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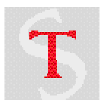
Mr Smith claimed that a female colleagues attitude towards him "as a gay man" was sex discrimination.



THOMPSONS SOLICITORS

Abusin' Suzen, but losin'

ECM (Vehicle Delivery Service) Ltd v Cox, EAT 15 May 1998

The EAT has had previous opportunities to consider the implications of the Suzen decision, but this is the first time that the President, Mr Justice Morison, has got his hands on the issue. He deals with it head-on in a welcome decision where a vehicle delivery contract had been transferred.

The drivers were "dedicated" to the contract concerned, although 50% of their time was spent on other work. No assets were transferred, the work was carried out differently, but was essentially the same and the customers were essentially the same.

No staff were transferred. This was the critical issue. The EAT said that if the drivers and yardmen had been taken on their could have been "no room for argument but that there had been a transfer of a discrete economic entity which retained its identity after the transfer".

The Industrial Tribunal had decided that the reason staff were not taken on was that they had asserted that TUPE applied. The EAT observes that Suzen does not deal with the situation where an employer decides not to take on staff in an attempt to avoid TUPE.

The EAT observed that "the issue as to whether employees should be taken on cannot be determined by the question of whether they were taken on": this would be circular. The EAT refused to accept that "it would be proper for a transferee to be able to control the extent of his obligations by refusing to comply with them in the first place. There is nothing in Suzen which requires us to adopt that course."

Employers who try to avoid TUPE by rejecting transferred staff face a nasty shock.

Members in conflict: who to support?

FBU v Fraser (Scottish Court of Session) (unreported)

Most unions have had to grapple with the problem of member v member allegations. It is most difficult where one member accuses another of either racial or sexual discrimination.

The union is faced with the decision of either supporting one member against the other, or supporting both. Levels of representation need to be decided upon and if the decision is to support one member only - which side should the union take?

The Fire Brigades Union was faced with these dilemmas and in 1994 supported a female member who had made allegations of sex harassment against a male Fire Fighter who was also a member of the FBU. He went to Industrial Tribunal arguing direct sex discrimination by the FBU against him in refusing him assistance in the investigatory and disciplinary hearing conducted by management as a result of the complaints made against him.

There was no direct evidence of discrimination at the IT, but the tribunal found against the FBU. The Court of Session has now overturned the IT's inference that the FBU had discriminated against Mr. Fraser.

The Court of Session found no evidence to justify the conclusion that he had been treated any differently by the FBU, to a female member in the same position. The FBU were perfectly entitled to protect alleged victims and view alleged perpetrators with disfavour - but that can apply whatever the gender of the perpetrator in a claim of direct discrimination.

There was nothing wrong with the General Secretary wishing to send the right signal to improve the climate of equal opportunities within the Fire Brigades and the fact that representation was rarely, if ever refused, was neither here nor there.

The Court of Session saw no need to remit the case to a new IT - they were in just as good a position to evaluate the evidence and see that there were no facts in the case on which an inference of sex discrimination by the FBU could be based.

Claiming in time

London Underground Ltd. v Noel (unreported) Employment Appeal Tribunal 13th May 1998

The 3 month time limit for presenting a claim of unfair dismissal is strictly applied in employment tribunals. There is however an escape clause in that the Employment Tribunal has a discretion to extend the time for presentation of the claim "within such further period as [it] considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of the period of 3 months." (The Employment Rights Act 1996 Section 111(2)(b)).

There are two hurdles for the employee to get over. First, she must show that it was not reasonably practicable to present her claim in time. The burden of proof in this is firmly on the applicant. Second, if she succeeds in showing that it was not reasonably practicable to present her claim in time, the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

The question of what is or is not reasonably practicable is essentially one of fact for the tribunal to decide. The appeal courts have been slow to interfere with the tribunal's decision.

The Employment Appeal Tribunal in London Underground Limited v Noel were asked to consider whether an tribunal with a chairman sitting alone was entitled to find that it was not reasonably practicable for Ms. Noel to present her claim within the 3 month time limit.

Ms. Noel had been employed by London Underground for 7 years and was dismissed following a row with a member of the public.

