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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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Come on down: unfair dismissal threshold reduced

Terms and Conditions of Employment, the Unfair Dismissal and Statement of Reasons for dismissal (Variation of Qualifying Period) Order 1999.

The length of service needed to gain protection from unfair dismissal is coming down from 2 years to 1 year from 1st June 1999.

Employees who are dismissed on or after 1st June 1999 will only need to have worked for the same or associated employer or have continuity of service protected by TUPE for 1 year - in other words since 31st May 1998 - to bring a claim in the Employment tribunal for unfair dismissal. They will also have the right to a written statement of the reasons for their dismissal, which must be asked for in writing. If their employer does not provide it, is slow in giving it, or gives inaccurate reasons, the employee can bring the claim to the Tribunal and get 2 weeks pay as compensation.

Other employment rights requiring 2 years service such as extended maternity leave and the right to a redundancy payment are not affected but maternity rights are being brought into line with the 1 year service rule in the Employment Relations Bill.

Hold back the night

R v Attorney General for Northern Ireland ex parte Burns [1999] IRLR 315

The Working Time Regulations have produced a wave of court decisions, illustrating the breadth of the legislation, but also its limitations.

We have already had a reference to the European Court on the qualifying period for holiday entitlement (R v Secretary of State ex parte BECTU, see issue 34), a finding that the annual leave provisions in the Directive have direct effect (Gibson v East Riding of Yorkshire) and a ruling that the maximum weekly working time limit is an implied term of every contract of employment (Barber v RJB Mining, issue 33).

The latest case comes from Northern Ireland. It deals with the definition of night worker, but also with the Government's liability for the failure to introduce Regulations within the time limit required by the Directive.

SHIFT WORK AND HEALTH PROBLEMS

Mrs Burns was required to work a three-shift system. Every third week she had to work from 9pm until 7am. She had regularly complained about this on health grounds since first required to work the shift in 1992.

In February 1997, she wrote to her employer saying she wanted to terminate her employment on medical advice. A few days later she tried to withdraw her resignation, asking for a transfer to day work on health grounds. Her employers refused.

Mrs Burns complained that she was entitled to protection as a "night worker" under the Directive and was therefore entitled to a transfer to day work on health grounds. She took the Government to court saying that its failure to implement the legislation by November 1996, as required by the Directive, meant that she had been deprived of a legal remedy.

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Hold back the night

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NIGHT WORKER

The first issue was whether Mrs Burns was a night worker. She spent one week of each three week cycle working from 9pm until 7am, Monday to Friday.

A night worker is defined in the Directive as a person who "works at least three hours of [her] daily working time at night as a normal course". Night time is defined as a period of at least seven hours which must include the core hours of midnight to 5am. The UK has since adopted the period of 11pm to 6am, but this was not in force at the time of this case.

There was no doubt that when Mrs Burns worked a shift from 9pm until 7am she worked at least three hours at night. The question was whether she did so "as a normal course".

The Government's Guidance on the Working Time Regulations issued in October 1998 by the DTI says that those who work night shifts as part of a regular pattern satisfy this definition. However, the Government argued a contrary view in this case. It tried to persuade the court that the proportion of Mrs Burns' night work was so small that she did not qualify for protection under the Directive.

The judge rejected this. He said that working three hours at night "as a normal course" involves no more than that "this should be a regular feature of her employment". It is not confined to someone who works night shifts exclusively or even predominantly. This means that all those who work a shift including three hours at night time as part of a regular shift pattern will be classed as night workers.

REMEDY

The judge said that the Government was legally liable for its failure to introduce working time laws in the UK by the deadline of November 1996. It could not use as an excuse for delay the Conservative government's unsuccessful challenge in the European Court. Any failure to implement on time means a government is liable.

This, however, was not enough to secure success for Mrs Burns. The judge concluded that the medical and other evidence did not show that she would have been able to require her employer to transfer her to day work and would have kept her job. Her claim for compensation failed.

A claim for compensation may have succeeded if there had been the necessary evidence in support. However, the provisions in the Working Time Regulations 1998 on transfer to day work do contain a number of difficulties, not least the fact that enforcement is supposed to be through the Health and Safety Executive rather than Tribunal claims. A worker whose doctor says she is suffering from health problems connected with night work is far from knowing that the law will secure a transfer to suitable day work.

Strike knocked off track

London Underground Limited v RMT, IDS Brief 636

A delay between strike action in July 1998 and a resumption of action in December 1998 led the High Court to issue an injunction restraining industrial action on London Underground.

The original ballot had been in May 1998, followed by action in June and July. There was then extensive negotiation. The union sought guarantees which were not given.

