

CONTENTS

early talks vital in job losses 2
£100,000 compensation in disability case 3
a comparator too far 4
third time lucky for cre? 6
compensation - but no job 8

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

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A key source of protection

(1) UNISON and others -v- Aintree Hospitals NHS Trust and RCO support Services Limited.

(2) UNISON and others -v- Initial Hospital Services and RCO Support Services Limited.

Liverpool Employment Tribunal decision 2 November 1998.

After some adverse decisions, a welcome ruling of the Employment Tribunal at Liverpool confirms that the Transfer of Undertakings (Protection of Employment) Regulations (TUPE) remain a key source of protection for employees and Trade Unions.

In earlier issues of this Review, reference has been made to the changing emphasis from UK and European Courts in TUPE claims, and this has been particularly seen in contractor/activity cases.

In June 1998 the EAT decision in ECM -v- Cox and others signalled a shift away from the restrictive approach seen in the Suzen case. In ECM the EAT considered a contract situation and re-asserted the economic entity test, confirming that the transferee should not be allowed to avoid the TUPE Regulations by refusing to take on staff.

In Liverpool the Aintree Hospitals Trust operated domestic and catering services from two hospital sites, A and B. Each site had a different provider for the services. Site A was set to close and the work was transferring to site B. This would fall under a different provider. The contractor at site B (RCO) refused to accept the application of the TUPE

Regulations, meaning that the site A staff were dismissed. All of the domestic staff did not even get a redundancy payment because the transferor relied upon the Regulations and would not make payments on a voluntary basis. This left the staff without jobs or compensation.

This appalling situation was considered by the Employment Tribunal in a combined hearing with claims relating to a failure to consult with UNISON.

The Tribunal decided that the transfer of work from site A to site B was covered by the TUPE Regulations, with the Tribunal relying upon the ECM decision. The Tribunal asserted that the purpose of the Regulations and Directive, was to protect the rights of the employees. The Tribunal believed that the European Court never intended the Suzen decision to lead to

avoidance measures being taken by transferees. On the facts, the Tribunal decided that the work was organised so as to represent an identifiable economic entity which continued after the transfer. Importantly, the Tribunal did not accept that the question of whether the employees should have been taken on is determined by asking whether they have been taken on.

The decision shows that the business decisions taken in transfer cases must recognise the purpose of the legislation. Identification of all aspects of an economic entity, including staff, is crucial, but employers must now know that the Regulations cannot be avoided simply by refusing to take on prospective employees. This must represent the intention behind the legislation, and it must be remembered by all Courts considering transfer claims.

**TUPE law
still a weapon
against
dismissal**



Early talks vital in job losses

KING V EATON LTD (NO 2) [1998] IRLR 686

In this long-running unfair dismissal case, the Inner House of the Court of Session (the Scottish equivalent of the Court of Appeal) emphasize once again the importance of meaningful consultations with unions and employees at the early stages of a redundancy dismissal.

Mr King and others were made redundant by Eaton Ltd, having been selected on the basis of criteria drawn up by management. The unions involved, and also the employees affected, were not consulted on the method of selection, nor the selection criteria, though they were advised in advance of the Company's intention to make redundancies and of the selection criteria to be used.

The Employment Tribunal, upheld by the Employment Appeal Tribunal and the Court of Session, (King v Eaton Ltd No 1) held that the employees had been unfairly dismissed on two main grounds. Firstly, there had been inadequate consultation. Secondly, there had been no evidence from those who had actually carried out the selection assessments, to enable the Tribunal to decide whether or not the assessments had been fairly applied. The cases were therefore remitted to the Tribunal for compensation to be determined.

At the reconvened hearing (King v Eaton Ltd No 2) the

Company sought to argue that compensation should be reduced, relying on the Polkey principle that even if the correct procedure had been followed and appropriate consultation taken place, it would have made no difference and the employees would have been selected anyway. Rejecting this argument, the

**"Procedure
riddled with
unfairness
throughout"**

Tribunal decided that it might be appropriate to reduce compensation in a case where there was a flaw in procedure alone, but this principle did not apply in a case like this which was "riddled with unfairness throughout."

It was against this second Tribunal decision that the Company again appealed to the Employment Appeal Tribunal and then to the Inner House. Their argument was that it was incorrect to distinguish in this way between procedural and substantive flaws in the dismissal process. However, both the Appeal Tribunal and the Inner House unequivocally reject this position : "In broad terms, it appears to us that there will be situations where one can say that what went wrong was "merely" procedural. Equally, in

broad terms, we think there will be situations where one can say that an employee has been deprived of 'something of substantive importance'."