The EAT upheld the decision of the tribunal and followed the previous case law that the expression "reasonably practicable" had to be looked at in a common-sense way. They were happy to leave the decision to a tribunal as the most appropriate forum for such questions.

There were special circumstances in Ms. Noel's case which provide a warning about the importance of protecting an employee's rights in an Employment Tribunal by lodging a claim in time.

Ms. Noel had been employed by London Underground for 7 years. She was dismissed following a row with a member of the public. She unsuccessfully appealed against her dismissal but at a final appeal on 23rd June 1997 she was successful.

She was offered re-employment at a lower grade starting from 7th July 1997. The 3 month time limit for the presentation of her complaint expired on 9th July 1997 as she had been dismissed on 10th April 1997. She was unable to start work on 7th July and subsequently failed a medical examination at which point the offer of re-employment was withdrawn. She presented her complaint of unfair dismissal on 7th August 1997. A chairman sitting alone held that the tribunal had jurisdiction to hear her complaint.

From the decision of the EAT it would appear that Ms Noel was aware of her right to present a complaint to a tribunal because of the assistance she was receiving from her Trade Union. She intended to exercise that right until the time the final appeal was resolved.

Ms Noel decided not to go ahead with her application because of her successful appeal. Although the EAT came down in favour of the tribunal chairman's decision and Ms. Noel, the more stress free way of protecting her position would have been to lodge an IT1 by the deadline.

If the offer of re-employment had worked out her claim could have been withdrawn. If not, her position would have been protected.

Unfair dismissal: less than 2 years service

The waiting is nearly over. The Advocate General has delivered his opinion on Seymour-Smith and the judgment of the European Court of Justice is likely to follow shortly which is likely to confirm the Advocate General's views.

The essential issue is does the two year qualifying period for unfair dismissal claims in the United Kingdom unlawfully discriminate against women? The AG's short answer is 'no'.

Assuming the ECJ's judgment follows the Opinion (which it usually does), the two year qualifying period will be valid. It is likely to mean therefore that most of the Seymour-Smith cases currently stayed in tribunal's and in the Employment Appeal Tribunal will be dismissed if they are not withdrawn.

But, the AG appears to consider that protection from dismissal on grounds of sex should be covered in the unfair dismissal legislation - now the Employment Rights Act 1996. He considers the UK Government has defectively implemented the Equal Treatment Directive and individuals (male or female) who are dismissed on grounds of sex with less than two year's service have the right to have their cases treated as unfair dismissal claims.

DIRECT EFFECT

The AG considers individuals can rely directly on this right, whether or not they are employed by emanations of the State or private employers. All employees can rely directly upon the Directive because of the defective implementation which therefore gives direct effect to all employees.

SEX DISCRIMINATION

It is unclear whether this will make much difference in practice. At present employees dismissed because of their sex short of the qualifying period use the Sex Discrimination Act to gain compensation. They cannot however use unfair dismissal provisions and therefore seek the remedy of reinstatement, re-engagement or the basic award.

The AG has not considered the interplay of dismissal being classified as a detriment in the Sex Discrimination Act 1975, and the protection in the Employment Rights Act for unfair dismissal. He appears to be saying that dismissal on grounds of sex should be treated as automatically unfair dismissal in the same manner as dismissal relating to, for example, pregnancy or trade union activities.

It is an interesting question whether Applicants are sufficiently protected under the Sex Discrimination Act now that the ceiling on compensation has been lifted, or whether they should be entitled, as well, to the option of reinstatement or re-engagement where the Applicant has been dismissed. Marshall v Southampton and South West Hampshire Area Health Authority (No 2) [1993] IRLR 445 ECJ suggested that reinstatement was not necessary where financial compensation would adequately compensate.

From now on where Applicants with less than two years service are arguing discrimination in dismissal, unfair dismissal should be added as a complaint in both box 1 and box 11 of the IT1 if reinstatement or re-engagement is sought.

The AG's 40 page opinion also reviews much of recent case law in the field of discrimination and answers a number of other questions referred in Seymour-Smith to the European Court of Justice.