The High Court agreed with the employer that a gap of five months was too long and that the protection of the original ballot was exhausted. The Court said that the nature of the dispute had also changed as the union was now seeking to obtain the best possible deal for all employees who transferred to new private sector employers and this had not been the original objective of the dispute.

This would depend on the facts of the case and circumstances of the case, but the Court went on to make a point of more general concern, picking up on the approach taken by the Court of Appeal in the case of University College London Hospital v Unison.

The Court found against RMT on this issue, saying that the action on the Underground - like that at University College Hospital - did not have legal protection because the primary focus of the assurances the union was seeking from London Underground related to what would happen to the workers who transferred to new employers.

There is an apparent trend of decisions that a dispute about terms and conditions which will apply following a TUPE transfer is not a trade dispute as it concerns terms and conditions with a future employer. This is not only objectionable on policy grounds, it is legally questionable, not least because the TUPE Regulations operate so that following the transfer the new employer is effectively treated as though it had always been the employer.

SEX DISCRIMINATION

Transsexuals regulations

Sex Discrimination. The Sex Discrimination (Gender Reassignment) Regulations 1999.

From 1st May 1999 both the Sex Discrimination Act 1975 and Equal Pay Act 1970 have been amended to protect transsexuals from discrimination. This follows the case of P v S [1996] IRLR 347 in the European Court of Justice. Discrimination because of gender reassignment was in breach of the Equal Treatment Directive even if it was not outside the Sex Discrimination Act as had been found by the Employment Tribunal.

The regulations cover people who intend to undergo, are undergoing or have undergone gender reassignment. Where absences are due to gender reassignment a comparison can be made with treatment of sickness or other absences to establish whether the employer's treatment is on grounds of transsexual discrimination.

The regulations also expand the categories of the defence of a 'genuine occupational qualification' which can justify what would otherwise be unlawful discrimination for transsexuals cases.

New developments in fixed term contracts

There are 850,000 workers in the UK employed on fixed term contracts.

Fixed Term Contract employees are in a uniquely vulnerable position in UK employment law. Unlike any other category of employee their employment rights can be signed away leaving them with no protection against unfair dismissal, when their contract expires the exclusion works if the contract is a year or more, or two years for redundancy payments or redundancy payment rights. In any other type of employment contract a clause waiving employment rights - a waiver clause - is void and has no effect. Not so with fixed term contracts and many employers routinely recruit staff on fixed term contracts and require them to sign a waiver clause as a condition of getting the job.

Attempts to challenge the use of waiver clauses through the courts have had mixed results most recently in BBC v Kelly Phillips [1998] IRLR 294 (LELR 21).

The Court of Appeal said that extensions of fixed term contracts - no matter how short the extension - can work to exclude employment rights. Even though employers could abuse the position by successively extending fixed term contracts and thereby deprive employees of their rights, the law permitted the exclusion of rights.

The Court of Appeal decision in Kelly - Phillips, is now being appealed to the House of Lords and is due for hearing in the Summer.

The Government has now intervened with amendments to the current law in the Employment Relations Bill, which will remove the possibility of waiver clauses excluding unfair dismissal rights in fixed term contracts. The removal of waiver clauses will not mean that fixed term contract workers cannot be dismissed but they, like permanent workers, will be protected from unfair dismissal.

Some employers use fixed term contract workers for genuine reasons, to work on projects with limited funding or which are time limited, to cover for staff sickness or maternity absences. Non-renewal of a fixed term contract in these circumstances is likely to amount to "some other substantial reason" within the meaning of S 98 ERA 1996 or be a genuine redundancy.

So as long as the procedure used to dismiss is fair, and the employee properly informed, the dismissal will be unlikely to be unfair. But where unscrupulous employers use fixed term contracts rather than permanent contracts as a way of excluding employees rights with no objective reason, non renewal of such a contract for an employee with more than one year service may make the employer vulnerable to an unfair dismissal claim.

Unfortunately, the Government has decided not to outlaw waiver clauses in relation to redundancy payments. However as the rules on redundancy waivers mean that the employee has to have a two year contract the argument is that the worker has certainty of a specified period of work. Also if a contract is extended or renewed a new waiver clause must be entered into.

Fixed term contract workers are also routinely excluded from the same contractual terms as permanent employees by being excluded from employers pension and sick pay schemes and contractual redundancy schemes. Yet in reality many fixed term contract workers may have a long employment history with the same employer.

The redundancy waiver and two tier contractual terms may not survive in their current form for long. The European Commission is planning a Directive on fixed term contracts following an Agreement reached by the European TUC and employers organisations.

