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End of the road for Seymour-Smith

The long running Seymour-Smith case has now finally reached the end of the road. As previously reported in LELR 2, 26 and 32, the Applicants in R v Secretary of State for Employment ex parte Seymour-Smith, were seeking to establish that the requirement for employees to have two yearsÕ service before being able to proceed with an unfair dismissal claim indirectly discriminated against women, on the basis that statistically women tended to have shorter periods of service than men.

We now have the House of Lords decision (17 February 2000). As expected, it finds against the Applicants. Although the Lords do conclude that the two year service rule had more of an impact on women than men (for every 10 men who qualified, only 9 women did), nonetheless they find that the

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Rights are not mythical

Unicorn Consultancy Services Ltd v Westbrook and others [2000] IRLR 80
Allen and others v Amalgamated Construction Co Ltd [2000] IRLR 119

TUPE continues to exercise the courts at home and in Europe. Whereas previous decisions tended to focus on the scope of TUPE (do the Regulations apply in particular circumstances?), the more recent cases tend to focus on its effect (do particular terms transfer? What is the effect of a dismissal ? etc).

We shall, in a future edition, review all the significant recent case law, but, in this edition, we look at two cases: one concerning the interpretation of a contract term after transfer, the other concerning a transfer between two companies in the same group.

Unicorn

The employees in this case worked on a contract for Surrey County Council which transferred from WS Atkins to Unicorn. They enjoyed the benefit of a profit-related pay (PRP) scheme based on the period 1 April to 31 March. They transferred to Unicorn on 1 April 1997, but Unicorn refused to pay their entitlement under the PRP scheme for 1996/97.

Unicorn's justification for the refusal to pay was a clause which provided "only those employed in the employment unit at the first of the month preceding the month in which payment of PRP is to be made will receive payment" (Rule 4.3). Payment was due to be made more than one month after the transfer and Unicorn argued that the employees were no longer employed in the "employment unit" of WS Atkins at that date.

The EAT concluded that this must be construed in the light of Regulation 5 of TUPE. The employees had all "earned" their PRP as they had all worked for WS Atkins throughout the complete profit period. Immediately before the transfer the employer had a liability to pay PRP as and when it became payable. Rule 4.3 should be construed as employment in the undertaking concerned and not as continued employment with the transferor company. This was also supported by the provisions of TUPE deeming anything done by the transferor before the transfer as having been done by the transferee and thus deeming Unicorn to be an employer participating in the scheme for that limited purpose.

This is a situation which also arises in public sector transfers where staff are entitled to bonuses based on the performance of the service or agency.

The Unicorn case was one where the transfer took place immediately after the completion of the profit period. The EAT pointed out that problems may arise in circumstances where the transfer takes place during the profit period. Practical problems would arise in ascertaining the profit and administering the scheme, but (depending on the wording of the contract) employees may still be entitled to PRP based on the performance of the transferor group.

There is a parallel with the position where transferred employees are entitled to pay rises in accordance with national negotiations to which the transferee employer is not a party. This derives from the Whent v Cartledge case ([1997] IRLR 153). Attempts by a contractor (Glendale Industries) to have that decision reversed have been dealt a fatal blow by a series of decisions in the Employment Tribunals and EAT, culminating in costs orders against the company.

Allen v Amalgamated Construction

This is a UK case which was referred to the European Court of Justice. It raises a number of issues.

The first part of the decision is the (perhaps unsurprising) conclusion that the Acquired Rights Directive applies to a transfer between two companies in the same corporate group which have the same ownership, management and premises and which are engaged in the same works.

There is also a helpful discussion on the criteria for establishing whether TUPE applies following on from Suzen and subsequent decisions. It confirms that it is not necessary for there to be a transfer of ownership of relevant equipment: in this case there was merely a transfer of use. ☛

New rights for employees?

Brigden v American Express Banks Ltd [2000] IRLR 94 High Court

The High Court has ruled in this case that Contracts of Employment are covered by the Unfair Contract Terms Act 1977. The Unfair Contract Terms Act prevents unreasonable attempts to restrict liability by making the offending clauses in contracts unenforceable.

The effect of this decision would be that an employee could, potentially, rely upon Section 3 of the Act which would give protection in three situations.

