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Time to challenge Unlucky 13

R v Secretary of State for Trade and Industry ex parte BECTU (High Court, 14 April 1999)

BECTU'S challenge to the qualifying period for annual leave has become the first UK case on working time to be referred to the European Court of Justice.

BECTU is challenging the requirement that a worker must be continuously employed for 13 weeks with the same employer before acquiring a right to annual leave. The union represents many thousands of workers who are regularly engaged on short term contracts in the film, theatre, cinema and related sectors. They rarely, if ever, work for 13 weeks or more for the same employer and consequently never acquire the right to paid annual leave.

Article 7 of the Working Time Directive grants a right to paid annual leave to every worker. On BECTU's behalf, Thompsons is arguing that the qualifying period unlawfully excludes workers from that right.

The argument centres on the phrase in Article 7 which says that the right to paid annual leave is "in accordance with the conditions for, entitlement to, and granting of, such leave laid down by national legislation or practice". The Government maintains that this allows them to impose a qualifying period.

Both sides agreed this was an important point which needed to be decided by the European Court. The court has been asked to decide whether the phrase is to be interpreted as permitting a Government to introduce legislation under which a worker does not begin to accrue rights to the paid annual leave (or to derive any benefits consequent on that right) until he has completed a qualifying period of employment with the same employer.

If a qualifying period is permitted, the ECJ must then decide what factors must be taken into account to decide whether a particular qualifying period is lawful, including whether it is proportionate. In particular, the court will be asked whether it is lawful for the Government to take into account the cost to employers of conferring the right to annual leave on all workers without a qualifying period. The Government has produced no figures which support this.

The court will bear in mind that once the qualifying period has been completed, the employment during the qualifying period is taken into account for the purpose of calculating the annual leave entitlement. There is a distinction between the approach taken by the UK Government and those EU countries which restrict the right to take annual leave at the start of employment, but not the right to accrue leave. In those countries, workers whose employment ends before the leave is taken will be entitled to a payment in lieu of untaken leave. In the UK, workers whose employment ends within 13 weeks are deprived of that right.

This important case will affect many thousands of workers on short term contracts. It also covers a crucial point of European law. The Working Time Directive is a health and safety measure. To what extent can governments impose restrictions on health and safety protection on the grounds of the potential cost to employers? The preamble to the directive precludes the "subordination of workers' safety, hygiene and health at work to purely economic considerations". The European Court is being asked to uphold that principle.

Equality for all

Thompsons seminar - Equality For The Many Not The Few

How to address the 20% disparity in pay between men and women, was one of the themes of Baroness Jay's address to the Thompsons equality seminar on 31 March.

Baroness Jay, Minister for Women and Leader of the House of Lords, explained initiatives being undertaken by the Government's Women's Unit. She focused in particular on the unit's project to encourage fresh ideas on flexible work practices in both the public and private sectors. Baroness Jay's address was followed by a talk by Sue Hastings, freelance advisor on pay and grading structures, looking at key developments and tactics in equal pay cases. Finally, Laura Cox QC analysed recent discrimination cases, identifying likely future initiatives in race discrimination in Europe. The seminar was attended by over 50 trade union officers and representatives, and was followed by questions and debate involving all three speakers.

TRANSFER OF ASSETS

EAT sees sense

CWW Logistics v (1) Ronald (2) Digital Equipment (Scotland) Ltd IDS Brief March 1999 633

In a sensible decision, the Employment Appeal Tribunal takes a broad-brush view as to what constitutes a "transfer of assets" when considering whether or not TUPE applies.

In CWW Logistics v (1) Ronald (2) Digital Equipment (Scotland) Ltd, the EAT finds that the grant of an "informal licence" to use industrial equipment, without a formal sale or lease, can amount to the transfer of an economic entity.

The Applicant worked on Digital's "stage 3" industrial process. In 1996, Digital contracted out the operation of that process to CWWL. The Applicant argued that TUPE applied. The Employment Tribunal had no difficulty in identifying a stable economic entity. It went on to find that the stable economic entity retained its identity after the transfer - on the basis that the employees working on the process did so exclusively, their numbers did not change after the transfer and there was a transfer of assets in terms of the equipment used in the process. It did not matter to the tribunal that the equipment was neither sold nor leased to CWWL.

On appeal, CWWL argued that there could not have been a relevant transfer because there had been no legal transfer of the equipment. Instead, all that had transferred was the use of that equipment. The EAT disagreed, deciding that an informal licence was consistent with there having been a transfer of an economic entity.