The Agreement which will form the basis of the fixed term work directive was signed on 18 March 1999. It aims to remove discrimination against people who are employed on fixed term contracts and prevent possible abuse arising from the use of successive fixed term contracts. The employers and trade unions have asked the Commission to propose the Agreement as a Directive. It follows the Directives on parental leave and

part time work also proposed by the social partners. The fixed term work Directive will complement the part time work Directive.

At the heart of the Agreement is the principle of non-discrimination (clause 4).

Fixed term workers shall not be treated in a less favourable manner than "comparable permanent workers" solely because they have a fixed term contract, unless the treatment can be justified on objective grounds. Clause 1 of the agreement aims to improve the quality of fixed term work, and clause 5 deals with measures to prevent abuse. Taken together these clauses will mean new rights for fixed term contract workers in the UK.

Non-discrimination will apply both in respect to contractual and statutory rights, hence the vulnerability of the UK's redundancy waiver clause. Periods of service qualification relating to particular conditions of employment must also be the same for fixed term workers as for permanent workers except where they can be justified on objective grounds.

Non discrimination against fixed term workers would mean that they should also have access to the same service based sick leave, holidays, pensions and maternity rights as their permanent colleagues.

It is difficult to conceive of an objective reason why a fixed term worker should be deprived of most contractual rights.

But an objective reason for excluding a fixed term contract worker from a pension scheme might be that they would only have a very limited period in the pension scheme. The financial cost of which to both the employee and employer would outweigh the benefit to the employee.

Clause 5 deals with measures to prevent abuse. It is proposed that member states shall introduce regulations to regulate fixed term contracts where there are no equivalent legal measures , as in the UK.

In so doing member states must take into "account the needs of specific sectors and/or categories of workers". The framework for the regulations will have to be based on one or more of the measures below:

a) objective reasons justifying the renewal of fixed term contracts

b) the maximum total duration of successive fixed term employment contracts and

c) the number of renewals of such contracts.

Regulations to prevent abuse would be welcome. Already some UK trade unions have reached collective agreements to ensure that after an agreed number of fixed term contracts a worker is moved on to a permanent contract. Regulations will not prevent the use of a fixed term contract where there is genuine need for one but it will prevent fixed term contracts being used to keep a compliant workforce as an alternative to proper workforce planning.

The agreement recognises that "employment contracts of an indefinite duration are the general form of employment relationships and contribute to quality of life of the workers concerned and improve performance". Permanent contracts are the norm and are better for the worker and his/her performance than the uncertainty of a fixed term contract. The agreement also recognises that over half of the fixed term contract working population are women and therefore measures to improve the position of fixed term workers will promote equality of opportunities between women and men. Another general consideration of the agreement is that fixed term contracts are a feature of employment certain sectors, occupations and activities "which can suit both employers and workers". In the UK fixed term contracts are most common in education and the media although the use of fixed term contracts is also growing in local government and health. The advantages of fixed term contracts in the UK particularly with the existence of the waiver clause have up to now been entirely with the employers.

Clause 6 deals with information and training and requires employers to provide information to fixed term workers about vacancies which become available to ensure that they have the opportunity to secure permanent positions. Also employers should "as far as possible" facilitate access to fixed term workers to appropriate training to "enhance their skills, career development and occupational mobility". Clause 8 means that employers should inform workers representatives about fixed term work in the undertaking.

The only group of fixed term workers excluded by the proposed Directive are those placed by a temporary work agency at the disposal of the undertaking. This may be dealt with in a future directive.

The proposed Directive is a welcome measure to end the abuses of fixed term contract working and promote permanent contracts as the rule. Taken with the proposals in the Employment Relations Bill to exclude the use of unfair dismissal waivers in fixed term contracts of more than one year the future should be brighter for fixed term workers.

Civil justice reforms - modernisation of rough justice?

Major Civil Justice Reforms came into effect on 26 April 1999. Life in the civil courts will never be the same again.

BACKGROUND

In 1994 Lord Woolf, now Master of the Rolls, was asked to tidy up civil procedures in England and Wales by producing one set of straightforward rules to apply to both the High Court and the County Courts written in plain English.

But Lord Woolf also took this opportunity to introduce root and branch reforms to civil procedures ultimately producing the unified Civil Procedure Rules published earlier this year.

CASES COVERED

The new procedures cover only civil cases in the High Court and County Courts in England and Wales, not criminal cases in the Magistrates and Crown Court.

The main types of cases affected are:

- Personal injury claims
- Breach of contract cases
- Debt actions
- Injunction applications

Even existing cases already before the court will be dealt with under the new procedures.