1 A clause in an employment contract entitling an employer not to perform all, or any, of the employers contractual obligations would be unenforceable unless it was reasonable;

2 A clause in an employment contract entitling an employer to render a contractual performance substantially different from that which was reasonably expected of him would be unenforceable, unless it was reasonable; and

3 A clause in an employment contract which, when the employer is in breach of contract, excludes or restricts any liability of the employer in respect of the breach unless it is reasonable.

This may have far reaching implications for employees in controlling exemption and exclusion clauses in contracts of employment. It has been suggested that this could apply to unreasonable application of mobility and flexibility clauses, changes to hours and job descriptions and even the operation of performance and merit pay systems. This may be how the case law will develop in future cases. However, the limitations of this case are illustrated by the fact that although Mr. Brigden succeeded in establishing that the 1977 Act applied, he actually lost his case.

The clause he was challenging in his contract, allowed the employers to pay him pay in lieu of notice if he was dismissed within the first two years and excluded him from the right to use the disciplinary procedure. The Judge held that this was not a contract term excluding or restricting the liability of the employers, nor was it a clause that entitled the employers to render a contractual performance substantially different from what was reasonably expected. It just set out the employee's rights in such situations. And the Judge went on to say that even if it did exclude or restrict the performance of the contract he would have held that it was reasonable. Therefore, the judge would have allowed the employer to rely on the clause even if it had come within one of the three categories where the Unfair Contract Terms Act bites.

The case therefore creates another weapon or argument on behalf of employees but its effectiveness will only be judged after further litigation. For now, it may be a better argument in negotiations than in the courts. But it is a big step forward to establish the principle that the Unfair Contract Terms Act 1977 applies in employment contracts. The next step is to give force to what that means in practice.

☛ It contrasted the Rygaard case on the basis that in the Allen case complete works contracts were transferred and the transferee had acquired a body of assets.

The Court confirmed that it is not necessary for the transfer of employees to coincide with the date of transfer of the works contract.

There is one comment which may prove to be of wider significance. The decision refers to the aim of the Directive to ensure rights of employees are safeguarded by "allowing them to remain in employment with the new employer on the same terms and conditions". This is in the context of a dismissal and re-engagement. It casts some doubt on the UK cases which suggest that a dismissal in those circumstances may be effective and appears to give confirmation that where the reason for the dismissal is the transfer itself, the dismissal is invalid and the employment contract continues with the new employer, rather than the new employer merely inheriting continuing liabilities for any breach arising from a valid dismissal.

The situation where there is a dismissal for an economic, technical or organisational reason is more complex and we shall return to this in future editions.

Partial improvements for part time employees

The Part-Time Employees (Prevention of Less Favourable Treatment) Regulations 2000

Draft Regulations have been published, which will give part-timers some new rights, and will come into effect on 7 April 2000. The Part-Time Employees (Prevention of Less Favourable Treatment) Regulations 2000 implement the Part-Time Work Directive (97/81EC), which was extended to the UK after the Government signed up to the EU Social Chapter. The Directive itself is founded upon a framework agreement negotiated at European level between the social partners.

The Regulations will make it unlawful to discriminate against employees on the ground of their part-time status. At present, part-timers have to rely upon indirect discrimination claims under both sex discrimination and equal pay legislation in order to combat the discrimination which they suffer. Although gender equality legislation will still be available as a means of protection for part-timers, they will now no longer have to rely upon gender discrimination in order to bring a claim. Instead, the Regulations will outlaw discrimination suffered by a part-timer when compared to a comparable full-timer, regardless of their sex.

The Regulations will apply to less favourable treatment, such as harassment, denial of access to training or promotion and other forms of treatment. The Regulations will also cover pay, contractual issues and pensions.

Controversially, the draft Regulations only apply to 'employees' and not to 'workers'. 'Employees' are defined as individuals who have entered into or work under a contract of employment. The Government's stated commitment is to extend the ambit of employment protection legislation to cover 'workers'. 'Workers', as defined in section 230(3) of the Employment Rights Act include not only those working under a contract of employment but also those who undertake to do work personally. There is a strong argument that the Directive requires the coverage of the Regulations to be extended to 'workers', as in the National Minimum Wage Regulations and the Working Time Regulations. As they stand, the draft regulations will not cover freelance, agency or casual workers. The TUC and several unions are already considering a legal challenge.

