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CONTENTS

Judge decides that contracts of employment must be treated as if they include the 48-hour limit

THOMPSONS SOLICITORS

Assessing the risk

Day v Pickles Farms Ltd [1999] IRLR 217

If an employer fails to comply with his health and safety obligations towards a pregnant employee under the Management of Health and Safety at Work Regulations 1992, then does the employee have a remedy under the Sex Discrimination Act 1975?

This is the important question posed, but unfortunately not answered, by the Employment Appeal Tribunal in their recent decision concering Day v Pickles Farms Ltd (10 November 1998).

Mrs Day became pregnant not long after starting work as a counter assistant with T. Pickles Farms Ltd in one of their sandwich shops. Chicken was cooked and roasted in the shop, and when she became pregnant the smell gave her such severe morning sickness that she could not continue working. She was signed off sick by her GP, and eventually she simply did not go back to work after the birth of her child.

The Tribunal who originally heard the case found against Mrs Day in relation to her claims for constructive dismissal, sex discrimination and payment for outstanding SSP. One of the main arguments before them had been that the company's failure to carry out any risk assessment, pursuant to the 1992 Regulations, amounted to a breach of contract and sex discrimination.

On appeal, the Employment Appeal Tribunal upheld the finding that there had been no constructive dismissal, but remitted the question of whether there had been a breach of the 1992 Regulations, and if so whether that amounted to a breach of the Sex Discrimination Act.

Pregnant woman could not claim compensation just by proving an employer breached health and safety regulations

Clause 13 of the 1992 Regulations provides that "Where (a) the persons working in an undertaking include women of childbearing age; and (b) the work is of a kind which could involve risk ... to the health and safety of a new or expectant mother ..." then a suitable and sufficient assessment of those risks shall be carried out by the employer.

The evidence of the Company in this case was that no such risk assessment had been carried out. If such an assessment had been carried out then, it might have led to the installation of a ventilation system reducing the smells so allowing Mrs Day to continue working. Therefore in these circumstances was the failure to carry out an assessment a detriment to Mrs Day within the meaning of Section 6 of the Sex Discrimination Act?

The difficulty that Mrs Day faced was that the 1992 Regulations do not impose civil liability, so a breach by an employer does not in itself entitle an employee to claim compensation. If the employee sustains personal injury, then the failure to carry out an assessment will be relevant in any personal injury compensation claim. Likewise, if she is dismissed then she has remedies under the Employment Rights Act 1996 and the Sex Discrimination Act. No equivalent remedy appears to exist for an employee who only suffers detriment as a result of a failure to carry out an assessment.

This has been touched on in the case of Iske v P & O Ferries 1997 IRLR 401. Here it was held that the employer's failure to provide alternative work to a woman suspended from her work, was due to the fact of the woman's pregnancy and therefore direct discrimination.

But it is much harder to see how a failure to carry out a risk assessment could be due to the fact of pregnancy itself. At the end of the day, it may be that a straightforward approach has to

be taken to cases of this sort. Perhaps the issue should be whether the employers would have complied with their legal obligations had they related to male employees as opposed to pregnant women.

Certainly the obligation to carry out risk assessments for all women of child-bearing age is not a widely acknowledged duty, and it may be possible to prove discriminatory treatment in this way. This will however be harder in a case such as Mrs Day's where the employer apparently carried out no risk assessments at all.

What remains to be seen is how effect will be given to the Pregnant Workers Directive 92/85, which supplements the 1992 Regulations. Article 4 of the Directive requires employers to carry out risk assessments for pregnant women, and Article 12 requires member states to introduce measures to enable workers to pursue their rights by judicial process.

Even if Mrs Day succeeds with her claim when the case is remitted, one wonders whether pursuing a remedy in these circumstances under the provisions of the Sex Discrimination Act on the grounds of comparatively worse treatment can be sufficient implementation of Article 12.

DISABILITY

Medical evidence a must in DDA claims

Buxton v Equinox Design Ltd [1999] IRLR 158

Medical evidence and its effect on compensation in personal injury cases is often considered by judges in the county court. However, until recently, it has not been something the Employment Tribunal has had to bother itself with too often.

The situation has changed with the advent of the Disability Discrimination Act. Buxton v. Equinox Design Ltd has highlighted the need for more carefully structured remedies hearings than we are used to seeing in Tribunal cases.

