Published by Thompsons Solicitors

CONTENTS

LABOUR AND EUROPEAN LAW REVIEW

ISSUE 39 October 1999

TUPE still delivers

ECM (Vehicle Delivery Service) Ltd v Cox [1999] IRLR 559 (Court of Appeal) s38 Employment Relations Act 1999

The application of TUPE to contracting out continues to attract the attention of the courts and the government.

The government will shortly be publishing a consultation document on the revision of the Transfer of Undertakings (Protection of Employment) Regulations 1981. This will do more than merely implement the revisions to the Acquired Rights Directive agreed last year. It will go further and make specific provision for the application of the Regulations to changes of service provider in the UK. The Government has taken the power to do this in section 38 of the Employment Relations Act. This enables the Government to make Regulations which go beyond the Directive and also to issue regulations applying TUPE to particular public sector transfers. This has already been employed to provide protection on the transfer of rent officer functions.

The motive force behind the Government's approach is a desire to clear up the uncertainty left by the Suzen decision (see issue 10). This led to a number of examples of employers attempting to avoid TUPE and a number of rogue court and tribunal decsions (see for example Betts v Bristol Helicopters [1997] 361 and North East Lincolnshire v Beech and Others(IDS 644)).

The President of the Employment Appeal Tribunal has shown a similar desire and this has now been matched by the Court of Appeal in a very welcome decision in the ECM case.

This was a situation where a vehicle delivery contract changed hands. The work was to be carried out from a different site, with different arrangements for delivery and administration. The new contractor, ECM, refused to offer employment to any of the 24 employees. The Employment Tribunal decided this was because ECM wanted to avoid TUPE.

The employers argued that, following Suzen, there was no transfer as there had not been a transfer of significant assets or a major part of the workforce. This argument was rejected by the EAT and the Appeal Court.

The Court of Appeal upheld the view that the customers were essentially the same and the work that was going on was essentially the same. The identity of the economic entity was retained following the transfer.

Very helpfully, the Court went on to set Suzen into context. The Court re-emphasised the continuing importance of the earlier decisions, including Spijkers, and the necessity to make a factual appraisal of all the facts characterising the transaction. The Court said that the importance of Suzen was overstated. It did set limits to TUPE, but these were not relevant to the ECM situation. ECM was not a case where it was asserted that the mere change of contractor of itself amounted to a transfer, nor did it depend merely on a comparison of the activities before and after the change. The Tribunal was entitled to conclude that the operation continued in different hands.

Significantly, the Court said that it was relevant to consider why the employees were not taken on. This allows Tribunals to see through avoidance schemes by employers who refuse to take on staff in the hope that they can escape the application of TUPE.

Up close and personal for company directors

R v F Howe & Son (Engineers) Ltd [1999] IRLR 434

Two recently reported decisions of the Court of Appeal make it clear that the Courts should be tougher when dealing with breaches of health and safety legislation.

Following an accident where an employee was fatally electrocuted, the company pleaded guilty to four out of five breaches of health and safety legislation and was then fined £48,000 plus £7,500 costs at Bristol Crown Court. The company appealed against the severity of the fine. The company consisted of two directors, neither of whom had an annual income in excess of £20,000 and 12 employees. Annual turnover was around £350,000 and net profit was £30,000 per annum.

The Court noted a tariff system for fines would not be appropriate. Each case had to be decided on its facts. It accepted that the level of fines for these offences was generally too low and that "*there may be cases where the offences are so serious that the defendant ought not to be in business*".

The Court laid down the factors to be taken into account by Magistrates' and Crown Courts in criminal cases for breaches of health and safety legislation.

1 Size does not matter – a company's size and financial strength or weakness does not affect the degree of care required in health and safety law: the standard of care is the same. It may affect the size of the fine however.

2 Fines should usually be higher where the breach of the health and safety law causes death.

3 Deliberate breaches of health and safety law to enhance company profits aggravate the offence and should be reflected in the fine.

4 The extent of the breaches – how little care was taken to protect workers' safety; the degree of risk and extent of the danger created will always be relevant;

5 Failure to heed warnings and breaches continuing over a long period will increase the fine.

But the Court said fines should be reduced where companies admit responsibility quickly or tighten up straightaway on breaches that are pointed out, and a previous good safety record will help.