Although it may be a more straightforward exercise where there was a "merely" procedural lapse, in a situation where something fundamental has gone wrong with the dismissals in a way that goes to the heart of the matter, then, according to the Inner House, " it may well be difficult to envisage what track one would be on, in the hypothetical situation of the unfairness not having occurred."

In this case, where there was an absence of consultation with unions and employees alike at the crucial stage of deciding what the selection criteria were to be, there was a substantive flaw that went to "the heart of the matter" in a way that could not be classified as purely procedural. To try and establish what might have happened would be pure speculation, and as a result the Tribunal were justified in refusing to allow the employers to put forward evidence.

Read with the House of Lords decision in Polkey, and the previous Court of Session decision in King v Eaton Ltd (No 1), the case provides a useful reminder of the importance of consultation at all stages of the redundancy process, but most particularly at the stage where redundancies are first being contemplated and selection criteria determined.

£100,000 compensation in disability case

**British Sugar Plc v Kirker
[1998] IRLR 624**

**Ridout v TC Group [1998]
IRLR 628**

The Employment Appeal Tribunal decision in the disability discrimination case of British Sugar Plc v Kirker is welcome on a number of counts.

Mr Kirker, a shift chemist working for British Sugar, was selected for redundancy on the basis of selection criteria for which he scored 0 for performance, competence, and potential. He had advanced glaucoma and was partially sighted. He maintained that his selection was due to his disability, and not to any objectively applied selection criteria.

The Tribunal's decision, upheld on appeal, was that the evidence entitled them to draw the inference that the poor scorings could be attributed to his disability. This was particularly taking into account the fact that on previous occasions, occurring prior to the introduction of the Disability Discrimination Act, Mr Kirker had been refused promotion expressly because of his disability.

Specifically acknowledging that the Act should be interpreted in a way analogous to the Sex and Race Discrimination Acts, where events prior to the three month period in which claims can be lodged may be taken into account, the Appeal Tribunal conclude that the history of Mr Kirker's treatment was pertinent to issues of credibility and therefore admissible, and in this case also persuasive.

However, of potentially more far-reaching significance, the Appeal Tribunal implicitly decline to follow the case of Clark -v- Novacold Limited (reported in LELR 26). In Kirker, a much more robust and realistic approach is taken to the issue of the identity of the appropriate comparator. According to Judge Peter Clark, Section 5(1) of the Act, unlike the equivalent provisions of the Sex and Discrimination Acts, does not require a like-for-like comparison: "the scheme of s5(1) ... simply requires the Applicant to show that he was less favourably treated than other employees where the reason for his treatment, that is a reason related to his disability, does not apply to those other employees. ...It was therefore unnecessary to consider the scores determining the causation question: but for his disability, would the applicant have been dismissed?". In just a few sentences, the contortions of the comparator requirement in Clark -v- Novacold fall away. It remains to be seen if subsequent cases follow Kirker and Clark, but all indications are that the Kirker analysis will be preferred.

The award of compensation to Mr Kirker of £103,146 to take into account injury to feelings, wage loss, and loss of statutory rights, is also particularly welcome, given the relatively low awards made to date in disability cases.

The Employment Appeal Tribunal decision in Ridout -v- TC Group is less helpful. The case considered the Section 6 duty to make reasonable adjustments and the application for

Section 6(6) provisions which state that "Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know... that the person has a disability".

Ms Ridout was interviewed for a job, having previously indicated on her job application that she had photosensitive epilepsy controlled by drugs. The interview room had bright fluorescent lights and at the interview Ms Ridout commented that the lighting might affect her. She was also obviously wearing sunglasses, but otherwise made no other reference to her condition. In being unsuccessful for the job, she brought a claim under the Act on the grounds that the Company had failed to adjust the lighting pursuant to their Section 6 duty.

The Tribunal, endorsed on appeal, found against her on the basis that could not reasonably be expected of the Company that they should have made further enquiries about the epilepsy to ensure that Ms Ridout was not prejudiced by the interview arrangements. As with other recently reported disability decisions, this flags up the difficulty that disabled people face, in having to decide whether to alert employers to a disability so running the risk of potential discrimination, or saying nothing and then losing the protection of the legislation.