COMPENSATION IS 'PAY'

The AG's view is that unfair dismissal compensation comes within the definition of pay under Article 119 of the Treaty of Rome which was to be expected. However he draws the line between the compensation and the conditions determining access, or potential access, to the compensation. His view is that it is only where there is a practically automatic link between working conditions and pay, that the working conditions themselves would come within Article 119. For example where promotion is practically automatic after a certain length of seniority which applies only to full timers, a part time worker's complaint would come within Article 119, rather than the

Equal Treatment Directive.

In the case of the qualifying period for unfair dismissal, the link is not so strong, he says. The fact that certain working conditions have financial consequences does not necessarily mean that Article 119 applies. The qualifying period falls under the Equal Treatment Directive, he says.

Although not relevant in this case, it is worth bearing in mind that in the United Kingdom, the position may be more complex. Our Equal Pay Act covers all terms and conditions of employment, not just pay, and is therefore wider than Article 119 in relation to contractual terms.

But the Advocate General's opinion is that the two year service rule does not introduce a distinction and therefore discrimination between men and women - either by its nature or its results. It will only be where there is discrimination in the dismissal: either direct or indirect that that two year limit can be disapplied.

INDIRECT DISCRIMINATION

The European Court of Justice has also been asked about the legal test of disparate impact in order to establish indirect discrimination. In view of the Advocate General's opinion of the case, given his conclusions these questions are irrelevant but, he nonetheless addresses all the questions raised in the reference.

How disparate does the impact have to be? The Advocate General declines to lay down a more precise test than the previous comments of the Court which require 'considerably higher', or 'a significant difference'. His personal opinion is the statistical difference demonstrated on the figures on Seymour-Smith is not sufficient to justify a finding of unequal treatment on grounds of sex, but it will be a question of fact for the national court.

But in passages which may have far reaching consequences, he sets out stringent requirements for proving indirect discrimination. Statistics, he says, are not enough and objective factors need to be shown.

The fate of unfair dismissal claims lodged subsequent to Seymour-Smith look very dicey indeed.

He gives no examples of what 'objective factors' he has in mind. It is hard to see how this will translate in practice. Indirect discrimination is, by its very nature, hidden and it is necessary to look at outcomes, such as are demonstrated by statistics.

STATISTICS

The AG states that you need both objective and numerical factors alike and statistics must be both adequate and significant. He did not believe the right statistics had been relied on in this case. He wanted to see both the percentages of men and women with less than two years employment at the time and, secondly, the percentages of men and women who were dismissed during the same period.

Only if the percentage of women dismissed was considerably greater than the corresponding percentage of men dismissed in relation to the percentage of women and men with less than two years employment can there, in principle, he said, be a question of indirect discrimination against women. What evidence will be required in any particular case, will remain a question of fact for determination by the national court.

JUSTIFICATION

More reassuringly, the AG affirms the Bilka-Kaufhaus test of objective justification which he considers to be settled law. Objective justification requires the measure to be necessary, appropriate and proportionate to the aim pursued and generalisations and abstract considerations of social policy cannot amount to justification. The then UK Government had failed to make out objective justification in Seymour-Smith he said.

It remains to be seen whether the European Court of Justice will follow, to the letter, the AG's opinion and how much of his comments will be reflected in the Judgment.

In the meantime the fate of unfair dismissal claims lodged subsequent to Seymour-Smith look dicey indeed. More hopeful is the prospect of obtaining unfair dismissal remedies for victims of sex discrimination with less than two years service.

Enabling legislation?

Clark v Novacold (1998) IRLR 420, Morse v Wiltshire (1998) IRLR 352, O'Neill v Symm (1998) IRLR 233

A man sustains an injury at work. He has a physically demanding job and, because of his injury, has to take several months off work. The doctors cannot predict when he will be able to return, but they think it unlikely that his condition will improve much over the next 12 months. In the light of this uncertain prognosis, his employers dismiss him.

Can the employee in this common enough situation argue that in dismissing him his employers are in breach of Section 5 (1) of the Disability Discrimination Act 1995? In a disappointing decision, the Employment Appeal Tribunal in Clark v Novacold Ltd , have, to all intents and purposes, given a resounding "no" to this question.

