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

Don't rely on the boss

University of Nottingham v Eyett and the pensions Ombudsman [1999] IRLR 87

It is well established that if an important employment right is available to an employee and he or she will not know about it unless the employer reveals it, then it is a breach of contract for the employer to keep quiet.

It is also clear that if an employer chooses to advise an employee about his or her employment contract, then the employer may be liable to pay damages to the employee if the advice turns out to be negligently given (provided that the employee can show some loss sustained as a result). The question in this case was whether the employer's obligations go further: must the employee be told if he or she is about to exercise an option which will clearly be against his or her best interests?

Mr Eyett was approaching his 60th birthday, and was looking at the possibility of retiring early. He could do so at the age of 60, if the university for which he worked consented (and in this case, it did so). When should he go?

Very sensibly, he got an estimate of his pension benefits, assuming that he retired on the 31st July 1994, the end of the month in which his birthday fell. In accordance with the rules of the scheme, the university based its estimate on his basic salary in the previous three years, using the salary paid at the 1st August in 1991, 1992 and 1993. Mr Eyett thought that the pension was sufficient for his needs, and duly retired on the 31st July.

If he had chosen to go on the 31st August, his pension would have been based on his pay on 31st August 1992, 1993 and 1994 - one year further forward. He lost about £80 per annum as a result. Should the university have warned him?

No, said the Court. The university had a blanket

policy of not giving advice, but it had given Mr Eyett the standard scheme booklet, from which he could have worked out his pension rights for himself. It might have been different if the university had deliberately misled him, and possibly if it had accidentally done so. But saying nothing was Mr Eyett's problem, not the university's. There was no obligation on the employer to catch him if he was about to slip up.

The important lesson is that if you have an important choice to make, be sure to check all the consequences. Read your contract, and if in doubt, ask. If the employer refuses to give any advice, find someone who will.

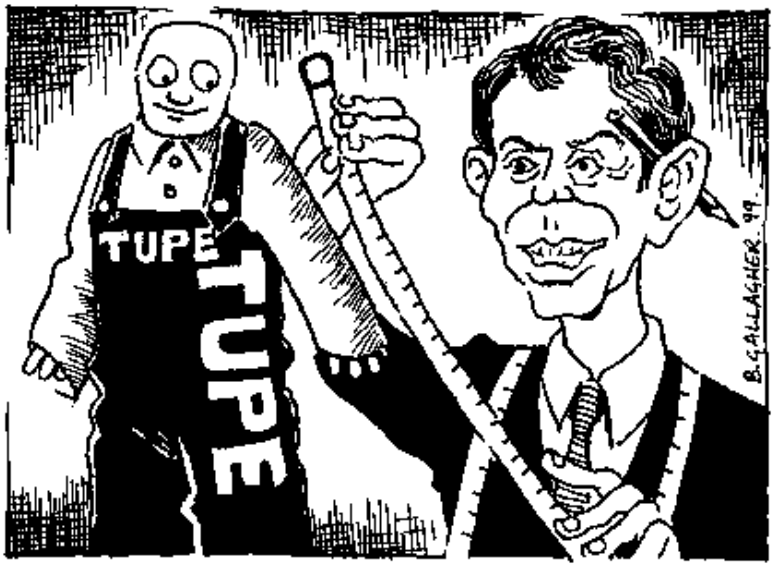
Spanish practices

Hernandez Vidal SA v Gomez Perez [1999] IRLR 132 (ECJ)

Sanchez Hidalgo v Associacion de Servicio Aser [1999] IRLR 136 (ECJ)

Magna Housing Association Ltd v Turner and others, EAT 21/10/98 (IDS Brief 631)

Lightways (Contractors) Ltd v Hood and others, EAT 17/11/98 (IDS Brief 631)



The UK Government is currently engaged on a re-draft of the TUPE Regulations following last year's amendment to the Acquired Rights Directive from which TUPE derives.

As reported in LELR [issue 24], the amendments introduced a new definition of the scope of the Directive. They included the provision: "There is a transfer within the meaning of the Directive where there is a transfer of an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary."