And the company's resources and the effect of the fine on its business is crucial. Any fine should reflect the means of the offender, whether corporate or individual.

In spite of the court's concern about low fines in general the appeal was allowed and the fine reduced to £15,000.

R v Rollco Screw & Rivet Co. Ltd [1999] IRLR 439

Following dangerous removal and dumping of asbestos, the company and its two directors pleaded guilty to breaches of health and safety legislation. The company was fined £40,000 plus £30,000 payable over six years, five months. In addition, one director was fined £6,000 with £2,000 costs payable over three months and the other director was fined £4,000 with £2,000 costs. Both the company and the directors appealed against the level of the fine. The company also appealed against the repayment period.

The Court of Appeal endorsed the decision in R v F Howe & Son (Engineers) Ltd [1999] IRLR 434 but went on to say that the first question was what was the appropriate level of fine for this offence and the second question was what can the defendant reasonably be ordered to pay?

The Court held that the fines against the directors were appropriate as were those against the company. However, it accepted that the repayment period for the company was excessive and, as the level of fines was appropriate, the award of costs would be reduced from £30,000 to £20,000 thus reducing the repayment period to five years, seven months.

During its decision, the Court said "*it seems to us important in many cases that fines should be imposed which make quite clear that there is a personal responsibility on directors and that they can not simply shuffle off their responsibilities to the corporation of which they are directors.*"

Part-timers lose out in redundancy calculations

Barry v Midland Bank [1999] IRLR 581

The House of Lords' decision in Barry v Midland Bank, regarding the calculation of a severance package for a part-time worker, raises fundamental questions about the relationship between part-timers and discrimination law. However, the unsatisfactory and contradictory reasoning in the Lords decision ends up confusing more than it explains.

Mrs Barry worked full time for eleven years, before taking maternity leave and then returning to work part-time. She continued working part-time until she took a voluntary severance package. The severance calculation was based on her length of service and her part-time salary as at the time of the termination of her employment. She argued that in basing the package on her part-time earnings and failing to take into account her previous full-time service, Midland Bank were indirectly discriminating against her, contrary to the Equal Pay Act 1970.

In endorsing the previous decisions of the Employment Tribunal, Appeal Tribunal and Court of Appeal, the House of Lords conclude that this method of calculating a severance package was not even potentially discriminatory so as to require objective justification on the part of the employers. They argue that the primary purpose of the scheme was to compensate for loss of a job, and given that the job that Mrs Barry was losing was part-time, it was appropriate in terms of the scheme to base the calculation on the part-time salary. To argue that her years of full-time service should be taken into account was to argue for a different scheme, and had nothing to do with indirect discrimination.

In reaching this decision, the Lords appear to place great emphasis on the fact that the intention of the severance scheme was to cushion the employee against the loss of a job.

This consideration of the intention of the alleged discriminator is an altogether unwelcome concept in the context of equal pay and indirect discrimination, and one that previously has been rejected by the Courts. By placing this emphasis on the intention of the scheme, the Lords avoid addressing the fundamental point that Mrs Barry was receiving less severance pay than her full-time comparators simply by reason of her part-time status. It may be that ultimately the employers could have ended up justifying the method of calculation, but in not allowing the case to get to the justification stage, the entire operation of the Equal Pay Act is sidestepped.

This approach contrasts markedly with the European Court case of Hill and Stapleton v Revenue Commissioners 1998 IRLR 466 (not referred to at all by the Lords), where it was held that an incremental point system that required part-timers to work for twice as long as full-timers in order to qualify for incremental points did indirectly discriminate against women. It is hard to reconcile Barry with Hill and Stapleton.

Mrs Barry's case was also rejected for the more coherent reason that there were no statistics adduced by her before the Tribunal to show that a greater proportion of women than men were disadvantaged by the system of calculating severance pay by reference to final salary as opposed to salary averaged out over the years.

This flags up the very demanding requirements that Applicants have to meet in producing evidence in pursuing indirect discrimination cases of this sort.

Mrs Barry's case was always going to be a difficult one to win, not least because the stakes were high. Had she been successful, then the system of calculating statutory, and most contractural, redundancy payments may have been vulnerable to challenge.