The Appeal Tribunal decision does have make some very useful comments on the need for tribunals to refer to the appropriate provisions of the Code of Practice in deciding disability cases.

A comparator too far

**Lawrence & Others -v-
(1) Mitie/Securicor
(2) Regent Office and
(3) CCG
(unreported - EAT)**

In a disappointing judgment, the Employment Appeal Tribunal has refused to endorse UNISON's progressive and expansive approach to the identity of comparators for the purpose of equal pay claims. The case follows on directly from the test case proceedings, which UNISON won, in *Ratcliffe & Others -v- North Yorkshire County Council*. In that case, school meal workers, who had their pay and terms and conditions cut in preparation for CCT, claimed equal pay with grounds maintenance and highways workers. The House of Lords rejected the Council's material factor defence, finding that the Tribunal had been entitled to conclude that the general perception in North Yorkshire was that school meals work was 'women's work', such that the 'market forces' material factor defence was itself discriminatory.

In *Lawrence*, the facts of the case are exactly the same - indeed, the cases relate to the same CCT contracts as those in *Ratcliffe*. The only difference is that, instead of being won by the DSO, the contracts were awarded to the three Respondents. In *Lawrence*, the applicants claim that following

a TUPE transfer, they can still compare their pay and terms and conditions of employment to those of comparators who remain in the employment of North Yorkshire County Council. There are many separate issues at stake in these proceedings, not least the effect of compromise agreements and redundancy payments at the time of the UNISON members' transfer from North Yorkshire County Council to the Respondents.

However, the sole issue before the Employment Appeal Tribunal was whether, disregarding any effects of TUPE, the applicants could say that they would be entitled to compare their pay and terms and conditions with comparators still employed by the Council.

Under the Equal Pay Act 1970, applicants are entitled to compare their pay and terms and conditions of employment with that of comparators 'in the same employment'. Broadly, a comparator is 'in the same employment' if he is employed by the same employer at the same establishment as the applicant, or is employed at a different establishment to the applicant, but at one at which common terms and conditions of employment are observed.

However, the equivalent Community law right, contained in Article 119 of the EU Treaty does not contain the same requirements that a comparator be "in the same employment".

The relevant European cases have concluded that Article 119 includes the situation where applicants and comparators are "in the same establishment or service".

In *Scullard -v- Knowles* and another [1996] ICR 399, the EAT considered the situation of a manager employed by a regional Council funded by the department of the environment and whether or not she could compare herself with male managers employed by other regional Councils even though the Councils were not associated employers. In *Scullard*, the Employment Appeal Tribunal concluded that such a comparison could be made because the applicants and the comparators were employed "in the same service".

In *Lawrence*, UNISON argued that the scope of Article 119 was not actually restricted to applicants employed by the same employer or at the same establishment or indeed in the same service. These were criteria merely to assist where equality was not otherwise apparent. The applicant's jobs had been evaluated against those of the comparators whilst they were both employed by the Council and had been found to be rated as equivalent. UNISON argued that there were no requirements for the wages and terms and conditions for the applicants and comparators to be controlled by the same person. In overall terms, the principal purpose of Article 119 and the Equal Pay



Directive, as interpreted through the European authorities, was to remove discrimination in pay not only in individual undertakings but also on an industry wide basis.

The Employment Appeal Tribunal whilst accepting the logic of much of UNISON's submission, and condemning the "forensic outrage" expressed by the Respondents, decided that a line had to be drawn. Although the precise ambit of Article 119, in the absence of a further Directive, was not precisely defined, limits had to be drawn as to its scope. The EAT decided that an applicant and a comparator must be "in a loose and non technical sense in the same establishment or service". In essence, the EAT is saying that

UNISON is ahead of its time in bringing this case - the relevant European legal principles are not yet established. In reaching this conclusion, the EAT appears to have been heavily influenced by a submission on the part of the Respondent that if such a comparison were capable of being made, the employer's opportunity to justify any pay differential would be severely restricted because it would not actually be the employer of the comparator. This should make no difference whatsoever - certainly when considered alongside the European concept of a comparator being in "the same service". There can be any number of largely independent employers within the same service.

At least for the time being, free

standing comparisons after a TUPE transfer between applicants working in a contracted-out service and comparators still employed by the Council will fail in so far as the claim relates to pay and terms and conditions of employment after the transfer. However, Lawrence is likely to go to the Court of Appeal. There are also further arguments yet to be heard as to the effect of TUPE. If an applicant is able to compare her pay and terms and conditions of employment with a particular comparator before a TUPE transfer, why should she not be able to make the same comparison, because of the protection afforded by TUPE, after the transfer?