This convoluted phraseology was an attempt to synthesise the decisions of the European Court in a series of cases, particularly in the light of the Suzen judgment (reported in LELR issue 10).

In two recent cases the European Court has demonstrated a desire to interpret Suzen in a way which reflects the new definition in the Directive. In doing so, the Court indicates a change in emphasis from some parts of the Suzen decision.

The Gomez Perez case involved a business which contracted out the cleaning of its premises. It then terminated the contract and decided to carry out the work itself. The Court said that the mere fact that the work carried out before and after the change is similar does not of itself mean that the Directive applies.

The transfer is covered by the Directive if the operation is accompanied by the transfer of an economic entity, meaning "an organised grouping of persons and assets enabling an activity which performs a specific objective to be exercised". This language bears a remarkable similarity to the amended Directive which, of course, did not apply to this case and has not yet been brought into force in Member States.

This left the question of whether there can be a transfer of undertaking without a transfer of assets. The Court recognised that a transfer of assets is of little relevance in a labour-intensive contact.

The Court considered this issue in Gomez Perez and in the related case of Sanchez Hidalgo, which concerned home help and security services which were transferred from one contractor to another. In both cases the Court said that "in certain labour-intensive sectors, a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity". This led the Court to the conclusion that the Directive will apply where the new employer does not merely pursue the transferred activity, but takes over a major part of the employees assigned to the contract.

This leaves the unsatisfactory position where the application of

TUPE to the transfer of a labour-intensive contract depends to a large extent on the proportion of employees who transfer. This is a circular argument, leading to uncertainty.

The EAT in the UK has taken a refreshingly positive and robust approach to the issue. It has said that an employer's refusal to take on staff cannot prevent TUPE applying (ECM v Cox, LELR issue 26). In two recent cases the EAT decided there was a transfer even though the majority of staff did not transfer.

In the Magnet case, no assets or employees transferred, but the EAT said that the question was whether the employees should have been taken on.

In the Lightways case, the EAT accepted that in the context of service contracts, an economic entity could amount to nothing more than the workforce or part of it. It was not essential that a majority of the workforce transfer, just a "material and identifiable" number of employees and as the new contractor required particular personnel to carry out the contract in this case, there was a transfer.

This enlightened approach is welcome, but the continued development of law at European level and the opacity of the language makes it very difficult for workers, unions and employers to know where they stand. In this context, it is welcome that the Labour Government does not intend merely to "copy out" the wording in the Directive, but to draw up a new TUPE tailored specifically to deal with the situation in the UK. The Government is consulting with the unions, contractors and the public sector in an effort to achieve a solution supported by consensus.

UNFAIR DISMISSAL: QUALIFYING PERIOD

Long-awaited, but indecisive

European Court of Justice Decision in Seymour-Smith

We now have the long-awaited European Court of Justice decision in the Seymour-Smith case. Unfortunately, it is not the decisive judgement that had been hoped for, and the question of whether the two year service requirement for unfair dismissal claims indirectly discriminates against women still remains to be decided.

Ms Seymour-Smith and Ms Perez both started work with their employers in 1990. Both were dismissed in 1991, with more than one year's service, but less than two years. Both argued that the two year service requirement which prevented them from pursuing unfair dismissal claims indirectly discriminated against women. They pointed to statistics which showed that in 1985, when the two year service requirement was introduced, only 68.9% of female employees had two years service, as opposed to 77.4% of men.

The case was unsuccessful in the High Court, where it was argued in Judicial Review Proceedings that the two year service requirement was contrary to the Equal Treatment Directive. The Court of Appeal overturned this decision, and allowed the applicants to rely on Article 119 as well as the Equal Treatment Directive. However in holding that there was indirect discrimination, they also said that it was not clear whether compensation for unfair dismissal fell within Article 119. The House of Lords, then referred the case to the European Court of Justice.

Following the controversially opaque decision of the Attorney General (reported LELR 26), it had been widely anticipated that the European Court of Justice would provide an authoritative answer to the questions raised in this case. However that was not to be. The Court has instead referred the three main questions back to the House of Lords, and provided very little guidance as to how the questions should be answered.