SMALL CLAIMS

Personal injury cases worth up to £1,000 and other types of cases worth up to £5,000 will be dealt with in the small claims track which is designed to be quick, cheap and informal.

Although court fees and witness expenses are payable to the winning party in the small claims track, lawyers fees are not. Lay representatives are permitted in the small claims track so parties can be represented by themselves or by friends, advisors or officials as well as lawyers.

The trend in the small claims track is towards informality with straightforward issues either agreed or dealt with on paper and evidence at the hearing limited to the key issues in dispute.

FAST TRACK

Claims valued between £5,000.00 - £1,000 in personal injury cases - and £15,000.00 will be allocated to the fast track in the County Court. In practice, the vast majority of personal injury claims will proceed in the fast track.

The objective is speedy justice and the courts are committed to hear cases within 30 weeks of allocation to the fast track. As the case is not allocated until the court receives the Defence, the time period is likely to be nine months from initial registration of the claim with the court, to the hearing date.

Although by no means speedy, this timetable is much quicker than the courts have managed in the past and it remains to be seen whether this promise can be delivered.

As the vast majority of personal injury claims will be fast track cases and since Defendant insurers have always strung cases out as long as possible, injury victims will reap the benefits in most cases.

But quicker justice is not offered without a price. Although the burden of proving the case remains firmly on the party claiming (the injury victim in personal injury cases) the new rules could make it more difficult to overcome that burden. Shorter trials and limited access to confidential documents could undermine the Claimants ability to prove the case. It remains to be seen whether the courts will adopt a common sense approach in such cases.

MULTI-TRACK

The more serious cases valued at over £15,000.00 will be allocated to the multi-track in which the focus is upon procedural judges taking control and managing the case at each stage.

The emphasis will be upon strict timetables, limiting the issues and encouraging co-operation between the parties. No deadlines have been set for hearing dates but the intention is to simplify cases and shorten court hearings so that cases can be concluded more quickly than before.

Again, the objectives are to be applauded but it remains to be seen whether the courts and the judges can rise to the challenge now before them.

CO-OPERATION

A corner-stone of the new

regime is co-operation by all concerned. The parties are expected to co-operate with each other by exchanging information openly, by confining their case to the key points in dispute and reaching agreement where possible on individual issues.

Lawyers can no longer hide behind legal terminology. The case must be set out in plain English. Defendants can no longer simply deny the allegations made. Instead, a Defence must now set out in detail the response to each allegation.

The parties are expected to co-operate before even taking the dispute to the courts. Codes of conduct known as protocols will be issued governing the parties conduct before any court proceedings are commenced. A protocol for personal injury cases is already in force.

Parties can no longer obtain conflicting expert evidence and leave it to an adversarial process through the courts to resolve differences of opinion. Joint experts will now be encouraged where possible. Otherwise, the parties will have to justify obtaining their own experts and communications between the experts and the parties or their representatives will be open to scrutiny.

Experts' overriding duties are now owed to the court rather than to either party and expert witnesses are expected to set out whether there are any contrary opinions which could legitimately be expressed on the facts, as presented.

LIMITING THE ISSUES

The importance of focusing upon the core issues has already been stressed. This will be emphasised by case management and by penalties imposed on parties (or their representatives) who unsuccessfully or unreasonably pursue particular issues.

The principle that the losing party pays the cost of the winning party may now apply to individual issues rather than the case as a whole. The winning party may be left with a hollow victory where failure on a number of issues has resulted in a substantial costs penalty.

The courts will also have wider powers to strike out particular aspects of a Claim or Defence considered by the court to be unsustainable or irrelevant. The courts may also require the parties to list a statement of the outstanding issues and experts may be required to meet to reach agreement where possible and list the issues in dispute between them.

SETTLEMENT

Settlement has always been encouraged with the Defendant's Payment into Court which threatens a substantial costs penalty where the Claimant ultimately succeeds but fails to recover more than the amount paid in. The procedure is to be extended so that the Claimant can now put pressure on the Defendant by making a Claimant's offer.

Where the Defendant refuses to settle the claim on the basis of that offer, the case will continue. Where the Claimant ultimately recovers the amount offered or more, the Defendant will be penalised as the courts will be encouraged to award extra compensation, dressed up as bonus interest.

For Claimants, it clearly makes sense now to put forward such an offer as soon as the case can be properly valued. For Defendants, it makes no sense to reject the offer where there is a real chance that the court award may equal or exceed the amount offered.