The issue facing the EAT in this case was the identity of the comparator. Section 5 (1) states that discrimination occurs where "for a reason which relates to the disabled person's disability, [the employer] treats him less favourably than he treats or would treat others to whom that reason does not or would not apply".

Mr Clark, disabled by reason of a back injury, argued that the treatment that he had received should be compared with the (hypothetical) treatment that would have been received by an employee who did not suffer from an injury and therefore did not have to take time off work. Novacold Ltd on the other hand argued that the correct comparator should be someone who was off work for a similar period of time, but for a non-disability related reason. The EAT decided that Novacold's view was correct.

> "I was dismissed because you failed to make necessary adjustments which would have enabled me to stay in useful employment."

As a result of this decision, it seems that all an employer has to show to defeat such a claim is that they do not distinguish between employees who take time off work for reasons relating to a disability, and employees who take the equivalent amount of time off work for a non-disability related cause. This is hardly a difficult task and therefore, as the law now stands, it will be virtually impossible for an employee in these circumstances to obtain protection under this part of the Act.

The Clark decision does however confirm that the Section 5(2) duty to make adjustments applies in a dismissal situation. According to the EAT, "I was dismissed because you failed to make necessary adjustments which would have enabled me to stay in useful employment" is a perfectly legitimate complaint.

By way of contrast, the decision of the EAT in Morse v Wiltshire County Council is more useful. Mr Morse was a road worker for Wiltshire County Council. He was injured in a road traffic accident which limited his ability to drive.

Following a re-organisation of his workplace, he was selected for redundancy by reason of his lack of flexibility in the jobs that he could do, and in particular his inability to drive. Backed by UNISON, he argued his case under both Section 5 (1) and Section 5 (2) of the DDA. Interestingly, in the light of Clark, his Section 5 (1) case failed on the issue of justification, and not comparators, it apparently being assumed that the comparator should be a person without the inability to drive, regardless of its cause: "the applicants selection was based on his lack of capability and that lack of capability was due to his disability. Thus, he has

been less favourably treated for a reason related to his disability, than others who did not have that disability."

However, the main issue before the EAT was the extent of the obligation on the employer to make reasonable adjustments. The IT had taken a superficial and subjective approach in finding against Mr Morse - "as to adjustments, it is hard to see what they could be. Nothing was suggested on the applicants behalf, and anything we could speculate upon would inevitably involve the respondents in considerable expense".

On appeal, the EAT concluded that this was not the correct approach. Instead they set out the "sequential" steps which a tribunal should follow in assessing the employers' duty to adjust: A tribunal must direct its mind to the specific provisions and requirements of Section 6 (3) (the various adjustments that might be made) and Section 6 (4) (the factors to be taken into account in determining if it is reasonable for an employer to have to make the adjustments). It is only once the tribunal has followed these specific steps that they can then turn to the issue of whether any failure to adjust can be objectively justified.

This is an encouraging decision, reflecting the stringent obligations on an employer to justify their behaviour objectively: it is not sufficient for them merely to behave "reasonably" if active and positive consideration has not been given to adjusting the workplace in order to accommodate the disabled employee in the various ways specified in the Act.

Less encouraging is the EAT decision in O'Neill v Symm & Co Ltd (previously discussed at LELR 13). In this case, the EAT reject the employee's appeal to conclude that in order to prove Section 5 (1) discrimination, the employer must be shown to have known of the disability in question. The fact that the employer thought that Ms O'Neill was suffering from a viral illness and did not know that she in fact had ME (on the facts of this case a "disability" within the meaning of the Act) was enough to defeat her claim.

It has to be doubted whether this is a correct decision. Nonetheless, as the law now stands, employees who are disabled and take the view that they are or may be at risk of being dismissed or subjected to other detriment, may have to consider expressly bringing the facts of their disability to their employers' attention to ensure that the employer cannot subsequently plead ignorance as a defence to a claim under the Act.

Both the Clark and O'Neill decisions are being appealed to the Court of Appeal.

