonable and just. But they gave no increases in awards which are currently below £10,000, and for those awards above £10,000 there should only be a modest tapered increase up to a maximum increase of one third in awards for the most catastrophic injuries. This is well below the Law Commission recommendations. In Mrs. Schofield's case, she received a 10% increase giving her an extra £4,000.

The Court of Appeal considered the survey commissioned by the Law Commission and also considered the level of awards in other jurisdictions. For example in Northern Ireland it is well known that claimants can be awarded three times the amounts awarded in England and Wales. Other considerations taken into account were the increases in life expectancy, improvements in medical treatment and the impact on insurance premiums and on the NHS.

The Court of Appeal were no doubt influenced by the impact on the insurance industry that in 1998 made a trading profit of 1.2 billion pounds. They said that their decision would have a significant effect on the public at large in the form of higher premiums and that there would be less resources available for the NHS. They expressed concern that the level of awards did involve questions of social policy and accepted that the appropriate award for general damages is always a difficult one.

Their decision was a blow to those who suffer injury because the majority of claims will not receive any increase in their awards. Those who have suffered catastrophic injuries get very little increases.

The matter is now being considered for appeal to the Lords and a campaign for reform by parliament.

HEAD OFFICE 020 7637 9761
BELFAST 028 9032 0148
BIRMINGHAM 0121 236 7944
BRISTOL 0117 304 2400
CARDIFF 029 2044 5300
EDINBURGH 0131 225 4297
GLASGOW 0141 221 8840
HARROW 020 8864 8314
ILFORD 020 8554 2263
LEEDS 0113 244 5512
LIVERPOOL 0151 227 2876
MANCHESTER 0161 832 5705
NEWCASTLE 0191 261 5341
NOTTINGHAM 0115 958 4999
PLYMOUTH 01752 253085
SHEFFIELD 0114 270 1556
STOKE 01782 201090

CONTRIBUTORS TO THIS ISSUE

RICHARD ARTHUR
NICOLA DANDRIDGE
CRAIG JONES
ANN ROONEY
JULIE WOOD
NICK BOOTH (GUEST AUTHOR)

EDITOR MARY STACEY
PRODUCTION NICK WRIGHT
PRINTED BY TALISMAN PRINT SERVICES

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