Similar sanctions and inducements have also been introduced to encourage offers in relation to particular aspects of the case or specific issues arising.

RESPONSIBILITY

Parties pursuing or defending claims now have greater responsibility to ensure that statements made are accurate and sustainable. Statements of truth have to be signed, either by the party pursuing or defending the claim, or by their representative who will be expected to ensure that their client fully understands the implications of this.

Verification in this way will apply to a wide range of statements, documents and forms lodged throughout the case. The intention is to ensure that parties are open and forthcoming throughout the proceedings and that advisers communicate fully with their clients at each and every stage.

SUMMARY

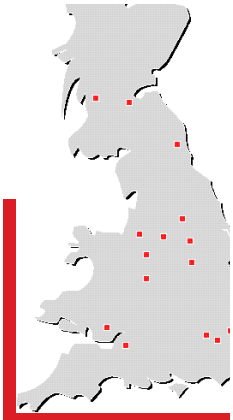
These reforms are clearly intended to bring about a sea change in attitudes from judges, parties and their advisers. There should be no hiding place for employers or insurance companies intent on using tactical devices to complicate or prolong relatively straightforward cases.

If the courts can rise to the challenge and if trade unions, officials and union law firms grasp the opportunities now presented, the reforms can only benefit members.

The new rules are not without their shortcomings. Some of Lord Woolf's original ideas ranged from misconceived to bizarre but many of these have been ironed out.

The balance sheet should favour trade union members injured at work. They have nothing to fear and a great deal to be gained if the realities in practice bear any resemblance to the promises on paper.

Race discrimination and equal pay



Wakeman and others v Quick Corporation

18 February 1999 EATRF 98/0076/3, reported IDS Brief 636.

Pay, contractual terms and treatment issues are all covered by the Race Relations Act. There is no separate Equal Pay Act as for sex discrimination.

Possibly as a result, race discrimination in pay rates is sometimes overlooked. Yet at all levels black peoples' pay, on average, lags behind that for white workers.

Whether equal pay principles can be imported into the Race Relations Act 1976 has been addressed by the Court of Appeal.

Mr Wakeman and his white, non-Japanese colleagues worked for the Quick Corporation, a Japanese company providing international financial information to its clients. The Corporation's head office was based in Tokyo.

Its London base, where Mr Wakeman and his colleagues worked, employed locally recruited London based staff, and also employees seconded from Japan to the London office. There was a substantial difference between the pay packages of the two categories of staff, with the seconded employees earning well over double the pay of their locally based equivalents.

The appellants brought proceedings under the Race Relations Act alleging unfair dismissal, race discrimination in relation to promotion and pay, and victimisation. The sole issue before the Court of Appeal concerned the pay claim, with the staff maintaining that the Employment Tribunal had been wrong to reject their arguments that they had been directly discriminated against on the grounds of race in relation to their pay levels.

The original tribunal had found against the staff on the basis that the Applicants' had not proved that the difference in pay was caused by their race. They also said that in making the necessary comparison between the London based, lower paid appellants, and the Japanese seconded staff, the appellants were not comparing like with like - "the relevant circumstances in the one case are the same, or not materially different, in the other." The Tribunal accepted Quick Corporation's evidence that the reason for the differential was due to such factors as the additional expenses required by the secondees in relation to short term accommodation in London, continuing home-based expenditure, additional social and educational needs, and an incentive to encourage the Tokyo based staff to agree to the secondment.

None of these factors applied to the locally based appellants, and accordingly it was not possible to compare like with like. There was therefore no basis on which to proceed to the comparison exercise of comparing the treatment of the two groups.

Before the Court of Appeal, it was argued on behalf of the staff that it was not adequate to reject the claims out of hand on these grounds: instead an analysis had to be made of each element of the respective pay packages. It was only by doing this that one could isolate the various elements and assess whether they were properly justified, and also establish what the true "rate for the job" was.

By analogy with the Equal Pay Act 1970, and associated European laws, the staff argued, that it was only by analysing the pay packages in this way that any discrimination in the pay levels could be identified.

This argument was conclusively rejected by the Court of Appeal. In a unanimous decision, the Court decided that there was no requirement in the Race Relations Act to break down pay packages in this way in this particular case.

Although in many cases it might be necessary to "disaggregate" pay elements, it was not a necessary requirement under the Act. It was a quite legitimate for the tribunal to conclude that, looking at the packages as a whole, no comparison should be made between locally based staff and seconded staff, simply because it was not comparing like with like.

It is interesting to speculate on the extent to which a different conclusion might have been reached had the case been proceeding under the Equal Pay Act. However, that is an academic exercise.

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