Third time lucky for CRE?

Strengthening the Race Relations Act 1976

The Commission for Racial Equality has submitted timely proposals to strengthen the UK's racial equality laws. The Home Office have consulted on the CRE document and legislative proposals are awaited. Race equality comes under the Home Office remit although most of the CRE proposals relate to the field of employment.

The Race Relations Act 1976 is in urgent need of updating. Black participation in the labour market remains disproportionately low. For example unemployment among all black workers in spring 1997 was 15%, against a white average of 6.6%. Black workers are far more likely to be low paid and suffer from job segregation. For example the bottom 10% of black workers earn on average 50p per hour less than the bottom 10% of white workers - representing a differential of nearly 20%. The further pressing concern is the effect of multiple forms of discrimination, most especially experienced by black women in the labour market. For example during the period 1985-1997 the black female rate in the labour market remained static at around 54% throughout the period whereas female activity started from a significantly higher rate and increased from 69%-72% during the same period. Stronger legislation is required to eliminate

these discrepancies.

The fairness at work proposals are strangely silent on the issue of racial discrimination in employment, yet eliminating racial discrimination is an integral part of fairness in the workplace. The oversight makes the CRE's proposals all the more timely.

The Race Relations Act needs urgent updating

The proposals are surprisingly modest and largely uncontroversial given the public consensus supporting the goal of racial equality and the statistics which show that this is yet to be achieved.

The CRE recommend strengthening the Act, extending the areas for protection and limiting the exception. It acknowledges the difficulty in proving cases and makes recommendations for better enforcement and preventative measures through record keeping.

A summary of the main points follows.

The CRE seeks to mainstream racial equality by making it a

permanent priority and obligation for both government and public bodies. This would include a statutory obligation to consider the race relations implications in all new legislation that of both primary and secondary. The Race Relations Act 1976 should apply to all aspects of government and public bodies and the creation of new racial equality duties to work for the elimination of race discrimination and to promote the equality of opportunity in gradations between people in different racial groups. This would include a statutory obligation to provide impact statements, ethnic monitoring, annual reporting and performance monitoring. Racial equality performance should be included as a key factor to be assessed with the purposes of best value procurement regime to replace compulsory competitive tendering.

In keeping with the Human Rights Act, the Commission proposes creating a positive right not to be discriminated against on racial grounds.

Specific amendments are proposed to the definition of indirect discrimination. It would be defined to include an apparently neutral provision or practice which is applied to those of all racial groups but either cannot be as easily satisfied or complied with by those of a particular racial group or where there is a risk that the provision may operate to the disadvantage of those from a particular racial

group. The discrimination will be unlawful unless the provision can be justified by objective factors unrelated to race. The new definition would widen the current definition in two significant ways - firstly to cover practices and policies as well as absolute conditions or requirements and secondly to cover situations where there is a risk of disproportionate impact, but where perhaps the narrow statistics of a particular workplace or department do not show significant disproportionate impact.

CRE also recommends extending victimisation protection to include matters arising post employment and where complaints have been made in good faith, but for technical reasons do not fall under the Race Relations Act 1976, thereby currently denying individuals who make such claims protection from having brought proceedings.

The CRE have proposed new areas for inclusion in the act including all stages of procurement in the tendering award of contracts, protection for volunteers, office holders and former employees all of whom are currently excluded from the act.

The CRE proposes limiting the exceptions to the act. Employment for the purposes of a private household should be more narrowly defined so that, for example, a chauffeur, and trades people are not caught by the exception. The categories of genuine occupational qualification should be reduced to cases where the racial group of the job holder is an essential defining feature, or where

personal services to a particular racial group can most effectively be provided by a person of that racial group. The proposals also include extending protection to the partnerships of five or less partners and to employment at an establishment anywhere in the EC.

The CRE stops short of calling for positive action in employment, other than to training facilities where under-representation is national or local and the proposals

CRE wants power to conduct formal inquiries

extend to training bursaries as well as training facilities and on the job training.

Compulsory ethnic monitoring is proposed for work forces in excess of 250 employees. Many a case is lost on lack of statistics. Ethnic monitoring would be a tremendous advantage in both establishing where under representation occurs and in providing evidence in particular cases. However 250 employees is a curious threshold. It is inconsistent with other legislation (eg Disability Discrimination Act 1995 where the threshold is now 15, collective redundancy consultation provisions where the

threshold is 20 employees) and we suggest a much lower threshold than 250 be applied. Record keeping by employers will become increasingly important and is not an unfamiliar concept both for tax, national insurance purposes but also under the Working Time Regulations and National Minimum Wage act.

