Published by Thompsons Solicitors

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 28 Nov 1998

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Restricted reporting orders

Associated Newspapers Ltd v London Industrial Tribunal [1998] IRLR 569 (High Court)

The increase in the use of restricted reporting orders in sex discrimination cases in recent years is remarkable. In so many of the cases the orders have been sought by the employers and alleged harassers, and not by the victims of harassment whom the orders were originally designed to protect.

Motivated by concerns about the potentially damaging publicity that such cases can attract, applications by employers are now commonplace. However, following this decision applications by employers are now less likely to be successful.

> ..."in any case which involves allegations of sexual misconduct the tribunal may... make a restricted reporting order"

Rule 14 (1) of the 1993 Industrial Tribunals (Constitution and Rules of Procedure) Regulations provides that "in any case which involves allegations of sexual misconduct the tribunal may ...make a restricted reporting order." A restricted reporting order is defined as an order prohibiting the publication of "identifying matter" likely to lead to the identification of an individual as "a person affected by, or as the person making, the allegation."

In the Associated Newspapers Ltd case, involving an allegation of sexual misconduct by a Council official, the Tribunal granted an order, not only in respect of the alleged harasser, and another employee allegedly harassed at the same time, but also in respect of the employer, the Council's Chief Executive, a witness, and the complainant herself, even though she was not in fact seeking the protection of an order.

The High Court, on the application of a newspaper seeking to print details of the case, reversed the Tribunal's decision. They held that a Tribunal should not grant a "blanket" order covering all the main parties in the action.

Instead, they should consider each individual in respect of whom an order was being sought, person by person, and decide in relation to each whether they were a person affected by the allegation of sexual misconduct. "It is vital that the decision maker does consider that scope on an individual-by-individual basis. A blanket approach to such a prohibition is improper."

Despite the fact that the Regulations were originally designed to protect the victims of harassment, to try and ensure that the threat of embarrassing and intrusive reporting did not deter potential complainants, the High Court appear to endorse the granting of orders to cover an alleged harasser, as well as a complainant. However, they do not accept the argument that the employer should not be named simply because to reveal it would reveal the identity of the individuals involved in the case.

They reject this as irrational, in that it is the primary responsibility of the media to ensure that in publicising a case, the identity of the person with the benefit of the restricted reporting order is not revealed. Interestingly, the Court leave open the question of whether a limited company, as employer, could be "a person" affected by an allegation.

Although it can be doubted whether the protection of restricted reporting orders should extend beyond potential complainants to cover alleged harassers as well, the High Court's robust restriction on the use of these orders is welcome.

Doctors and the duty of care

Kapfunde v Abbey National and Daniel [1998] IRLR 583 (CA)

Does a doctor engaged by a company to carry out medical assessments on potential employees owe a duty of care to the person they are assessing? In a surprising decision, the Court of Appeal says no.

Mrs Kapfunde, was employed on a temporary contract by Abbey National and applied for a permanent post as a cashier. When she filled in her application form, she revealed details about her medical history including that she was a sickle cell anaemia sufferer which in the past had led her to being absent from work.

The company retained a general practitioner, Dr. Daniel who provided medical services including pre-employment assessments. Dr. Daniel's assessment was that Mrs Kapfunde was likely to have a higher than average level of absence. The company decided not to employ her.

She started a civil action for damages in the County Court against Abbey National and Dr. Daniel claiming negligence and consequently damages for the economic loss which she suffered as a result of not getting the job. She argued that the doctor owed her a duty of care in relation to the information she had provided concerning her sickness record. She argued that the doctor over-assessed the risk of her being off work due to illness related to sickle cell.

The doctor had failed to discharge her duty of care competently and, as a servant of Abbey National, they were vicariously liable for her negligence. The County Court judge dismissed the claim against both Defendants.

The case was appealed arguing that (1) Dr. Daniel did owe a duty of care because it was reasonably foreseeable that if the doctor negligently over-assessed the risk of her having a higher than average level of absence from work the company would still accept and act upon that assessment. As a result she would suffer economic loss and (2) in the circumstances Dr. Daniel did assume responsibility in a relationship which was of sufficient proximity to give rise to liability and (3) it was fair, just and reasonable in the circumstances for the court to impose a legal duty of care.

Paragraph 5.5 of the Code issued alongside the Disability Discrimination Act states that an employer can stipulate essential health requirements.