Mr Buxton, a craftsman working on exhibitions, was diagnosed as having multiple sclerosis in 1994. At first he was put on light duties, then placed on sick leave following an incident with a bandsaw. Later, his employers obtained information on Mr Buxton's condition from their Employment Medical Advisory Service (EMAS). The only predictions were that his condition was deteriorating slowly, that he would not return to normal and that his future should be considered. No assessment of risk was carried out; the employers' response was to meet Mr Buxton and dismiss him.

Craftsman claims £500 not enough for 'injured feelings'

An employment tribunal found Mr Buxton's dismissal to be unfair and awarded £7,627.50 compensation to include £500 for injury to feelings. The loss was limited to one year from the date of the EMAS' letter, although no oral evidence was heard from the doctor. Mr Buxton appealed on grounds that £500 was far too low for the injury to his feelings and the remainder should not have been limited to loss for one year.

The EAT, allowing the appeal in part, referred the matter back to the employment tribunal for a remedies hearing stating that the case should involve "careful pre-preparation under the management of the tribunal". If this could not be agreed, a medical expert should be called to give oral evidence. The tribunal should not decide to limit compensation to one year without a medical prognosis.

Who gets it and who doesn't

The national minimum wage (the "NMW") came into force on 1 April 1999. We reported in issue 28 on the public consultation exercise carried out by the DTI last September, and the draft regulations as they then stood. The National Minimum Wage Regulations 1999 did not actually receive parliamentary approval until a matter of weeks before they came into force.

Those Regulations and the National Minimum Wage Act 1998 provide the legislative framework for the implementation and enforcement of the NMW. The main changes introduced in the final version of the regulations are the introduction of the new concept of "salaried hours work", removal of the right of any worker to an NMW statement and exclusion of additional categories of workers - such as au pairs, family workers and homeless workers on shelter schemes .

WHO IS COVERED?

The NMW applies to "workers". Coverage extends beyond "employees" working under a contract of employment to others who work under contracts to do or perform personally any work or services for other parties except work or services provided for a client or customer of a profession or business.

Those covered by the NMW will include: agency workers, home workers, foreign workers working in the UK, UK workers working abroad and agricultural workers. Those not covered by the NMW will include those under 18, the genuinely self-employed, members of the armed forces, most volunteers, au pairs and family workers.

Others not included are the homeless working on charitable schemes providing shelter, workers on placements of up to a year on higher education sandwich courses and workers in the first three weeks of Government or European Social Fund work experience schemes. Likewise, apprentices who are under 26 will not usually be entitled to the NMW during the first twelve months of their apprenticeship.

The NMW is of universal application - geographically, across different employment sectors, across employers of different sizes and for all ages of workers over 26. There are two modified rates: £3 per hour for workers who are 18 or over, but have not reached 22; and £3.20 per hour for certain trainees who are under 22 and in the first six months of a job.

FOUR TYPES OF 'WORK'

Fundamental to the concept of the NMW is an assessment of the hours for which a worker must be paid the NMW. This may be relatively straightforward, for example, for office workers or hourly paid workers, but is inevitably more complex for commission workers, home workers and care workers. The original draft regulations defined three types of work for this purpose. Those categories have been extended to four in the regulations themselves - with different calculation mechanisms for hours which count for each.

"Time Work" is work that is paid for by reference to a period of time, but which isn't "salaried hours work" (see below) - eg hourly paid workers.

"Salaried Hours Work" is work under an annualised hours contract, is new in the final version of the Regulations and is designed to deal with the difficult issue of term-time working.

"Output work" is work that is paid for by reference to the number of pieces made or processed, or transactions or sales completed, by the worker.

"Unmeasured work" is any other type of work. Included will be work where there are no specified hours and the worker is required to work as and when needed. Examples would include residential care workers and pub managers.

THE 'PAY REFERENCE PERIOD'

The pay reference period is the averaging period over which the NMW must be paid for each reckonable hour. The pay reference period is set at one month, except for workers paid by reference to a period of less than a month, for whom the pay reference period is that lesser period. So the pay reference period for a weekly paid worker would be one week.

HOURS OF WORK - GENERAL PRINCIPLES

The regulations define the type of work-related activities for which the NMW must be paid. Time when a worker is "absent from work" does not count- this includes time spent participating in industrial action. Time spent training is counted for NMW purposes.

For "time work" and "salaried hours work", time when a worker is available, at or near a place of work, for the purpose of doing work, and is required to be there, counts as reckonable time. However a worker who by arrangement sleeps where she works can only count hours when she is awake for the purpose of working.