The mechanism contained in the Regulations involves a comparison between the treatment of a 'part-time employee' with a 'comparable full-time employee'. A full-time employee is someone who is paid wholly or in part by reference to the time she works and, having regard to 'the custom and practice of the employer and, where relevant, her contract of employment, and is 'identifiable' as a full-time employee'. A part-time employee is someone who is paid wholly or in part by reference to the time she works and is not 'identifiable' as a full-time employee.

A comparable full-time employee is a full-time employee who:

- does the same or broadly similar work to the part-timer;
- has a broadly similar level of qualifications, skills and experience; and
- works at the same establishment, or where there is no comparable full-time employee at that establishment, works at a different establishment.

The provisions relating to comparison between part-timers and full-timers are problematic. In particular, the draft Regulations contain no 'equal value' provisions similar to the Equal Pay Act which would enable a part-timer to compare her or his job with a full-timer doing a completely different job, but the demands of which were the same as the part-timer's job. Similarly, there is no apparent scope for the type of "cross-employer" comparisons now made in equal pay cases.

However, the important point is that no difference in gender is required. A part-time female employee may compare her treatment with that of a full-time female employee. The same applies to part and full-time male employees. This will make a differ-

ence in predominantly female workplaces, such as the NHS and cleaning and catering industries.

The draft Regulations provide that less favourable treatment of part-time employees will be unlawful unless the treatment is 'justified on objective grounds'.

In establishing whether a part-timer has suffered less favourable treatment, the principle of pro rata will apply unless it would be inappropriate. However, the draft Regulations do not give any guidance on how tribunals are to assess when the application of the pro rata principle will be inappropriate.

What is required by way of justification is not spelt out in the draft Regulations either, but we anticipate that experience can be drawn from equal pay and indirect discrimination law. Following the Bilka-Kaufhaus case, employers are likely to have to show that any discriminatory treatment corresponds to a real need on the part of the employer, is appropriate to achieving that objective and is necessary to that end.

Disappointingly, but consistent with the European Court of Justice decision in the Helmig case, a part-timer will not be discriminated against where she works overtime, without receiving overtime rates, where her total hours are still less than those of a full-timer, even though the full-timer becomes entitled to overtime rates when working in excess of her or his contracted hours.

Complaints under the Regulations may be made to Employment Tribunals. The time limit for presentation of a claim relating to less favourable treatment is three months from the date of the treatment or detriment. Where the less favourable treatment or detriment consists of pay or a term in a contract of employment which is less favourable, the three month time limit will run from the last day on which that particular term is less favourable.

The Regulations will also contain anti-victimisation provisions and a right to receive a written statement of reasons for less favourable treatment, but unfortunately there is no questionnaire procedure such as is used in race, sex and disability discrimination cases.

In overall terms, the draft Regulations are welcome but do not do enough to protect part-timers from discrimination. On the Government's own estimates, only 45,000 of the UK's six million part-time employees are likely to benefit directly from the regulations with increases in pay and non-wage benefits. Protection of all part-time work forces is likely to be problematic and, as with existing equal pay claims, identification of comparable full-time employees may well be difficult.

Thompsons have prepared a full response to the draft regulations submitted to the DTI as part of their consultation exercise on the draft Regulations. Contact the Employment Rights Unit at Congress House for a copy.

The unjustifiable cannot be justified

Crossley and Others v ACAS (Birmingham Employment Tribunal, 1304744/98 20.12.99)

Jorgensen v Foreningen af Speciallaiger and Sygesikringens Forhandlingsudvlag C-226/98 and Jamstalldhetsombudsmannen v Oreboro Lans Landsting C-236/98

The startling headlines from last month, showing that on average a woman will earn £250,000 less than a man during her lifetime, underline the ever-present need for effective equal pay laws. These statistics are the result of an extensive analysis carried out on behalf of the Government's Women's Unit. According to Baroness Jay, Minister for Women, these statistics will inform future policy-making on welfare support, the New Deal, childcare and career choices. Nonetheless, as the Government last year made clear in response to the Equal Opportunity Commission's demand for changes to the equal pay laws, it did "not consider the time is right for major changes in the law."