Once again, the EAT has adopted a purposive approach to the application of TUPE - in its own words "viewing the whole arrangement at a little distance". This is welcome, particularly when added to the EAT's decisions in Magna Housing Association Limited v Turner and others and Lightways (Contractors) Limited v Hood reported in LELR issue 32 (March 1999), and shows once again that domestic courts and tribunals need not be too legalistic in their approach, and indeed don't have to see themselves as shackled by the Suzen decision.

A stake in the future: dangers and opportunities

Thompsons seminar on Government pensions proposals

There are approximately 35 million people of working age in Britain. Approximately 10.5 million are members of occupational pension schemes, and another 10 million have purchased personal pensions.

The remainder have made no provision for the future of their own, but of those, about 7 million people are relying on the state earnings related pension scheme thinking that this will provide them with an adequate income in retirement. The consequences are stark: the poorest 20% of single pensioners receive an average income of £68 per week, the richest fifth receive an average weekly income of £205. This gap between the richest and poorest, is growing.

This is the problem which the government is seeking to address in its proposals for reform of the state pension scheme, and which the Secretary of State addressed at a recent seminar organised by Thompsons.

There are three principal elements to the government's proposals. First, all pensioners will receive a guaranteed, minimum income of at least £75 a week for single pensioners and £116.60 for couples. This minimum income guarantee came into effect from April 1999.

Second, the Government will introduce a new "second state pension" to replace the state earnings related pension. This will not affect those who are earning more than about £18,500 per annum; it will be substantially higher than the current SERPS provision for those who are now covered by the SERPS scheme, providing twice as much for a person earning £9,000 per annum. Like the SERPS scheme however, it will not apply to anyone earning less than the lower earnings limit (currently £3,300 per annum).

> Many trade unions are working on proposals for union stakeholder pension schemes, but questions of scale will have to be addressed.

The cornerstone of the Government's proposals are so called stakeholder pension schemes. These are aimed primarily at those who are earning between £9,000 and £18,500 per annum, and will gradually replace the state second pension.

They would be administered by trustee bodies, like current occupational pension schemes, but they will not be limited to one employer. So an employee who leaves one job and starts another, will be able to remain in the same stakeholder pension. Benefits will be provided on a money purchase basis. It will not be compulsory to join one, and, in particular, it will not be compulsory for employers to make contributions on behalf of their employees.

Stakeholder pension schemes provide the greatest challenge to trade unions. Although they will not have to contribute towards them, every employer which does not offer an occupational pension scheme will have to make a stake holder scheme available to its employees.

The Government's express hope is that the schemes will be provided by "affinity organisations" including specifically, trade unions. Many trade unions are working on proposals for union stakeholder pension schemes and these were discussed at the seminar; it is clear, however, that questions of scale will have to be addressed. At the same time, care will have to be taken to ensure that employers do not offer stakeholder pension schemes and use that as an excuse to wind up decent occupational pension schemes.

When is a strike not a strike?

Connex v RMT [1999] IRLR 249

The Court of Appeal has decided that industrial action consisting of a ban on overtime and rest-day working constituted strike action rather than industrial action short of a strike.

The distinction between the two types of industrial action is crucial as it can affect the lawfulness of the action. The union must, by law, ask members on the ballot paper which type of industrial action they want to take part in - strike action or action short of a strike. Only the type of action that a majority of members vote for will then be protected and immune from legal action by the employers or others.

The RMT balloted its members for industrial action over train conductors' conditions of work with Connex. The union asked its members, on the ballot paper, whether they would be prepared to take part in industrial action consisting of a strike. A majority voted "yes" and the union issued its notice indicating when the action was to start and that it would take the form of a ban on overtime and rest-day working. Connex sought an injunction to prevent the action, arguing that the RMT only had the protection of the law for strike action and a ban on overtime and rest-day working was action short of a strike.

A "strike" is defined in section 246 of the Trade Union and Labour Relations (Consolidation) Act 1992 as any concerted stoppage of work. There are two questions. What is a 'stoppage of work' and what is 'concerted'. The Court of Appeal said that concerted means mutually planned and that any refusal to work, if mutually planned , will be within the definition of a strike. A strike is a case where an employee refuses to work for a period of time for which he or she is employed to work.

The union must, by law, ask members on the ballot paper which type of industrial action they want to take part in - strike action or action short of a strike.