Stand-by or on-call time will therefore probably be covered by the NMW if the worker is required to be on site. Time spent travelling also counts - but only to the extent that it is integral to the job and consists of time when the worker would otherwise be working. For "output work" and "unmeasured work", time spent travelling counts for NMW purposes.

CALCULATING HOURS OF WORK

For "time work", the hours subject to the NMW are simply the total number of hours worked in the pay reference period. For the three other types of work, the scheme of the regulations is to provide for a "default" mechanism which applies unless various conditions are met.

For "output work" and "unmeasured work", the default mechanism is the same as the time work mechanism- the total number of hours actually worked. For "salaried hours work", the default mechanism is the annualised number of hours divided by the number of pay reference periods in the year.

The alternative mechanisms for "output work" and "unmeasured work" apply where there are written agreements in place setting out estimates of, for "output work", the working hours in the pay reference period, and, for "unmeasured work", the average daily hours carrying out contractual duties.

These averaging mechanisms are used to calculate the "ascertained hours" to be worked in the pay reference period.

The alternative mechanism for "salaried hours work" applies where the basic hours are exceeded in a pay reference period.

The mechanism involves a hybrid of the default mechanism and the actual hours worked.

PAY COUNTING TOWARDS THE NMW IN A PAY REFERENCE PERIOD

The starting point is gross pay in that reference period, and gross pay in the next reference period in respect of the period under consideration. Various payments are excluded-eg loans, advances of wages, redundancy payments and pension payments. Various items are then subtracted: pay for absences and industrial action, payments included in earlier reference periods, premia payments, unconsolidated allowances, tips not paid through the payroll, expenses, living accommodation in excess of £19.95 per week, employment-related expenses and deductions for the employer's own use.

Certain payments then have to be added back in to arrive at the pay for NMW purposes. These include overpayments, amounts for the purchase of shares and accommodation costs over £19.95 per week.

RECORD-KEEPING REQUIREMENTS

The employer has to keep sufficient records to establish that it is paying workers at least the NMW. Training, fair estimate and daily average agreements must be kept. Records must be kept in a single document for each pay reference period, and must be kept for three years.

A worker who on reasonable grounds suspects that she is not being paid the NMW can require her employer, on 14 days' notice to produce those records. The sanction for failure is currently £288, enforceable in a Tribunal.

ENFORCEMENT

The burden of proof in establishing whether the NMW has been paid lies with the employer. The NMW itself can be enforced by workers, through claims based on an implied contractual right to be paid at least the NMW, and is treated as an unlawful deduction under Part II of the Employment Rights Act 1996 (the old Wages Act).

Enforcement officers can also impose a penalty of twice the hourly rate of the NMW per worker per day of non-compliance.

There are also six criminal offences created by the NMW Act.

Anti-victimisation provisions are wide ranging. A worker is protected from being subjected to any detriment for enforcing a right to the minimum wage including simply qualifying for it.

If an employee is dismissed because they qualify or might qualify for the minimum wage, it will automatically be an unfair dismissal and there is no qualifying service requirement to gain this right.

Net pay is crucially important

Cantor Fitzgerald International v Callaghan and Others; 21 January 1999, Court of Appeal (The Times 25/1/99)

The Court of Appeal has held that, in a contract of employment, arrangements for pay between employer and employee are of crucial importance.

A deliberate and determined refusal by an employer to honour an agreement which reduced the value of an agreed salary package was effectively a cancellation of the contract (repudiatory breach in the jargon).

The five employees of Cantor Fitzgerald International ("Cantor") were members of a team of brokers.

Their contracts of employment with Cantor made provisions for payments to each of them of 4-year £60,000 loans that included arrangements to exclude any tax liability being incurred by the employees.

However, each employee eventually became liable to tax and Cantor refused to do anything about the problem. In 1997, all five employees left the company on the same day, handing in a joint notice of termination of their employment.

Cantor sued the five for breach of contract, claiming that clauses prevented them from moving immediately to work for a rival firm. The employees claimed that their contract of employment had been repudiated on the grounds (among others) that Cantor had wrongly failed or refused to comply with the agreed arrangements in relation to their salary packages, in particular with assurances given to them about tax liabilities.

