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EDITOR'S NOTE: Apologies for the delay in distribution!

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Sacked too soon

Raspin -v- United News Shops Limited [1999] IRLR 9 (EAT)

In a welcome decision, the Employment Appeal Tribunal goes against previous trends and finds that there are circumstances in which an employee can claim damages for breach of contract in respect of a lost opportunity to claim unfair dismissal.

Previous authorities, and in particular Janciuk -v- Winerite Limited, suggested that this was not possible. Although the previous cases are treated as involving different arguments, there is every possibility of the impact of the decision being far reaching.

Mrs Raspin started working for United News Shops on 16th May 1994. In 1996, United News Shops found that money had been going astray and eventually decided to dismiss Mrs Raspin. Mrs Raspin attended a disciplinary meeting on 15th April 1996, following which she was suspended. She was summarily dismissed with effect from 27th April 1996. Her appeal against dismissal was rejected.

The Employment Tribunal concluded that there was no evidence of wrong doing on Mrs Raspin's part and upheld her claim for a breach of contract. The Tribunal also found that United News Shops had committed a further breach of contract in failing to follow the disciplinary procedure which was incorporated into Mrs Raspin's contract of employment. It made a finding of fact that it would have taken an additional three weeks to follow a proper disciplinary procedure. The Tribunal agreed with Mrs Raspin that, if a proper procedure had been followed (ie. there had been no breach of a contract of employment), she would not therefore have been dismissed before 16th May 1996. Accordingly, she would have had the requisite period of service to claim unfair dismissal and the breach of the contractual disciplinary procedure had deprived her of the opportunity of claiming unfair dismissal. She claimed damages in respect of that loss of opportunity.

Employers must comply with contractual disciplinary procedures

The Employment Tribunal considered itself bound by earlier authority to dismiss Mrs Raspin's claim. In Focsa Services (UK) Limited -v- Birkett the EAT had disregarded what might have happened had the contractual disciplinary procedure been followed and simply awarded damages in respect of the time it would have taken to comply with the disciplinary procedure.

The Employment Appeal Tribunal upheld Mrs Raspin's appeal. The Employment Appeal Tribunal said that the Focsa case was different. In that case, no question of the approach of limits of the qualifying period had arisen. The issue relevant to Mrs Raspin had therefore not been decided.

As the Employment Appeal Tribunal saw Mrs Raspin's case, there were three possible outcomes if United News Shops had complied with the contractual disciplinary procedure:

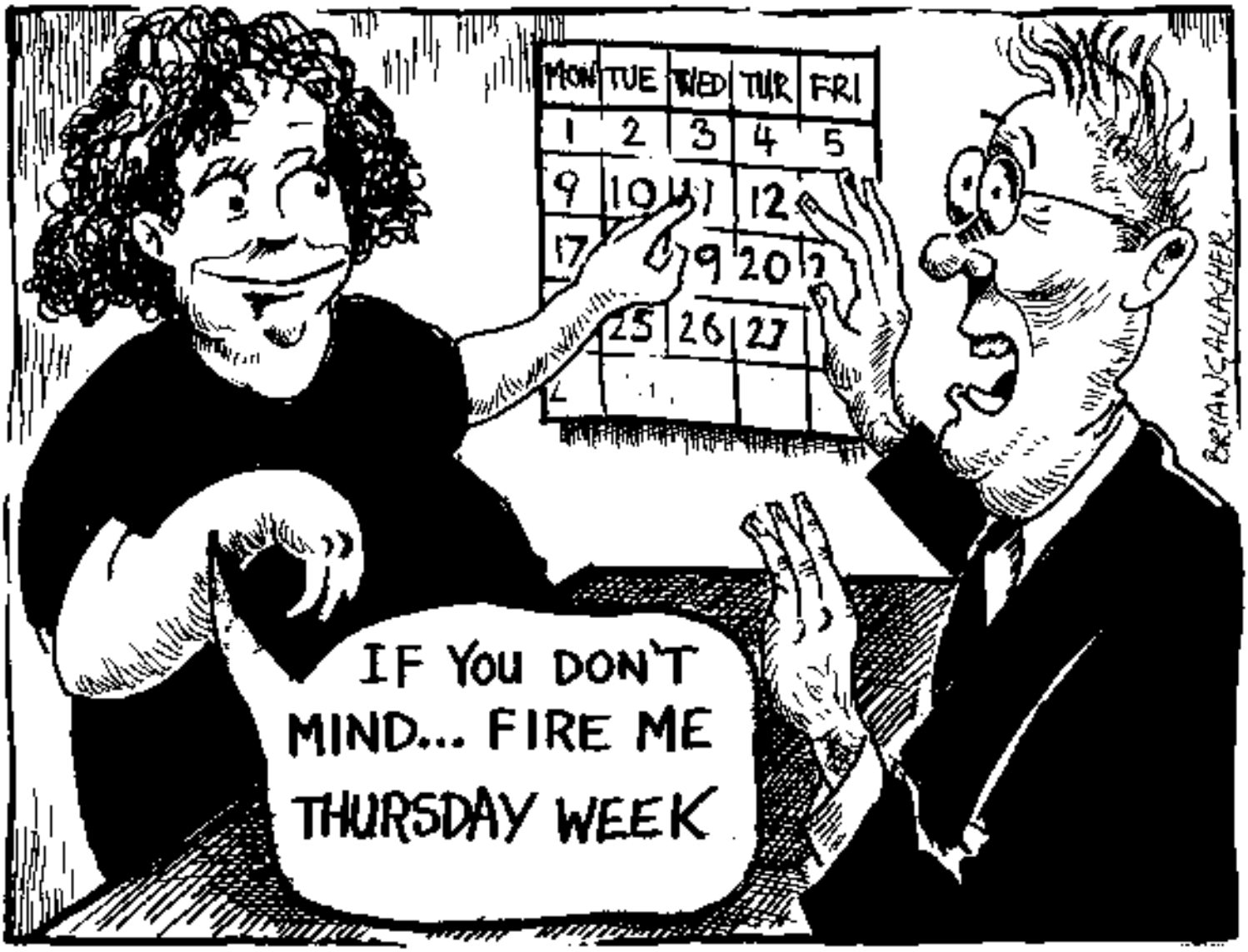
(i) Mrs Raspin might have been dismissed in circumstances in which the dismissal was unfair;

(ii) she might have been fairly dismissed; or

(iii) there might have been no dismissal at all.

The EAT pointed out that in the first situation, there was a potential loss arising out of the employer's breach of contract. It is in respect of that potential for claiming unfair dismissal at a later date, that damages may be awarded.

The decision is plainly right. The correct measure of damages in any breach of contract claim is an amount which would put the employee in the same position she or he would have been in if the contract had been properly performed. If Mrs Raspin's contract of employment had been properly performed, she would not have been dismissed before 16th May 1996 and there was,



therefore, at least a chance that she would be unfairly dismissed thereafter. Courts and Tribunals, as the EAT noted, are perfectly capable of grappling with lost chances and loss of opportunity. The two relevant factors are: first, what the loss would have been if the eventuality (ie. unfair dismissal) had occurred; and, what the chances of that eventuality happening were.

However, it is difficult to reconcile the decision in Mrs Raspin's case with that in Janciuk. Mr Janciuk tried to claim damages for the loss of a chance that had the disciplinary procedure been followed, he might not have been dismissed. The EAT decided that Mr Janciuk should only be compensated on the basis that his employer would have chosen to perform the contract in the least burdensome way - ie. that the contract would have been lawfully terminated at the earliest available opportunity.

Crucially, in Mrs Raspin's case, the Tribunal made a finding of fact that, if the disciplinary procedure had been followed, she would not have been dismissed until she had acquired the necessary two years' continuous employment. However, it may be possible to extend the ambit of this case to situations where the time taken to comply with, for example, a contractual disciplinary procedure did not take the employee's qualifying service over the threshold for qualifying service for claiming unfair dismissal. In such a situation, even though the employee would not necessarily have acquired the relevant qualifying service, there remains a chance that she or he would have done, and that they may have been unfairly dismissed. There is still a loss of opportunity, as there was in Mrs Raspin's case, for which damages might be recovered. In practice, however, we would recommend that tribunals are asked to make findings of fact, in breach of contract cases, as to what would have been the earliest date on which the employee could have been dismissed if the employer had complied with the contractual disciplinary procedure.

A broken promise

Consultation over a code of practice

The Government has announced that there will be no law outlawing age discrimination in employment. This is an opportunity missed and a manifesto promise broken as reported in LELR 21.

Instead of legislation we now have the draft voluntary Code of Practice, which employers will be encouraged to follow.