While this was good news for the RMT in the Connex case, the decision has potentially serious ramifications for unions preparing for industrial action. The RMT had put the correct label on the industrial action and so neither the court nor the employers could prevent it taking place.

But the judgment widens the definition of strike and also leaves grey areas and questions unanswered. The difficulty of distinguishing between the two types of action remains. The judgment does not, for example, necessarily extend to a voluntary overtime ban. If you fail to volunteer to work overtime which you are not contractually bound to do, is that a period of time that you are employed to work for?

The view has often been taken in the past that industrial action consisting of a ban on overtime or rest-day working or, for example, a work to rule, is industrial action short of a strike. Now even more care will need to be taken to analyse whether the action proposed fits the definition of strike. The consequence of getting it wrong can be fatal to the action.

The case highlights the absurdity of the law. The Court of Appeal has lost sight of the purpose of the law and anyway it never fulfiled the purpose the Conservative government claimed for it. The reason for categorising the two types of industrial action, the Thatcher government would have us believe, was to enable trade union members to know exactly what they were being asked to vote for and take part in. Let the members decide in true democratic fashion. But the law defines the meaning of strike (section 146) and that meaning is not what most people think.

The Court of Appeal agreed that most members of the public

think a strike means a refusal to work at all, but that was irrelevant. In other words, it did not matter what the people being asked to tick the ballot box thought they were voting for. So, the RMT had to ask members to take part in a 'strike' on the ballot paper by law.

But in practice, to explain to the members what that meant, the union explained in a circular that members were not being asked to go on strike but for a rest day and overtime working ban. The irony was missed - there was no legal obligation on the RMT to send the helpful circular. Nothing could demonstrate more clearly the uselessness of the law and the way in which employers can seek to exploit legal technicalities to stop industrial action

But now, unions balloting for industrial action consisting of rest day working or an overtime ban, will need to ask members whether or not they are prepared to take part in industrial action consisting of a strike on ballot papers. Action caught by this wide definition of a strike may extend beyond a ban on over-time, possibly to a refusal to carry out defined tasks. Industrial action involving members not performing work which was available for them to do could possibly, after the Connex case, be classified as strike action.

This obviously has profound implications in terms of the likely outcome of any ballot. It may be that members are more likely to vote in favour of industrial action short of a strike than for strike action. Yet they may be in favour of the action contemplated, but are put off by it being termed 'strike' action. The law is therefore a barrier to the members knowing what they are being asked to vote for.

The effect of the Connex case will be reversed in part by an amendment introduced into the Employment Relations Bill by the Government. Section 229 of the Trade Union and Labour Relations (Consolidation)Act 1992 will be amended so that an overtime ban and a call-out ban will constitute industrial action short of a strike for the purposes of the ballot paper. It may be that the industrial action under consideration in the Connex case would fall within the revised section 229.

However, there may well still be types of industrial action which, after the Connex case, count as strike action and are not within the scope of the new section 229. The difficulty for trade unions is that where there is uncertainty, there is the scope for litigation by employers to challenge the action and history has shown the eagerness with which some employers take unions to court.

SEXUAL HARASSMENT

Victim's reaction is the key

Reed & Another v Stedman (IDS Brief 634 April 1999)

ST v North Yorkshire County Council [1999] IRLR 98

The decision of the Employment Appeal Tribunal in Reed v Stedman is more interesting for its implicit definition of sexual harassment than its perhaps predictable conclusion that Ms Stedman had been sexually harassed.

Ms Stedman was employed as a secretary for a year, during which time the marketing manager's behaviour towards her was, according to the tribunal, which found in her favour, bullying and pervaded with sexual innuendo.

Concluding that none of the incidents in themselves would be capable of constituting sexual harassment, the tribunal nonetheless decided that taken together, they represented a course of conduct which was a detriment to the applicant and amounted to unlawful harassment.

In upholding this decision, the Employment Appeal Tribunal refer to sexual harassment as consisting of "words or conduct which are unwelcome to the recipient", undermining the employee's dignity at work and creating an "offensive" and

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Victim's reaction is the key

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"hostile" work environment. "It is for the recipient to decide for themselves what is acceptable to them and what they regard as offensive".

This emphasis on the definition of harassment being a subjective matter to be determined by the recipient is significant. There is no definition of harassment in the Sex Discrimination Act itself. The European Commission's Code of Practice on measures to combat sexual harassment does however state that harassment is "behaviour which is unreasonable and offensive to the recipient…"

This is not necessarily the line that has been taken by tribunals in the past. For example in De Souza v The Automobile Association 1986 IRLR 103, the Court of Appeal defined harassment in terms of whether the "putative reasonable employee" could justifiably complain about her working conditions. There was no reference to the reaction of the harassed employee herself.