In his judgment, Lord Justice Judge commented that, "it was difficult to exaggerate the crucial importance of pay in any contract of employment. In simple terms, the employee offered his skills and efforts in exchange for his pay". The Court held that whether or not an employer's non-payment of wages or interference with salary amounted to a fundamental breach of contract depended on the facts of each case.

If a failure or delay in payment was repeated and persistent (as opposed to a temporary error), perhaps also unexplained, the court might be driven to conclude that the breach or breaches were so severe that the contract was essentially cancelled. Further, where an employer unilaterally reduced his employee's pay or diminished the value of his salary package, the entire foundation for the contract of employment was undermined.

An emphatic denial by an employer of his obligation to pay an agreed salary or wage, or determined resolution not to comply with his or her contractual obligations in relation to pay and remuneration, would normally be regarded as so serious that the contract was effectively at an end.

In this case, the loan agreement was integral to the contract of employment and formed part of the defendants' agreed salary package.

In the context of the overall package the amount at issue was not very great, although the sums at stake were not trivial. However, the refusal to pay was deliberate and determined, motivated by a desire improperly to make the brokers work harder and undermined the contract of employment to such a degree that the employer ended the contract.

The case is not simply of importance to well salaried brokers. It illustrates that a deliberate and determined refusal by an employer to honour an agreement in relation to an agreed salary package may amount to a such a serious breach of the contract of employment that it enables an employee to claim that he or she was constructively dismissed.

This case is a further advance in the law of constructive dismissal following the recent decision of Weatherfield Limited t/a Van and Truck Rentals v Sergeant [1999] IRLR 1994 (see also February 1999 LELR). In Weatherfield the Court of Appeal held that, in order to establish a claim of constructive dismissal, there is no requirement as a matter of law that an employee must tell the employer the true reason why they are leaving.

This overturned the holding of the Employment Appeal Tribunal in Holland -v-Glendale Industries Limited [1998] ICR 493 that constructive dismissal can not be established unless it is made clear to the employer that the employee is leaving because of the employer's repudiatory conduct.

Friend or foe?

Friend v Institution of Professional Managers and Specialists [1999] IRLR 173

Bank of Credit and Commerce International v Ali

Since the Employment Rights (Disputes Resolution) Act 1998 came into effect in August that year trade union officials have been able to sign off Compromise Agreements which terminate employment or bring an Employment Tribunal claim to an end. These new powers must be exercised carefully as two recent cases confirm.

The BCCI case is another part in the long running saga following the collapse of BCCI in 1991.

Former employees of BCCI signed ACAS COT3 agreements in settlement of "all and any claims whether under statute, common law, or in equity" arising out of their employment and they received compensation.

Later during the course of the liquidation of BCCI, the bank tried to recover loans made to the employees and the employees in turn claimed damages for breach of their employment contract for stigma damages (see Malik v BCCI LELR 14).

BCCI argued that the employees were not able to pursue breach of contract claims due to the COT3s signed by them.

The High Court held that the COT3 together with the compensation settled claims whether the parties were aware of them or not. The employees could not pursue their breach of contract claims. The Court rejected the employees' argument that BCCI were under a duty of disclosure.

This case means that where trade union officers are negotiating settlements in unfair dismissal and other employment law disputes they should be wary of sweeping compromise agreements or COT3s. As a matter of course it is wise to exclude personal injury claims and claims for accrued pension rights.

The duties of a trade union and its officer when advising their members were also considered by the High Court in Friend v IPMS.

Captain Friend was employed by the Civil Aviation Authority and was a member of the IPMS. He had a long running dispute with his employer which eventually led to his dismissal. Throughout he was advised and assisted by his trade union.

After his dismissal, his union instructed solicitors to represent him in his claim for unfair dismissal. His unfair dismissal complaint succeeded on procedural grounds but the Tribunal held there should be no award of compensation because of his contribution to his dismissal. He appealed to the EAT and the appeal failed.

Captain Friend later issued separate proceedings against the union and the solicitors engaged on his behalf.

The action against the solicitors was struck out and the writ against the union was struck out and the action dismissed.

Captain Friend appealed to the High Court who dismissed his appeal. In giving judgment it was said that a trade union has a duty in tort to use ordinary skill and care in advising and/or acting for a member in an employment dispute.

However once solicitors have been engaged "any duty that there might previously have been on the union to advise in relation to the conduct of the claim falls away". Any failings in the advice then lie at the door of the solicitor.

The judge said that the case had no realistic prospect of success and struck it out.