The spotlight will now be on the forthcoming Part Time Work regulations to see if the injustice experienced by people like Mrs Barry will be remedied.

Works Councils arrive

Implementation of the European Works Council Directive: Consultative Document URN 99/926

The government has published its proposals for implementing the European Works Councils Directive. The legislation must be brought into force by 15 December 1999, the deadline imposed by the Extension Directive which applied the original Directive to the UK, following the "signing up to the Social Chapter".

The consultative document includes draft regulations, to be known as *The Transnational Information and Consultation of Employees Regulations 1999*.

This article looks where the draft Regulations depart from or expand upon the wording of the Directive and where the method of implementation may be controversial.

"Article 13 agreements"

The original Directive and the Extension Directive permit voluntary agreements instead of agreements under the provisions of the Directive. To be valid, these agreements must be for transnational information and consultation and cover the entire workforce. They must be in force by particular dates: for those European undertakings which were covered by the original Directive, by 22 September 1996; for those only now covered because of the extension to the UK, by 15 December 1999.

These agreements are known as "Article 13 agreements" after the provision in the original Directive.

The UK regulations do not spell out much detail on these agreements. They do not stipulate that the signatories on the employee side must be representative or independent, nor do they stipulate that the agreement must be legally enforceable. This creates a problem as the agreement must be legally enforceable in order for the UK to comply with its obligations under the Directive. This abstentionist approach means that it is up to the parties to the agreement to decide whether the agreement is enforceable and the method of enforcement. The parties are not given the option of adopting the enforcement methods through the Central Arbitration Committee (CAC) and Employment Appeal Tribunal (EAT) which apply to agreements under the Regulations.

"Employees"

The regulations are confined to "employees", namely those who work under a contract of employment. This contrasts with the wider definition of "worker" used in the Working Time Regulations and National Minimum Wage Act.

This means that wider categories of worker are deprived of participation and that numbers of employees for calculating whether the thresholds are satisfied are kept artificially low.

Number of employees

The legislation applies where a European-wide undertaking (or group of undertakings) has 1000 or more employees within the Member States of the European Economic Area, with at least 150 employees in each of two or more Member States.

The UK method of calculation is averaged over a two year period and allows employers to count part-time workers as half an employee in the calculation. This is discriminatory and the decision to average the calculation over two years even when a company has been in operation for less than two years may unfairly exclude employees of new companies from the legislation.

Special Negotiating Body

The Regulations say that central management need only initiate negotiations when a request is made by 100 or more employees or their representatives. The Directive requires management to act on their own initiative.

The Special Negotiating Body (SNB) is the group which will negotiate to establish the European Works Council (EWC).

The provisions include some weighting towards Member States with larger workforces, but still would allow the minority of the workforce to outvote the majority if there were a large number of Member States with small workforces. This is important because the SNB acts by a majority and may vote by a two-thirds majority not to continue negotiations.

Selecting SNB members

The government proposes that in every case there must be a ballot of all employees to choose the members of the SNB. This is unnecessary, costly and cuts across existing

COMPOSITION OF THE SPECIAL NEGOTIATING BODY

- One member from each Member State where the undertaking has establishments
- One additional member from each Member State where between 20% and 40% of the total employees of the undertaking are employed
- Two additional members from each Member State where between 40% and 60% of the total employees of the undertaking are employed
- Three additional members from each Member State where 60% or more of the total employees of the undertaking are employed.

representational structures.

In other Member States, existing representatives are entitled to choose the members of the Special Negotiating Board. This means the choice can be made by trade unions or existing employee representative bodies (eg existing national works councils or consultative committees).

There are relatively few rules for the conduct of ballots and the employer is allowed to choose constituencies. Paid officials of the union may be members of an SNB. The SNB may have one expert funded by management.

The negotiating process

Negotiations must be conducted in a "spirit of co-operation".

Central management must commence negotiations within six months and the agreement must be concluded within three years, otherwise an application can be made to establish a "statutory EWC" in line with the requirements set out in the schedule to the Regulations (broadly in line with the Annex to the Directive).

The draft Regulations propose that the three year period may be extended by six months by agreement. This provision is not in line with the Directive.