Nonetheless, there are cases suggesting that a more subjective definition of sexual harassment is appropriate, most notably in British Telecommunications plc v Williams 1997 IRLR 134, and now in this Employment Appeal Tribunal decision. This has an added significance in the light of the analogous definition of a racial incident that is set out in the Stephen Lawrence MacPherson report : In the recommendations of the Report it is simply stated that a racist incident "is any incident which is perceived to be racist by the victim or any other person".

In the Reed case, the EAT also decide that the original tribunal were entitled to conclude that by virtue of their vicarious liability, the employers had breached their implied contractual duty of trust and confidence. Ms Stedman was therefore entitled to resign and claim that she had been constructively dismissed.

Harassment - "behaviour which is unreasonable and offensive to the recipient..."

This decision also addresses questions of employer liability. The Employment Appeal Tribunal upheld the tribunal's decision that by failing to investigate Ms Stedman's complaints and launch an investigation, the employers were liable for the manager's acts of harassment.

A different conclusion was reached by the Court of Appeal in the case of ST v North Yorkshire County Council, [1999] IRLR 98. In a claim for common law breach of duty, the Court of Appeal reject a claim pursued by a pupil in a school who alleged that he had been sexually harassed by the deputy headteacher on a school trip abroad.

There is a difference between case brought under the anti discrimination statutes - the Sex Discrimination Act and Race Relations Act for example, and claims under common law.

In both cases the employer is vicariously liable if the employee is acting in the course of his or her employment.

But "in the course of employment" has a broad everyday meaning in discrimination law. The test is whether the event was something that was sufficiently under the control of the employer to have been prevented or reduced by good employment practice.

But "in the course of employment" has a restricted and technical meaning in common law claims and the Court of Appeal have refused to extend the definition in light of the discrimination statute definition, even though the complaint was of discrimination.

The common law position requires that for an employer to be liable, the acts complained of must represent "an unauthorized way of carrying out authorized duties." In this case of ST v North Yorkshire County Council, however, the alleged assault by the deputy headteacher could not be regarded in any sense as an authorized activity, and, according to the Court of Appeal, the claim had to fail.

Race against time

Aniagwu v London Borough of Hackney Case 116/98 unreported

Some reprieve may be available to applicants in discrimination cases where the Originating Application is lodged out of time due to an on-going internal appeal. The Employment Appeal Tribunal in Aniagwu v London Borough of Hackney allowed Mr Aniagwu's race discrimination case to proceed even though it was lodged outside the usual three month's time limit.

Mr Aniagwu claimed that he had been discriminated against on the grounds of his race when his grievance was dismissed by his manager. The decision was taken on 20 March 1997, but the result was only communicated to him on 26 March 1997. He subsequently lodged an internal appeal against this decision, but the Council delayed in dealing with the appeal, so eventually he decided to proceed with a Tribunal claim for race discrimination. He lodged his Originating Application on 26 June 1997.

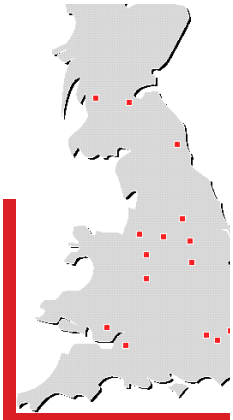
The Employment Tribunal dismissed his case on the grounds that it was out of time, the three month time limit running from 20 March 1997. They declined to exercise their discretion to allow the late claim on the grounds that it was not just and equitable to do so.

The Employment Appeal Tribunal overturned this decision. They agreed with Mr Aniagwu's argument that the three month time limit should run from the date on which he had been notified that his grievance was rejected. The employee should be able to identify his detriment and he could only do that once he had been notified that his grievance had been dismissed. But even taking this into account, the Originating Application was still one day out of time. Nonetheless, in the circumstances of this case, the Employment Appeal Tribunal concluded that the original Tribunal had erred in not exercising their discretion to allow the case to proceed on just and equitable grounds. The claim was only one day late, and the Respondents had not been able to demonstrate any prejudice by reason of this one day delay. Further, the reason for the delay was that the Council had been slow in dealing with the appeal, and the applicant had been hoping that the matter would be resolved by the appeal. "This was a responsible and proper attitude for someone to take, albeit that he had an extant complaint of race discrimination. He was looking to have his grievance resolved rather than go to law."