Regrettably the Court of Appeal dismissed the appeal. They agreed with the County Court Judge that the doctor did not owe a duty of care to Mrs Kapfunde when she carried out the assessment.

They emphasised that there was no duty of care because the fact that a persons actions were likely to cause damage to another if there was failure to take due care was not sufficient by itself to create that duty of care. In this instance, there is insufficient proximity between Mrs Kapfunde and the doctor. It was the employers to whom the doctor owed a duty of care.

Whilst this decision is of concern, cases such as these may now fall foul of the Disability Discrimination Act. This case arose before the act came into force.

Paragraph 5.5 of the Code issued alongside the Disability Discrimination Act states that an employer can stipulate essential health requirements. But the employer may need to justify doing so, and to show that it would not be reasonable for him to have to waive them in any individual case.

This means that an employer should always consider whether suitable adjustments can be made to facilitate the individual's employment.

Discrimination: who is protected?

Loughran and Kelly v Northern Ireland Housing Executive [1998] IRLR 593 (HL)

The House of Lords decision in Loughran and Kelly v Northern Ireland Housing Executive sets new boundaries for the scope of discrimination law. It may also raise the prospect of new legislation such as the National Minimum Wage and the Working Time Regulations protecting wider categories of workers.

The case was brought under the Fair Employment (Northern Ireland) Act which defines "employment" by reference to "a person employed under a contract of service or of a apprenticeship, or a contract personally to execute any work or labour". Similar provisions are contained in all UK discrimination statutes, the draft National Minimum Wage Regulations and the Working Time Regulations, although those provisions do not apply to workers operating as a profession or trade.

Mr Loughran, a sole practitioner solicitor, and Mrs Kelly, a partner in a larger firm of solicitors, were turned down for inclusion on a panel of solicitors maintained by the Housing Executive. They claimed that they had been discriminated against on grounds of their religious belief or political opinion.

The question to be determined was whether or not the definition of "employment" was wide enough to cover their situations whereby each would have been providing services to the Housing Executive, either as a sole practitioner, or through a firm.

The House of Lords had no difficulty in finding that Mr Loughran would have been "employed" for the purposes of the Fair Employment Act. However, they also found that Mrs Kelly could bring a claim in her own name, and her firm was probably also entitled to claim that it had been discriminated against.

It seems unlikely that under the National Minimum Wage and Working Time Regulations that self-employed, sole traders or partnerships would be protected.

The House of Lords reaches this conclusion by deciding that a "person" includes a partnership, so a partner was seeking to enter into a contract personally to execute work and was entitled to pursue her claim for discrimination.

In theory, therefore, a partnership or an individual partner, can bring a claim that it, or he or she, has been discriminated against. It is possible, but unlikely, that a company would be in the same position.

The difficulty here would be that the company would be the contracting party, but it is difficult logically to describe work as personally executed by a company itself.

The definition of a "worker" in the Working Time Regulations and in the draft National Minimum Wage Regulations is, in any event, slightly different. A worker means an "individual" who might work on any sort of contract whereby he or she, the individual, undertakes to do or perform personally any work or services for another party to the contract. The term "individual" has been interpreted to include, for example, companies.

However, the definition does not apply to a situation where the other contracting party is a client or customer of any profession or business undertaking carried on by the individual. It may be possible to argue that a partner in a firm would be a qualifying "individual", but, in cases analogous to Loughran, they would almost certainly be contracting with a client or customer.

It seems unlikely, therefore, that, under the National Minimum Wage Regulations and the Working Time Regulations, self-employed, sole traders or partnerships would be protected.. The case might, however, assist in, for example, the building industry where the sub-contracting workers may be forced to work through their own companies of which they are the only employees.

'Continuity knocks'

Can the employment relationship continue despite an apparent break in service?

Carrington v Harwich Dock Co Ltd [1998] IRLR 567 (EAT) and Clarke and Tokeley Ltd v Oakes [1998] IRLR 577 (EAT)

In two recently reported cases further guidance has been given over when an apparent break in service will be treated as such when the issue of continuity of employment is considered.

In Carrington V Harwich Dock Co Ltd the Employment Appeal Tribunal considered the application of section 212(1) of the Employment Rights Act 1996 to a break in service. That section provides:

"any week during the whole or part of which an employee's relations are governed by a contract of employment counts in computing the employee's period of employment."

Mr Carrington was employed by the company and had been for many years. To ensure that his pension would be calculated to take advantage of his highest earnings level, in agreement with the company, he tendered his resignation.