For the moment, therefore, women will have to continue to make the best of the current inadequate and arduous equal pay legislation as the main legal tool for rectifying the £250,000 deficit. And continue to make use of it they do. In 1998, there were 3,447 equal pay cases lodged with the Tribunals. This compares with 2,886 applications in 1997.

Equal pay claims can of course be financially significant, and recent legal developments reinforce the possibility of large financial settlements. The landmark Employment Appeal Tribunal case of Levez v T H Jennings (Harlow) Pools Ltd 1999 (LELR 40), has declared that the two year back pay limit, contained in section 2(5) of the Equal Pay Act 1970, is contrary to European law. As a consequence from now on the section 2(5) limit is to be disregarded in all equal pay cases in favour of a six year limit, in keeping with analogous breach of contract cases. However, even the six year limit is being questioned in the part timers pension cases, Preston v Wolverhampton Healthcare NHS Trust 1998 IRLR 197 (European Court of Justice decision expected later this year or next.) If successful, the part-timers will be allowed to back date their pensions to April 1976.

Together with developments relating to compensation, the impact of equal pay as a negotiating tool continues to have effect. A recent successful Tribunal case pursued for PCS union by Thompsons against, ironically, ACAS has required ACAS to revisit their pay systems. The case may also have wider repercussions across the civil service.

In Crossley and Others v ACAS (Birmingham Employment Tribunal, 1304744/98 20.12.99), the Tribunal found in favour of the Applicants. The Applicants' case was that the ACAS pay system, which rewarded length of service, was indirectly discriminatory and therefore contrary to the Equal Pay Act. Within ACAS the pay structure incorporated the old incremental point system which had automatically awarded incremental pay increases to staff each year.

Even though the incremental system had since been abandoned in favour of performance related pay, nonetheless the old increments remained embedded in the system. Employees moved on to the performance or box marking pay system with their increments preserved in tact. Because ACAS historically has operated within a male dominated environment, the longer serving staff were primarily men. The female staff had shorter periods of service not only due to joining ACAS at a later date, but also because of breaks due to child care. Statistically, therefore, a large number of men were clustered in the higher pay ranges, with the women clustered at the bottom of the scales. Since pay

increases are now purely performance related, the lower paid women can never catch up with their longer serving male colleagues.

ACAS sought to argue before the Tribunal that seniority was, in itself, a sufficient objective justification defence. This argument was unanimously rejected by the Tribunal. They said that the Bilka test of objective justification presented "a formidable hurdle" for an employer seeking to justify an indirectly discriminatory pay system. If an employer wished to adopt a pay system which rewarded seniority, then they had to ensure that there was a necessary correlation between the seniority that was being rewarded, and the requirements of the job. In this case the necessary correlation had not been made out.

"Another useful equal pay case is Young v National Power plc (EAT [2000] ICR 78). Here, the Applicant was seeking to claim equal pay in respect of work that she had carried out two years prior to the termination of her employment. She argued that the six month time limit on bringing proceedings related to her overall employment with the Company. The Company on the other hand argued that the six month limit related solely to the period in relation to which she was claiming equal pay. The EAT agreed with the Applicant. As long as the Applicant remains employed under the same contract with the employer, then she can claim equal pay in respect of any job she had done, and if she leaves her employment then she can claim within six months, again in respect of any job that she had done."

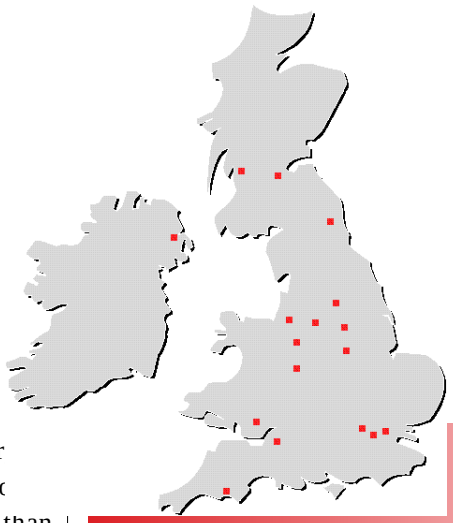
Justification is also the subject of two interesting European cases, where decisions are awaited. Apart from surely making history as having the longest case names ever, Jorgensen v Foreningen af Speciallaiger and Sygesikringens Forhandlingsudvlag C-226/98 and Jamstalldhetsombudsmannen v Oreboro Lans Landsting C-236/98 both deal with the extent of the burden on the employer to justify apparently discriminatory pay systems. Jorgensen raises the question of whether financial constraints can amount to objective justification. Previously, the assumption had been that cost cutting could not amount to objective justification, as, for example, with Hill and Stapleton 1998 IRLR 466 ECJ. Nonetheless in Jorgensen, the question being referred to the European Court is the extent to which "considerations relating to budgetary safe-guards, savings and planning…may be treated as objective and valid considerations."