The Code is due to be published in its final form towards the end of March 1999, with a full review of its effectiveness by February 2001.

In his introduction to the draft Code, the Minister for Employment, Andrew Smith, points out that in 10 years time nearly 40% of the workforce will be aged over 45, so that discrimination against older workers will have a severely detrimental effect on the skills and abilities of a company's workforce. Despite this, it was decided not to introduce a law against age discrimination , in part because the effectiveness of similar laws in other countries, most notably the United States, was open to doubt.

So instead we have a voluntary code, emphasizing the advantages to business of not discriminating. Divided into six sections, the theme of the Code is that employers should be alert to stereotypical assumptions about age; should make decisions based on skills and abilities alone and should not operate policies which either overtly discriminate or indirectly have an unnecessary adverse impact on either younger or older people.

RECRUITMENT

The Code recommends that age limits should not be included in job advertisements, and words which imply restrictions, such as "young graduates" or "mature persons", should be avoided.

SELECTION

Employers should ensure that interviewers are trained to ask questions which solely relate to the job in question, and that the interviewers themselves are, where possible, of mixed ages.

PROMOTION

Promotion opportunities should be advertised through open competition and should be made available to all staff, regardless of age.

TRAINING

Training of all staff should be reviewed regularly, and age should not be a barrier to training. Employers should look at how training is delivered, and should ensure that different learning styles and needs are addressed.

REDUNDANCY

Age should not be used as the sole criterion for selection of redundancy. Objective, job related criteria should be adopted, and options such as part-time working, career breaks or short term contracts should be considered as alternatives to redundancy.

RETIREMENT

Retirement schemes should be based on business needs, whilst giving employees as much choice as possible. Age should not be the sole criterion when operating retirement schemes, and flexible schemes or phased retirement should be adopted where possible to allow employees to prepare for the changes to their lives that retirement will bring.

The Code in itself will have no legal force. Even the usual provision that tribunals must have regard to its terms in assessing, for example, the fairness of a dismissal (as in the ACAS disciplinary Code) is absent. Clearly time will tell whether the voluntary code will have any impact. Meanwhile we do have a number of tribunal decisions which have been used to challenge discriminatory practices.

In LELR 21, we reported the case of Nash v. Mash/Rowe Group Limited, where the Sex Discrimination Act was used to challenge a normal retirement age of 65. Similar arguments were advanced over 20 years ago in Price v. Civil Service Commission 1978 IRLR 3. Here the Sex Discrimination Act was again successfully used to challenge an age limit on recruitment, on the basis that it had an adverse impact on women who had taken years off work to look after young children.

In Secretary of State for Scotland v. Taylor 1997 IRLR 608, reported in LELR17, an equal opportunities policy committing the employer to offer opportunities on an equal basis "regardless of gender, race, religion, sexual preference, disability or age" was held to have been incorporated in a contract of employment, thus acquiring contractual force. However, the decision in Grant v. South West Trains Limited (No2) 1998 IRLR 188 (LELR21) went the other way and the equal opportunities policy was held to have no contractual force and was no more than a statement of policy.

So even though the Code itself may have little direct legal effect, it is to be hoped that it will push the issue of age discrimination up the agenda at the very least. And it may also encourage these other more indirect legal routes to enforcement.

Britons deprived of their rights

Gibson v East Riding of Yorkshire Council (EAT, 5 February 1999)

Cawley v Hammersmith Hospitals NHS Trust (EAT, 21 January 1999)

SIMAP v Conselleria de Sandid y Consumo de la Generalitat Valencia (reference to ECJ)

R v Secretary of State for Trade and Industry ex parte BECTU (hearing date 13 April 1999)

The first UK case law under the Working Time laws is starting to emerge.

The first decision of significance is a UNISON case which arises from the delay in implementing the Directive, attributable primarily to the actions of the last Conservative government.

The Directive should have been implemented by 23 November 1996, but the necessary legislation was not in place until the Working Time Regulations came into force on 1 October 1998.

This meant that UK workers were deprived of their rights for nearly two years. The question was: did workers have any remedy for this?

The EAT has answered with a resounding "yes", as far as the annual leave provisions of the Directive are concerned. These provisions are contained in Article 7, which states that EU governments shall:-

"Take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions for entitlement to, and granting of, such leave laid down by national legislation or practice."