The CRE is also seeking to extend its own powers to conduct formal investigations and specify remedial action and time scales in non-discrimination notices as well as extending its powers to issue codes of practice in new areas and enter into legally enforceable undertakings. The CRE should be revising its code of practice on discrimination and does not need new powers to do this.

It is recommended that the EC burden of proof directive applicable in sex discrimination cases should be used to amend the burden of proof in race discrimination cases too. Proposals are made to extend time limits for bringing claims to six months, group litigation and wider remedies be available to Employment Tribunals together with the power to award compensation in unintentional indirect race discrimination cases.

As well as the CRE's proposals, the outlawing of religious discrimination, such as exists already in Northern Ireland, should be urgently considered. Trade unions should be able to reserve places for black candidates on elected bodies that to mirror section 49 of the Sex Discrimination Act 1985.

The CRE have previously made similar recommendations in 1985 and 1982. Lets hope there is an element of third time lucky.

Compensation - but no job

The Practicability of Re-engagement

Wood Group v Crosson IRLR 680.

The EAT have in Wood Group v Crosson considered re-engagement and whether this remedy is practical in a workplace where there has been a breakdown in trust and confidence between an employer and employee.

Mr Crosson, a lead hand, had been employed by Wood Group for 16 years when he was dismissed following allegations that he had used drugs in the workplace. He was also accused of time keeping and clocking offences. Mr Crosson argued that he had been a victim of a conspiracy and that certain employees were 'out to get him'.

An employment tribunal found that Mr Crosson had been unfairly dismissed as the employers had not carried out all the investigations reasonable in the circumstances nor had they followed a fair procedure. The employers did not tell Mr Crosson when and where he was alleged to have smoked drugs on his employers' premises. In addition the employers did not give him details concerning the false clocking allegations. These failures by the employers meant that Mr Crosson was unable to provide information in his defence which would have justified further investigation. Despite this, however, the tribunal were satisfied that the employers had formed a genuine belief that Mr Crosson was guilty of the allegations against him based on various witness statements from other employees.

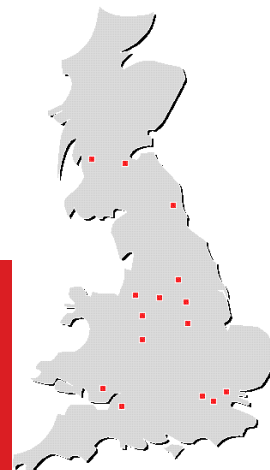
Mr Crosson sought the remedy of reinstatement. The tribunal made an order for re-engagement (as the position of lead hand no longer existed). The employers appealed on the issue of re-engagement and the decision was overturned by the EAT. The employers also appealed against the finding of unfair dismissal although this part of the decision of the tribunal was upheld.

In making an order for re-engagement under s115 Employment Rights Act 1996, the tribunal shall take into account a) any wish expressed by the complainant as to the nature of the order to be made b) whether it is practicable for the employer (or successor or an associated employer) to comply with an order for re-engagement, and c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms (s116(3)).

The EAT, in this case, were of the belief that it was not practical to order re-engagement because of the finding that the employer genuinely believed in the substance of the allegations. They found it difficult to see how the 'essential bond of trust and confidence that must exist between an employer and employee, inevitably broken by such investigations and allegations can be satisfactorily repaired by re-engagement or upon re-engagement.' They went on to confirm their belief that the remedy of reinstatement/re-engagement will only be practical in the rarest of cases.

Also taken into consideration was the fact that Mr Crosson used the defence that there was a conspiracy against him. The employers representative argued that the earlier Court of Appeal decision in *Nothman v London Borough of Barnet* (No.2) [1980] IRLR 65, should be followed, where the employee thought she had been the victim of a conspiracy by her employers and this factor was considered relevant in justifying a tribunal refusing an order for reinstatement/re-engagement. The EAT agreed.

All factors considered, the EAT found the remedy of re-engagement impractical in this case and allowed the appeal on this point. The matter was referred back to the employment tribunal for them to consider the remedy in monetary terms. This case shows us again that tribunals will only be successful ordering reinstatement or re-engagement in exceptional cases.



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