> Mr. Aniagwu claimed that he had been discriminated against on the grounds of his race when his grievance was dismissed by his manager.

In considering the implications of this decision, the specific facts are important: the Originating Application was only one day late, there was no evidence of prejudice suffered by the Council, they were the ones who were responsible for the delay in dealing with the internal appeal, and the reason for not lodging the claim sooner was due to Mr Aniagwu's desire to see if the matter could be resolved internally. It is not often that these circumstances apply, and indeed the basic position remains that internal appeals do not stop the clock from running. Therefore the usual method of dealing with this situation is to lodge the Originating Application and then to apply to the Tribunal to have the claim stayed pending the outcome of the appeal. However, if an applicant is in the position of having lodged a late claim, then this case is a useful reminder to Tribunals that they must properly address the issue of whether it is just and equitable to allow the claim to proceed, and the existence of an on-going internal appeal may in fact be a factor that works in favour of the applicant.

Victory for commonsense



Clark v TDG Limited trading as Novacold (Court of Appeal) Times Law Report 1 April 1999

The Court of Appeal has heard its first case under the Disability Discrimination Act 1995. It has delivered a landmark judgment that is a victory for both common sense and disability rights.

There are two types of discrimination under the Disability Discrimination Act 1995 (DDA). The first is where a disabled person is less favourably treated. The second is where an employer fails to make reasonable adjustments to prevent a disabled person being at a substantial disadvantage to non-disabled people.

In the first type of discrimination the crucial question is the comparator: who does the disabled person contrast his or her treatment with? Who is being more favourably treated? That person can be real or hypothetical. The Employment Tribunal must compare the treatment of a disabled person with the way in which the employer treats or would treat someone else.

The case concerned an all too familiar dismissal for ill health. Mr Clarke had been absent from Novacold for over five months with a back injury with no anticipated return date. He was dismissed. He had insufficient service to claim unfair dismissal and relied on the DDA.

The employment tribunal held that the comparison should be made with someone absent from work for the same length of time but not because of disability. Anyone off for five months would have been dismissed, the tribunal found, therefore there was no less favourable treatment and therefore there was no discrimination.

The Employment Appeal Tribunal agreed and endorsed the interpretation. But, as the Court of Appeal have now confirmed, to take such a narrow approach misses the point of the protection intended by the DDA. It was intended to cover the consequences of and perception of disability. The DDA is differently worded to both the Race Relations and Sex Discrimination Act and covers both direct and indirect discrimination.

There are two questions: first, was Mr Clarke dismissed for a reason relating to his disability? If so, did Novacold treat him less favourably than they would others to whom that reason would not apply.

The proper approach is this: Mr Clarke was disabled, therefore he could not work and therefore he was dismissed. He was dismissed for the reason that he could not work and a comparison should be made with someone to whom that reason does not apply - in other words someone who can work.

The effect of the case will be felt in most disability discrimination cases. It will be easier to show less favourable treatment, but it is open to an employer to justify the treatment. Again this is a key difference between the disability legislation and sex and race - direct sex and race discrimination cannot be justified. Disability discrimination can. The Court of Appeal have given the strongest hint that the employment tribunal, which will now reconsider Mr Clarke's case, will find his dismissal to be justified if it was impossible for him to perform the main functions of his job and there were no other vacancies.

The second form of discrimination is the failure to make a reasonable adjustment. The Court of Appeal confirm this is a separate claim and it is therefore possible to win on one type of claim and lose on the other. It was quite wrong for the tribunal to say that because there was no less favourable treatment, Mr Clarke's claim for a "reasonable adjustment" also had to fail.

However since Mr Clarke only argued discrimination in dismissal itself, it fell outside the scope of reasonable adjustment. The duty to make reasonable adjustments arises before dismissal - it is intended to prevent dismissal amongst other things. Advisors must always argue pre-dismissal failures in any case and put them in the IT1 - for example by listing the steps that could have been taken to prevent dismissal.

A failure to make reasonable adjustments can and often does result in dismissal and the subsequent loss of earnings can be claimed in tribunal proceedings. It is a great relief that the Court of Appeal have sorted out conclusively the appropriate comparator in disability discrimination cases and a timely reminder of the importance of arguing pre-dismissal failures in a claim involving reasonable adjustments.

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