The Court was firstly asked whether compensation for unfair

dismissal was "pay" within the meaning of Article 119, and whether the right not to be unfairly dismissed fell within Article 119 or the Equal Treatment Directive. The Court answers these by saying that compensation for unfair dismissal is "pay", and that an employee's claim for compensation for unfair dismissal falls within Article 119. A claim for reinstatement or re-engagement falls within the Equal Treatment Directive.

The Court re-iterated the already well-known legal test that it was for the national Court to verify whether the statistics indicated that a considerably smaller percentage of women than men meet the two year requirement. However, significantly, at this point the Court does imply in fairly clear terms that they are not convinced by the Applicant's statistics: "Such statistics [77.4% of men as opposed to 68.9% of women able to comply] do not appear, on the face of it to show that a considerably smaller percentage of women than men is able to fulfil the requirement".

The fourth question related to the time when the legal test should be applied in circumstances such as this where Applicants were maintaining that a law was discriminatory. Again the European Court simply refers the matter back to the national Court, saying that it is for them to determine the point in time in which the legality of the rule should be assessed.

Finally, they were asked what the legal conditions were for establishing objective justification of the measure adopted by a Member State. Once again, the European Court simply reaffirms the principle that it is for the Member State to show that the rule reflects a legitimate aim of its social policy, that the aim is unrelated to any sex discrimination and that the means chosen were suitable for attaining that aim.

Such bland restatements of the law, referring the key questions in this case back for determination in the House of Lords, are no doubt in keeping with the important principle of subsidiarity. However, this will be little comfort to those Applicants whose claims have been lodged and stayed in the Tribunals for several years now, pending the outcome of this case. Those Applicants will simply have to continue waiting until the House of Lords reconsiders that case, probably later this year. Meantime in the light of the European Court's discouraging comments about the inadequancies of the Applicants' statistics on the disparate impact of the two year service requirement for women and men, it is hard to be optimistic about the chances of success.

EMPLOYER'S LIABILITY

On duty, or off duty?

Meaning of "Course of Employment" Under Discrimination Law and Common Law

The doctrine of the " course of employment" is a principal one in employment law. It is the situation for an employer's vicarious liability under the discrimination statutes, and at common law(law as defined by courts in their decisions).

Vicarious liability is the obligation which falls on one person as a result of an action of another. Within employment law it would be the liability of an employer for the acts and omissions of his employees.

Current cases reported show that the words, "course of employment", must now be regarded as having a different meaning, depending on the nature of the case.

In **Chief Constable of the Lincolnshire Police -v- Stubbs [1999] IRLR 81**, a male officer subjected a female colleague to

several incidents of inappropriate sexual behaviour at social gatherings immediately after work.

Was the male officer acting in the course of his employment when he committed acts of unlawful sex discrimination, and were his employers vicariously liable for his actions under section 41(1) of the Sex Discrimination Act?

Section 41(1) says: " Any thing done by a person in the course of his employment shall be treated as done by his employer as well as by him, whether or not it was done with the employer's knowledge or approval".

The Employment Appeals Tribunal(EAT) concurred with the tribunal findings, that these acts were committed in the course of his employment, and the incidents, although 'social events' away from the police station, were extensions of the workplace. They came within the definition of course of employment as determined by the Court of Appeal in Jones -v- Tower Boot Co. Ltd [1997] IRLR 168 CA.

The EAT stated that it would have been different had the discriminatory acts occurred during a chance meeting. Hence work-related social functions may be interpreted as an extension of employment.

Contrast this with the case of Waters -v- Commissioner of Police of the Metropolis [1997] IRLR 589 CA, where a female officer alleged she had been sexually assaulted by a male colleague. At the time both officers were off duty. It was held that the assault had not been committed at the place of employment nor in the course of her colleague's employment, hence the employer could not be vicariously liable for it.

This case is currently on appeal to the House of Lords.

Essentially, the phrase, "course of employment", will be a question of fact for the tribunal to resolve. Factors which will need to be considered are whether a person is or is not on duty, and whether or not the conduct occurred on the employer's premises. In the case of Stubbs, the female officer was not and could not thought to have been socialising with the male officer on either occasion.