If the parties agree within the three year period, they will have reached a negotiated EWC agreement, also known as an "Article 6 agreement".

Statutory EWCs

The default requirements of the schedule are very similar to the Annex to the Directive. They set out requirements for the composition and conduct of an EWC where no agreement is reached.

The rules for composition are essentially the same as for the SNB (see above), although paid union officials cannot be members – only employees of the company. Once again, the members must be elected by all employees; they cannot be appointed.

Confidential information

The Directive allows restrictions on the use of confidential information. The draft Regulations provide that management may withhold information where, according to objective criteria, it would seriously harm the functioning of the undertaking or be prejudicial to them. The CAC may resolve any dispute on this.

The government proposes draconian penalties for disclosure of confidential information. It is an offence for SNB or EWC members to disclose any information provided in confidence by central management. Only if the representative can show it was not reasonable to impose the confidentiality or that disclosure was not likely to cause serious harm or prejudice will the representative escape a criminal conviction.

This is an absurdly harsh sanction which encourages employers to develop a culture of secrecy and is out of all proportion to the "offence". Civil remedies allowing damages or injunctions would have been sufficient.

Enforcement

The remedies for disclosure of confidential information contrast starkly with the much weaker sanctions on employers for failure to comply with their obligations.

Disputes on whether the Regulations apply, the validity of the request to initiate negotiations and the SNB election process are to be decided by the CAC which may issue declarations.

If management refuses to commence negotiations within six months or fails to conclude an EWC agreement within three years, the EAT will order the establishment of a statutory EWC and may impose financial penalties.

Disputes about the operation of an EWC agreement are to be resolved by the EAT which may order the employer to take action and impose financial penalties. However, the EAT is denied the power to make orders which require management to suspend or overturn any action taken by management. This denies the EAT the most effective remedy – the power to order that decisions cannot be implemented until there has been consultation with the EWC in accordance with the law. This is the remedy available in other jurisdictions, as for example in the Renault case in the French courts.

The EAT does have power to impose a financial penalty of up to £75,000. This is supposed to equate to the cost of an EWC meeting, but is a paltry sum to the multinational employers who will be covered by these Regulations.

Redefining redundancy

Murray and another v Foyle Meats Limited [1999] IRLR 562

In a remarkably short judgment, the House of Lords may have ended years of uncertainty regarding the meaning of redundancy. In Murray and another v Foyle Meats Limited, the Lords decides what amounts to a redundancy situation, interpreting the statute and grappling with the old "contract" and "function" tests.

In 1997 the Employment Appeal Tribunal decided that a simple factual analysis was the correct approach, Safeway Stores Limited v Burrell [1997] IRLR 200.

The Employment Appeal Tribunal's reasoning is adopted in the leading judgment of Lord Irvine, the Lord Chancellor. The statutory definition of redundancy includes reference to dismissals being attributable wholly or mainly to redundancy in the employer's business, including the location of business, and/or a reduction in working of a particular kind (Section 139 Employment Rights Act 1996). Such a straightforward definition has led to numerous problems with Employment Tribunals considering the terms of contracts and becoming involved in endless debates about the functions actually performed or able to be done under the terms of the contract.

The Burrell case led the way and Lord Irvine has now decided that redundancy is a question of fact decided by applying two questions to the statutory definition. Employment Tribunals must ask whether or not one of the sets of economic tests set out in Section 139 is established, eg are less workers needed to perform work of a particular kind? If that is established then the Employment Tribunal must ask whether the dismissal is attributable wholly or mainly to that reason, or whether it is the cause of the dismissal.

Murray had a flexible contract but normally worked in the slaughter hall. The employer reduced the slaughter hall work and the employees were selected for redundancy. The Lords rejected the idea of considering the work that could be done under the contract, and instead decided:

- That there was a reduction in work of a particular kind (ie slaughter work).
- That the particular reduction in work caused the dismissals to occur.
- That having decided the above questions, the dismissal fell within Section 139.