In Jamstalldhetsombudsmannen, the primary issue is what aspect of an Applicant's pay can be compared with what element of the comparator's. The Advocate General's opinion confirms the Rainey principle ([1987] IRLR 26) that it is each element of the pay package that can be compared: "treating each element of remuneration independently for the purpose of an equal pay comparison will in general be the only proper way to ensure equality". What is the position, however, where the separate elements cannot be disentangled? Here, the Advocate General advises that a global assessment will need to be carried out. "In that case, the mere fact that the structure is not transparent means that the employer retains the burden of disproving alleged discrimination".

It is an increasingly common feature of employers' pay systems that managerial discretion and consequent lack of transparency dictate the terms. It is precisely that lack of transparency that makes it hard to identify and locate the £250,000 shortfall, and why the pay gap between men and women is proving so difficult to eradicate. Against that background, these recent decisions and Opinions, emphasizing precisely the extent of the "formidable burden" on employers to justify what otherwise would be discriminatory pay systems, are particularly welcome.

Additionally an under used tool in equal pay bargaining and tribunal cases is the Equal Opportunities Commission Code of Practice on equal pay. Combined with these recent trends on justification, the effect could be powerful indeed.

Disabled should be in the A Team



Kent County Council v Mingo [2000] IRLR 90 EAT

Disabled employees are often most at risk in redundancy situations. Selection criteria that is based on sickness absence can discriminate against the disabled, as can criteria such as multi-skilling and adaptibility. In this case the Employment Appeal Tribunal has had to scrutinize the Kent County Council redeployment policy in light of the Disability Discrimination Act 1995, and found it wanting.

Mr Mingo, an Assistant Cook with Kent County Council, injured his back at work and was unable to continue in this role. Mr Mingo's attempts to find alternative employment with Kent County Council were thwarted by the Council's redeployment policy. Under the policy staff at risk of redundancy (called 'category A staff') would be interviewed for any internal vacancies before any applications from other staff were considered. If the category A staff met the person specification then they would be appointed. Staff who were being re-deployed on the grounds of incapability/ill health were the next in line for consideration for redeployment and were called 'category B staff'. Even after the Council introduced a new category to cover staff with a disability under the Disability Discrimination Act, category A staff continued to be placed at a higher level.

Mr Mingo was repeatedly turned down for internal posts in favour of category A redeployees.

The Employment Tribunal agreed with Mr Mingo that his correct comparators were category A staff, not other categor employees who were incapable of perfo ing their duties, but for reasons other than disability. He was on the redeployment list for a reason connected with his disability. That reason did not apply to category A staff - they were redundant, therefore Mr Mingo could compare his treatment to that of category A staff.

The Employment Appeal Tribunal upheld the decision.

A redeployment policy of giving preferential treatment to redundant or potentially redundant employees does not adequately reflect the statutory duty on employers under the Act, since it means that those with disabilities are relatively handicapped in the redeployment system. In the present case had the employers' policy permitted the applicant to be treated as a category A redeployee, on the facts found by the tribunal, he would have been redeployed and not dismissed. On that basis, the Tribunal was entitled to conclude that the appellants had unlawfully discriminated against him.

The Council had also failed to consider any reasonable adjustments in relation to the posts the Applicant was interested in applying for. Indeed, one of the managers was more concerned whether making an adjustment for Mr Mingo would be fair to the other staff. Therefore the Tribunal was also correct in finding that the Council had failed in it's duty to make reasonable adjustments to enable Mr Mingo to undertake a new post

The case of Kent County Council against Mingo is a useful reminder that statutory rights override collective agreements and that redundancy and redeployment policies are particularly prone to result in unlawful disability discrimination.

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