When a review gains appeal

Adivihalli v Export Credits Guarantee Department, Appeal No. EAT/917/97, unreported

Where an Industrial Tribunal is considering a complaint of unfair dismissal involving an internal appeal process the Tribunal should have regard to the overall process of the termination of the contract of employment in deciding whether the dismissal was unfair. This cannot be decided simply on the basis of pigeon-holing the type of appeal (a review of the case or a re-hearing) to decide whether the appeal process corrected unfairness at an earlier stage.

This was an appeal against a decision of the Industrial Tribunal which unanimously dismissed Mr Adivihalli's complaint of unfair dismissal and of discrimination on racial grounds. He argued that the first stage decision to dismiss him was unfair, and this was not corrected by either of his appeals, the first to a senior manager and the second to the Civil Service Appeal Board (CSAB).

The IT decided that the initial decision to dismiss was unfair but the first appeal did correct the procedural defect of the first decision to dismiss. Even if it had not done so, the CSAB was an independent body and had conducted a full and fair rehearing and so would have corrected any flaw in procedure.

The appeal to the Employment Appeal Tribunal questioned whether the Industrial Tribunal were entitled, as a matter of law, to reach this conclusion. It was argued that the first stage appeal was more of a review, rather than a rehearing, of the previous decision and therefore the procedural defect could not be cured.

The CSAB proceedings also failed to cure the initial defect. There was a distinction between the two types of appellate process; whether it was (a) a rehearing, or (b) a review of what had already occurred, with further opportunities to make representations. A review was not capable of curing a procedural defect and therefore the Tribunal should have questioned whether there was a genuine rehearing.

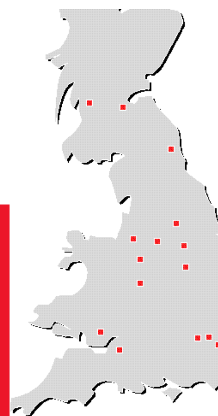
However, the EAT said that the time had come to reassert the need for IT's to have regard to the statutory language. The EAT referred to the case of Whitword & Co Plc v Mills [1998] ICR 776 where there was a review of a large number of authorities.

> The EAT said that the time had come to reassert the need for IT's to have regard to the statutory language.

What the present EAT took from Whitword decision was that where an employee has exercised a contractual right of appeal against dismissal the IT should have regard to the overall process of the termination of the contract of employment in deciding whether it was fair or not.

In some circumstances unfairness at the original stage may be corrected or cured as a result of what happens at the appeal process. Whether or not an appeal cures a procedural defect is not simply a matter to be determined by reference to the precise category into which an appeal process falls, ie. whether it is a review or a re-hearing. The EAT said that often it would be difficult to categorise an appeal process as being either a rehearing on one hand or a review on the other. There may be a mixture of the two.

Whether the procedural defect which had been identified by the IT was corrected by the appeal process was purely a question of fact and judgment for the tribunal looking at the overall process. It was not simply a question of deciding fairness or unfairness purely by categorising the type of appeal process.



THOMPSONS

HEAD OFFICE
CONGRESS HOUSE
TEL: 0171 637 9761

BIRMINGHAM
TEL: 0121 236 7944

BRISTOL
TEL: 0117 941 1606

CARDIFF
TEL: 0122 248 4136

EDINBURGH
TEL: 0131 225 4297

GLASGOW
TEL: 0141 221 8840

HARROW
TEL: 0181 864 8314

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TEL: 0181 554 2263

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TEL: 0151 227 2876

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TEL: 0161 832 5705

NEWCASTLE-UPON-TYNE
TEL: 0191 261 5341

NOTTINGHAM
TEL: 0115 958 4999

SHEFFIELD
TEL: 0114 270 1556

STOKE ON TRENT
TEL: 0178 220 1090

CONTRIBUTORS TO THIS MONTHS I

STEPHEN CAVALIER
NICOLA DANDRIDGE
BRONWEN JENKINS
WENDY LEYDON
VICTORIA PHILLIPS
MARY STACEY

EDITED BY **DUNCAN MILLIGAN**
DESIGNED BY **SARAH USHER**
PRINTED BY **TALISMAN PRINT SE**