Lord Irvine rejected the contract approach from a long line of authority, and instead the straightforward analysis in Murray should assist in all redundancy cases. The Lords also confirmed that the reduction in work which causes the dismissal need not relate to the work actually done by the dismissed employee. Thus "bumping" dismissals can be by reason of redundancy, thereby removing some of the uncertainty caused by the decision in Church v West Lancashire NHS Trust [1993] IRLR 4. In any case, whether involving bumping or not, Employment Tribunals should enquire carefully before deciding that the dismissal is caused by the particular circumstances, and the work done in terms of the contract will fall to be determined as part of the overall factual enquiry undertaken by the Tribunal.

In a separate case, Shawkat v Nottingham City Hospital NHS Trust [1999] IRLR 340, the Employment Appeal Tribunal has considered the issue of redundancy in a typical reorganisation situation. In this case Mr Shawkat's work altered so that he undertook a new role, but the employer did not need fewer employees and denied that a redundancy situation existed.

The Employment Tribunal applied the Burrell case in a very restrictive sense and this approach was rejected by the Employment Appeal Tribunal. The Employment Appeal Tribunal referred the case back to the Employment Tribunal and confirmed that the terms of the contract and the work done are relevant, but not conclusive factors in applying the statutory test in Section 139.

The Employment Appeal Tribunal adopts a similar approach to the Lords in Murray, in looking to reduce the test to a straightforward factual analysis.

In applying the test to the facts in Shawkat, the Employment Appeal Tribunal offers guidance as to the relevant circumstances to be con-

sidered, but they must relate to the facts of the particular case. Shawkat was decided before Murray, but it is generally in line with both the House of Lords and the Employment Appeal Tribunal in Burrell so that we are now left with a simple test of fact. Have the employer's business requirements altered in accordance with Section 139, and has this caused the dismissal? If the answer to those questions is positive then there is a redundancy situation.

The test set out by the Lords is to be welcomed for its simplicity. However, the real world produces facts that do not always sit neatly into simple tests and the real test will be to see how the Lords decision is applied in practice.

EQUAL VALUE

Two bites at the cherry

Wood & Others v William Ball Ltd EAT unreported

In a welcome decision, the EAT concludes that a Tribunal which decides not to refer an equal value case to an independent expert is not entitled to dismiss the applications summarily.

Instead, it must, separately, give the applicants the opportunity to bring their own expert evidence before determining whether or not the applicants' work is of equal value to that of a comparator.

In Wood & Others v William Ball Ltd., the applicants were cleaner/packers and the comparators were picker/packers. The employer manufactured and distributed kitchen, bedroom and office furniture.

The Tribunal convened a hearing for the purpose of hearing an "application to adjourn the case for preparation of an expert's report pursuant to Section 2A(1)(b) of the Equal Pay Act 1970". On hearing the employer's expert evidence, and evidence from the applicants and comparators, the Tribunal concluded that there were no reasonable grounds for determining that the work of the applicants was of equal value to that of the comparators. It then proceeded to dismiss the applications as, in its opinion, they had no reasonable prospects of success. The applicants appealed.

Before 1996, Section 2A(b) of the Equal Pay Act provided that a Tribunal could not determine the question of equal value unless (a) it was satisfied that there were no reasonable grounds for determining that the work was of equal value; or (b) it had required the preparation of an independent expert's report.

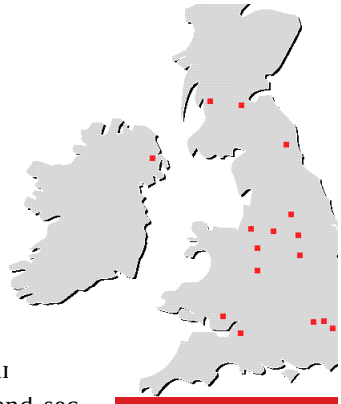
In 1996, however, Section 2A(1) was amended so that a Tribunal could either (a) determine the question of equal value; or (b) unless it was satisfied that there were no reasonable grounds for determining that the work was of equal value, require the preparation of an independent expert's report. This meant that Tribunals were given the option of determining the question of equal value themselves, rather than referring cases to an independent expert.

The GMB supported their members case and instructed Thompsons in the appeal.

The Employment Appeal Tribunal in the Wood case decided that the 1996 amendment envisaged a two-stage process. The Employment Tribunal had been wrong to elide the two stages so as to dismiss the applications at the same time as finding that there were no reasonable grounds for determining that the work was of equal value. Instead, the Tribunal should have arranged a separate hearing at which the applicants would have been able to present their own expert evidence, as they had indicated they wished to do.