The EAT had to consider whether this granted a right which was sufficiently precise and unconditional that it could be relied on by public sector workers to enforce the right against employers who were "emanations of the state", in this case a local authority.

The answer was that the Article was clear and precise and allowed for no ambiguity or uncertainty. This meant that Mrs Gibson, who was a contract swimming instructor employed by the council, was entitled to four weeks' paid leave for the two years between October 1996 and 1998. As she had taken unpaid leave, she will be entitled to compensation for the pay she should have received.

This decision means that other public sector workers who received no paid leave and instead took unpaid leave over that period should be able to claim back pay. Most public sector workers will have received paid leave, so the decision is most likely to be of benefit to contract workers like Mrs Gibson and casual or temporary staff who may have been deprived of the right.

The entitlement is to 4 weeks' annual leave for the two years, as the UK's option to take advantage of the transitional provision limiting leave to 3 weeks only applies from 1 October 1998 until 23 November 1999.

The decision may also have wider implications for the possible direct effect of other provisions of the Directive.

Although the decision is confined to the annual leave provisions, the EAT said that Article 7 could only have direct effect after taking into account the totality of the Directive and considering the particular article in that context. This lead to the conclusion that:-

"The structure of the Directive is consistent with it having direct effect. It is designed to require Member States to confer minimum rights in a way which can be said to be unconditional."

This may help the process of establishing that other parts of the Directive have direct effect, although it will still be necessary to show that the particular provision is itself clear, precise and unconditional.

The EAT was asked to consider this in Cawley in relation to the provisions on daily rest and night work (Articles 3 and 8). It did not decide the issue as it found against the employees on other grounds, but made the observation that the arguments on the direct effect of these articles were "more neatly balanced".

This observation was influenced by a point raised in the case of SIMAP which has been referred by a Spanish Court to the European Court of Justice.

One of the issues to be considered in that case is the interpretation of the definition of working time. This

says that working time is where a person is "working, at the employer's disposal and carrying out his activity or duties".

The UK Government believes that all three limbs of the test must be satisfied for time to count as working time, so that for example it is not enough merely to be "at the employer's disposal". The European Court is being asked to decide if this is correct. The EAT in Cawley thought that the Directive was "patently ambiguous" on this point. If the conclusion contradicts the view of the UK Government it will greatly extend the scope of working time and have profound effect on, for example, the treatment of time spent "on call".

There is a direct challenge to the Government's interpretation and implementation of the Directive on another point, once again related to annual leave.

BECTU is challenging the provision in Regulation 13 (7) of the Working Time Regulations which says that a worker does not qualify for any entitlement to paid annual leave until she or he has worked for the employer for a continuous period of thirteen weeks.

This means that those who are employed on a series of fixed term contracts of less than thirteen weeks with gaps of more than one week in between will never acquire a right to paid holiday. This may apply, for example, to people who work only during school terms.

BECTU says this conflicts with the requirement in Article 7 that "every worker" is entitled to paid leave. The Government says it is can restrict the right in this way as a "condition for entitlement" within Article 7. The judicial review on this point will begin on 13 April 1999.

The two year hitch

Levez -v- T H Jennings (Harlow Pools) Limited [1999] IRLR 36 ECJ

In the eagerly awaited decision in Levez -v- T H Jennings (Harlow Pools) the European Court of Justice has failed to answer the fundamental question as to whether or not the two year limit on arrears of back pay in an equal pay claim is, in principle, compatible with EU law.

That is a question which may be determined by the Employment Appeal Tribunal when the Levez case returns to it. However, the European Court of Justice has sunk the Government's main defence to the two year limit, as deployed in the part-timer pensions cases. We are cautiously optimistic that the two year limit will now be thrown out.

Mrs Levez began employment with Jennings as a manager in February 1991. She transferred to a new site in December 1991, but it was not until April 1992 that her pay was raised to the same level of her male predecessor, with whom she performed work of equal value. It was only when Mrs Levez left Jennings in March 1993 that she discovered that she had been paid less than her male predecessor until April 1992. She therefore presented a claim for equal pay, relying upon Article 119 of the EU Treaty, in September 1993.

Section 2(5) of the Equal Pay Act 1970 provides that a successful Applicant can only obtain back pay for the two years immediately preceding the date he or she submitted the claim. To recoup the entire difference in pay, Mrs Levez needed to extend her arrears of back pay beyond the two year limit.