"The common law principles of vicarious liability differ significantly from the principles governing employment law."

The decision of the Court of Appeal in the case of **S T -v- North Yorkshire County Council [1999] IRLR 99** emphasises the division between discrimination statutes and the common law.

This case concerned a mentally handicapped schoolboy who brought a claim against the council for damages in tort on grounds that he had been sexually assaulted by the deputy headmaster while on a school trip.

The Court of Appeal were of the view that the acts of indecent assault were outside the course of employment. Assaulting a pupil was not a method of supervising the pupil's well-being, even though the assault occurred when the deputy headmaster was claiming to look after the pupil.

The common law principles of vicarious liability differ significantly from the principles governing employment law.

In the common law test for vicarious liability, the employer is responsible for acts actually authorised by him and for the way in which the employee does it. However, the employer will not be responsible for unauthorised acts done in the course of the employee's employment- this would be regarded as an independent act; the employee would be acting outside the employment domain.

The outcome in this case appears to embrace a rather severe test - that is an employee is not employed to commit an assault, hence an assault is outside the course of employment.

This decision plainly demonstrates that the Court of Appeal accept that the common law test for determining the scope of employment and the discrimination law test are distinct.

Driven to resignation

Weatherfield Limited t/a Van & Truck Rentals v. Sargent [1999] IRLR 94 Court of Appeal

The Court of Appeal decision in Weathersfield Ltd t/a Van & Truck Rentals v. Sargent has given a wide interpretation to the words " on racial grounds" within the meaning of the Race Relations Act. Significantly, the Court of Appeal has upheld a finding of the Employment Tribunal that a white European employee was discriminated against on racial grounds when she resigned in response to being given an instruction to discriminate against prospective customers of black and Asian origin.

Mrs Sargent, of white European ancestry, had obtained a job as a receptionist for the Respondents. She was given an induction course by a senior employee of the Respondent, which included guidelines as to how individuals and classes of people should be assessed for risk. She was told that the company had a special policy regarding ethnic minority customers: " We have got to be careful who we hire

the vehicles to. If you get a telephone call from any coloured or Asians you can usually tell them by the sound of their voice. You have to tell them that there are no vehicles available". The following day, Mrs Sargent was interviewed by a director of the Respondent company and asked whether or not "the policy" had been explained to her. The senior employee agreed that it had and that the applicant had been informed about taking calls from coloureds and Asians.

Mrs Sargent was so upset about this policy that she decided that she could not continue in the job. As a result, the applicant telephoned the director and told him simply that she could not do the job. Mrs Sargent did not at the time give the reason for her resignation, although she subsequently did so by letter to the Respondent. Mrs Sargent then brought a case of race discrimination against the Respondent. The Employment Tribunal upheld the complaint and awarded £5000 compensation.

On appeal the Court of Appeal rejected the more natural meaning of the words of the Race Relations Act that, in order for someone to be treated less favourably "on racial grounds", the treatment must be related to their own race. Lord Justice Pill acknowledges in his judgment that this construction of the statute "does involve giving a broad meaning to the expression racial grounds", but he explains that "it is one which in my view was justified and appropriate".

It should be pointed out that this is in contrast to the wording of the Sex Discrimination Act, which says explicitly that the less favourable treatment must be on grounds of "her sex". The Court of Appeal agreed with the reasoning of the EAT in Showboat Entertainment Centre Limited v. Owens [1988]IRLR 7 that the words "on racial grounds" are capable of covering any reason or action based on race,and that Parliament could not have intended that a person dismissed for refusing to obey an unlawful discriminatory instruction should be without a remedy.

The Court held that the applicant was unfavourably treated by comparison with somebody who was prepared to go along with the employer's unlawful instruction.

The Respondents had argued that Section 30 of the Race Relations Act, which provides that it is unlawful for a person who has authority over another person to instruct him to do any act which is unlawful, was the only section which could apply to the current circumstances. Section 30 does not give an individual a right of complaint to an Employment Tribunal, but rather enables the Commission for Racial Equality to take action against someone in breach of Section 30. The Court of Appeal rejected this argument, stating that "there is no reason why the individual's right to complain of the wrong done to him and the Commission's right to stop unlawful acts generally by injunction should not co-exist".