This is an important case. Many applicants claiming equal value will wish to see, first of all, whether or not the Tribunal is prepared to refer the matter to an independent expert which will, of course, save the applicants a considerable amount of money. If not, the applicants should still be given the opportunity to bring forward their own evidence at a separate hearing to determine whether or not their work is of equal value to that of their comparators. As such, the old law, on the pre-1996 provisions, as stated in Sheffield Metropolitan District Council v Sibury & Another, no longer applies.

Hopes rise after AG delivers opinion



Shirley Preston & Others v Wolverhampton Heath Care NHS Trust & Others and Dorothy Fletcher & Others v Midland Bank Plc

In the long-running part timers' pensions access saga, referred to the European Court of Justice by the House of Lords last year, the Advocate General has now delivered his opinion.

The Advocate General has found that the two-year limit on retrospection should be disapplied, although he upholds the six-month time limit which, for teachers and lecturers, should apply in relation to the end of each successive contract.

Since October 1994 trade unions have encouraged workers who have been denied access to pension schemes because of their part-time status to bring claims for backdated access relying on Article 119 of the Treaty of Rome – now Article 141. Over 100,000 claims have been lodged with Employment Tribunals. These are being dealt with through test cases in the private and public sectors, which, so far, have dealt with preliminary issues. The remainder of the cases have been stayed in the Tribunals.

The cases before the European Court of Justice concern three preliminary issues:

- Whether the six-month time limit from the end of employment for bringing a claim complies with Community law;
- Whether the two-year limit on retrospective access to pension scheme complies with Community law; and
- In the case of workers who work regularly for the same establishment under successive contracts, such as teachers, whether the six-month time limit runs from the expiry date of each individual contract.

The Advocate General has assessed each of these preliminary issues against two concepts of Community law: first, domestic procedural requirements must not make it impossible in practice for claimants to exercise their Commu rights (the "principle of effectiveness"); and secondly, the domestic procedural requirements applicable to a claim based on Community law must be no less favourable than the procedural requirements applicable to the nearest analogous domestic claim ("the principle of equivalence").

The Advocate General's view is that the two year limit on retrospective access to pension schemes contained in Section 2(5) of the Equal Pay Act offends the "principle of effectiveness". It is therefore to be disapplied.

The Advocate General gives pointers as to how to identify the nearest analogous domestic claim for the purpose of the principle of equivalence. He rules out a domestic claim under the Equal Pay Act as an appropriate comparator and suggests that a claim (other than discrimination) by a part-timer for access to a pension scheme may be a possible comparator claim. We do not believe that that is the proper analysis – instead, comparison should be made with a claim for backdated wages or a claim for equal pay on grounds of race where no limits apply.

Unfortunately, the Advocate General finds that the six-month time limit from the end of the employment contract for presentation of a claim does not offend the principle of effectiveness.

The Advocate General has found that the six-month time limit applies to the end of each successive contract of employment for lecturers and teachers employed under a succession of contracts. This is disappointing and means that part-time teachers and lecturers would have had to have presented a separate claim after the expiry of each contract of employment – which would have lead to a multiplicity of virtually identical claims.

The Advocate General's opinion will not necessarily be followed by the European Court of Justice when it rules finally in the New Year but it is an indication of the possible outcome.

A fuller briefing is available from Thompsons Employment Rights Unit at Congress House.

THOMPSONS

HEAD OFFICE
CONGRESS HOUSE
020 7637 9761

BELFAST
028 9032 0148

BIRMINGHAM
0121 236 7944

BRISTOL
0117 941 1606

CARDIFF
029 2048 4136

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-UPON-TYNE
0191 261 5341

NOTTINGHAM
0115 958 4999

SHEFFIELD
0114 270 1556

STOKE ON TRENT
0178 220 1090

CONTRIBUTORS TO THIS MONTHS

STEPHEN CAVALIER
NICOLA DANDRIDGE
RICHARD ARTHUR
STEVE PINDER
CRAIG JONES

EDITED BY **MARY STACEY**
PRODUCTION **NICK WRIGHT**
PRINTED BY **TALISMAN PRINT SE**