He said "The plaintiff is attempting to pin on his advisers the fact of his original dismissal and the failure of the unfair dismissal proceedings".

Employers are increasingly using Compromise Agreements which have far reaching implications for the employee who is thereby excluding her right to pursue a range of claims.

Trade union officials can only sign off Compromise Agreements under ERDRA 1998 if they have been certified in writing by the trade union as competent to give advice and are authorised to do so by the union.

It is also necessary for the union to have an insurance policy in place to cover the risk of a negligence claim against the adviser.

When 'equal' equals unequal

Evesham v North Hertfordshire Health Authority Secretary of State for Health [1999] ILR 155

The concept of "pay", for the purpose of equal pay legislation, applies to each, individual term of a contract of employment.

A successful applicant in an equal pay case is entitled to the benefit of an "equality clause". This means that each and every term of her contract of employment which is less favourable than the equivalent term in her male comparator's contract is modified so as to be not less favourable.

It is therefore essential to analyse an applicant's contract of employment to identify each individual term contained within it. The Employment Appeal Tribunal fails to appreciate the distinction between two such contractual terms - one being the grade within which an applicant is entitled to be paid and the other being the mechanism for progression within that grade in this case - Evesham v North Hertfordshire Health Authority and Secretary of state for Health [1999] IRLR 155.

Mrs Evesham is a speech therapist. Along with Pamela Enderby and other speech therapists, Mrs Evesham claimed equal pay to that of clinical psychologist comparators - in her case, a Dr Mollan. Mrs Evesham succeeded in showing that her work was of equal value to that of Dr Mollan. However, she claimed that she should, in overall terms, actually be paid more than Dr Mollan.

Mrs Evesham had been in her current post for six years at the time she submitted her claim. She therefore had six years' worth of annual increment added to her salary as a speech therapist. Dr Mollan was in his first year in post. At the time that Mrs Evesham submitted her claim, Dr Mollan had no addition by way of incremental progression to his basic salary for his grade. Mrs Evesham claimed that she should be entitled to be paid within the same grade range as her comparator, but at the incremental point within that grade appropriate to her years in post in accordance with her contract of employment.

The Employment Appeal Tribunal refused Mrs Evesham's appeal. In a short judgment, thin on reasoning, the EAT found that Mrs Evesham had established equal value only with Dr Mollan's work, and not with all, or indeed any, other clinical psychologists.

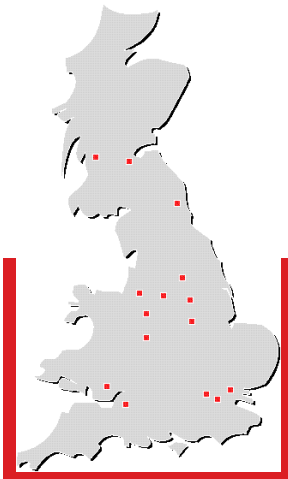
She was therefore entitled to "mirror" Dr Mollan on the incremental pay scale- she was only entitled to the same overall rate of pay as Dr Mollan and not to additional incremental progression based on her years in post.

This is not only a disappointing decision, it is plainly wrong. Relevant to these proceedings were two terms in Mrs Evesham's contract of employment: first, the grade within which Mrs Evesham was entitled to be paid; and, secondly, the mechanism for incremental progression within that grade.

Mrs Evesham sought only to have modified the first of those terms - that is, the one that was less favourable to her. She did not seek modification of the system for incremental progression, yet the EAT has nonetheless taken it upon itself effectively to modify the application of the second term to Mrs Evesham by awarding her an overall rate of pay based on Dr Mollan's years in post.

It is well settled law that each term in a contract of employment falls to be considered, for equal pay purposes, on a separate basis. The legislation does not operate by taking a "global" view of the contract as a whole, nor by allowing one term to be "traded off "against another in an overall comparison of an applicant's and a comparator's contract. Plus, the statutory requirement is that the relevant term in the applicant's contract should be no less favourable: not that it should not be more favourable.

The EAT failed to distinguish between the two contractual terms at play and denied Mrs Evesham the benefit of a term in her contract of employment which it had no right to modify. If Mrs Evesham were to be given equal pay to that of Dr Mollan as required by equal pay legislation, she should be given, not only the same grade as Dr Mollan, but also the opportunity provided for in her own contract of employment to progress incrementally. In any event this is no more favourable than the equivalent term in Dr Mollan's contract.



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