The decision is also of significance to the law of constructive dismissal. 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.

In the present case, the Court of Appeal found that the Tribunal were amply justified in holding that there was a constructive dismissal. The employee had been put in an outrageous and embarrassing position and it was understandable that she did not want immediately to confront the employer with her reason for leaving.

The Court held that the unlawful instruction to discriminate was such that the employee was entitled to treat it as grounds for resigning and claiming constructive dismissal. This overturned the holding of the EAT in Holland v. Glendale Industries Limited [1998] ICR 493 that constructive dismissal cannot be established unless it is made clear to the employer that the employee is leaving because of the employer's repudiatory conduct.

The Court of Appeal have applied a broad and literal interpretation of the meaning of the words "on racial grounds" in the Race Relations Act, confirming that the phrase could be related to the race of a third party, and not merely to the race of the applicant.

This decision has a significant practical impact on employers who operate racist policies, leaving them open to claims brought by any employee, regardless of their race, who are able to show the Tribunal that they have been offended by the racism, and thereby suffered a detriment.

Where duty begins (and ends)

Kenny v Hampshire Constabulary 1999 [IRLR 76]

The duty on an employer to make reasonable adjustments for disabled people is at the heart of the Disability Discrimination Act, and is a unique feature in comparison with the Sex Discrimination and Race Relations Acts.

In Kenny -v- Hampshire Constabulary 1999 (IRLR 76), the issue to be decided by the Employment Appeal Tribunal was the extent of the employer's duty when a disabled person applies for a job.

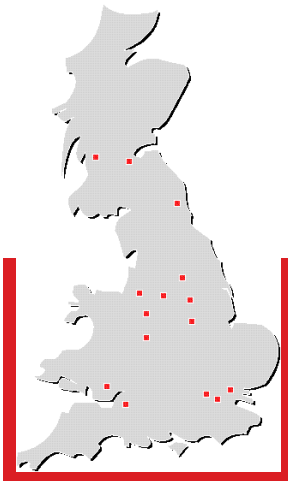
Mr Kenny has cerebral palsy. He applied for the post of Analyst / Programmer with the Hampshire Constabulary. He was offered the post, subject to the Constabulary making appropriate arrangements for him, in that he needed personal assistance in going to the toilet. Volunteers were sought for this task from within the Department where he was to work, but not enough people came forward. For security reasons, the police had decided that it was not possible for him to work from home. An application to fund a support worker was made under the Access to Work Scheme, but a decision on the application had to be delayed beyond the time when the Constabulary considered that they had to reach a decision, and as a result the job offer was withdrawn.

The Employment Appeal Tribunal held that the Tribunal were correct in finding that the Constabulary had not discriminated against Mr Kenny contrary to Section 5 (2) or Section 6 of the Act, and dismissed his appeal. According to the Employment Appeal Tribunal, the Constabulary were not in breach of the Act in failing to provide him with a personal carer to assist him with his toilet needs. Although the Act imposes an obligation on employers to make reasonable adjustments to accommodate employees and job applicants with disabilities, this duty was restricted to "job-related" matters, and assistance with going to the toilet fell outside this duty.

EAT says "it seems to us that a line must be drawn somewhere"

This obligation does not extend to matters which are personal to the employee or job applicant. An employer for instance is not obliged to make adjustments to accommodate employees who require assistance in travelling to and from work. The Employment Appeal Tribunal acknowledge that this may deprive a disabled person of a job, but "it seems to us, a line must be drawn somewhere".

Quite where that line will be drawn in other cases is not altogether clear from this decision, and to some extent every disability affecting an employee's performance at work could be categorised as either job related or personal, depending on one's perspective. However what is significant in this decision is the emphasis that the Employment Appeal Tribunal places on the Code of Practice. The Code makes no reference to an employer being required to provide personal assistance in going to the toilet, and accordingly, the Tribunal conclude that it cannot have been Parliament's intention for this to be a consideration for employers. Once again, therefore, we are being referred back to the Code to determine the application and interpretation of the Act.



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