The relevant legal principles are well settled. It is their application which causes the problems. It is up to Member States to decide the procedural rules governing the enforcement of rights based on Community law, but such procedural rules must:

(i) Not make it impossible or excessively difficult for applicants to exercise their Community law rights (the "effectiveness" principle); and

(ii) Not be less favourable than procedural rules applying to 'similar domestic actions'(the "equivalence" principle) - such as a claim relating to discrimination

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The two year hitch

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in pay on the grounds of race.

The Employment Appeal Tribunal referred two questions to the European Court of Justice:

(i) Is the two year limit on back pay compatible with Community Law where the limit does not apply to any other claim, is not capable of extension and there are rules more favourable to applicants in other areas of employment law such as claims of breach for contract, race discrimination in pay, unlawful deductions from wages and sex discrimination in matters other than pay?

(ii) What is meant by a 'similar domestic action' for the purpose of the "equivalence principle"? - i.e. which types of claim are comparible and which are not.

In answering the first question, the European Court of Justice focuses on the fact that Mrs Levez had been deliberately misled by her employer about the rate of pay of her male predecessor. To allow Jennings to rely upon the two year limit would have made it impossible, or virtually impossible, for Mrs Levez to exercise her Community law rights - a breach of the "effectiveness" principle. Accordingly, because there was no possibility of extending the two year limit and the delay in bringing the claim was attributable to the fact that the employer deliberately misrepresented to Mrs Levez the level of remuneration received by her predecessor, the two year limit was to be dis-applied in her case.

That was enough to decide the Levez case. Because of the argument advanced by the UK Government, however the European Court of Justice went on to make observations on the second question. To an extent, the European Court of Justice's observations are unfounded - the suggestion is that the UK Government sought to argue that the 'similar domestic action' (for the purpose of the "equivalence" principle) was an equal pay claim brought in the County Court coupled with an action for deceit on the part of the employer. This is inaccurate.

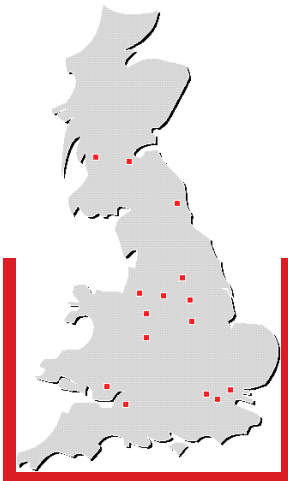
The UK Government was simply attempting to suggest an alternative mechanism by which Mrs Levez could have secured full compensation before the domestic courts.

Nonetheless, the ECJ's observations as to how to identify "similar domestic actions" are very helpful, not least to the many thousands of part-timers claiming retrospective access to pension schemes who await the outcome of the reference in Preston & Others -v- Wolverhampton Health care NHS Trust & Others.

The ECJ finds that the purpose and essential characteristics of potentially similar domestic action must be considered. Furthermore, national courts must take into account the role played by any particular provision in the procedure as a whole, and take into account special features of that procedure. It will plainly be relevant, in the context of the Equal Pay Act, that the time limit for presentation of a claim does not expire until six months after the date of leaving employment. Although again not subject to discretionary extension, this is likely to be seen as more favourable than, for example, the time limit for a sex discrimination claim not related to pay.

Most importantly, the ECJ finds that the "similar domestic action" to a claim based on Article 119 cannot be a purely domestic equal pay claim. This is the argument which found favor with the Court of Appeal in Preston and defeated the part-timers (for the time being) in their pensions access claims. The ECJ said that this argument is flawed because, although the Equal Pay Act predates the UK's accession to the Treaty of Rome, the Equal Pay Act is still the UK's mechanism for implementing rights contemplated by Article 119. This is plainly correct and avoids the circular logic which found favour with the Court of Appeal in Preston.

This means that another 'similar domestic action' must be chosen. The European Court of Justice has left that choice, in Mrs Levez's case, to the Employment Appeal Tribunal. Unfortunately, the EAT may well be able to duck that question - the answer is not strictly necessary for the determination of Mrs Levez's case. However, certainly for the purposes of Preston, the "similar domestic action" will have to be identified. A breach of contract action has a six year limit on back pay. However, claims for unlawful deductions from wages, and for arrears of pay arising out of race discrimination have no limit on arrears recoverable. There are therefore grounds for optimism that the two year limit on back pay will fall altogether, or at least be extended to six years.



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