Thereafter he was able to draw his pension. The company undertook to re-engage him, though that re-engagement was said to be on the basis that he had no continuity of employment. In line with that undertaking Mr Carrington resigned on the Friday and started back to work the following Monday. Four months later the company dismissed him.

When his unfair dismissal claim was lodged the company took the view that he could not pursue the claim because he had less than 2 years' service. The Employment Tribunal took the view that the company's argument was right, he had broken his service and could not now claim unfair dismissal.

The Employment Tribunal took the view that the company's argument was right.

The tribunal considered themselves bound by the earlier decision in Roach V CSB (Moulds) Ltd [1991] IRLR 76 though that case is easily distinguished by the fact that there the employee , after leaving, worked for another employer for 11 days.

In Carrington, the EAT found that the wording of section 212 (1) was clear and that the employment obligations continued and there had been no break in service. The fact that new terms of employment had been signed by Mr Carrington which specifically stated that he was to regard himself as having no continuity of service was in the EAT's view of no effect, it being impossible for an individual to contract out of his/her rights as regards unfair dismissal. This must be right.

In Clarke & Tokeley Ltd t/a Spellbrook Ltd - V - Oakes the Court of Appeal considered the effect of paragraph 17(2) of Schedule 13 of the Employment Protection (Consolidation) Act 1978 (now found at section 218(2) of the Employment Rights Act 1996) where there had been a transfer of an undertaking.

The company to which Mr Oakes transferred argued that as he had been dismissed by an appointed liquidator prior to employment with them, there was a break in service which was fatal to his attempts to pursue a claim for unfair dismissal.

Mr Oakes worked for company B. Negotiations to sell Company B and its associated company had been entered into with C&T Ltd in late 1995. Whilst agreements were reached in principle, because Company B and its associated company were in financial difficulties, on 7th March 1996 both companies went into voluntary liquidation and a liquidator was appointed. On 14th March 1996 the liquidator dismissed all the staff including Mr Oakes.

At the request of receivers involved, Mr Oakes continued to go into the premises of company B and carried on his job. The business was still functioning and was subsequently sold as a going concern to C&T Ltd on 21st March.

Mr Oakes was then employed by C&T Ltd but was dismissed 9 days later. He presented a claim to the employment tribunal for unfair dismissal against C&T Ltd. They contested the claim on the basis that he had not had 2 years' service with them and, therefore, the tribunal had no jurisdiction to hear his case.

Mr Oakes did not seek to argue that his employment was transferred to C&T Ltd by reason of Regulation 5 of the TUPE Regulations 1981. Instead, he pursued his case on the basis that he had continuity of employment by operation of what is now Section 218(2) of the ERA 1996 which provides:

"If a trade or business or undertaking..... is transferred from one person to another -

the period of employment of an employee in the trade or business or undertaking at the time of transfer counts as a period of employment with the transferee, and

the change of employer does not break the continuity of the period of employment."

The Court of Appeal took the view that the ET and EAT had correctly interpreted the words at the time of transfer by looking at the transfer as a whole process rather than narrowly to state that it occurred when the so-called sale took place on the 21st March. Lord Justice Mummery said:

"A trade or a business will usually be a going concern of some complexity, giving rise to different considerations than [will] a simple transfer of ...property. The trade, business or undertaking may comprise ....property, stock-in-trade,...goodwill and work in progress, the benefit of existing contracts and the employees themselves. The completion of the transfer of these different elements of the trade, business or undertaking may occur at different times. Such a transfer is more in the nature of a process extending over time than an event timed to take place only at a particular moment..."

Thus the Court was prepared to hold that there were no disqualifying gaps of service and Mr Oakes had continuity allowing him to pursue his unfair dismissal claim. Although the facts were not the same, by way of contrast it is notable that the other employees who solely relied upon TUPE were apparently unsuccessful.

The clear lesson to be learnt must be not to overlook the value of section 218(2) to protect employees. In the right case it may be of greater assistance than TUPE which is, perhaps, the law that most would initially have considered the relevant tool to pursue the case.

360° Spin: National Minimum Wage

The National Minimum Wage Bill received Royal assent on 31st July 1998 and established the legislative frame work for the national minimum wage ("NMW"). The Government has now published draft Regulations to implement it. The Regulations, which are currently the subject of a public consultation, are expected to come into force on 1st April 1999.

New draft regulations

The rate of the NMW is set at £3.60 per hour. Workers under the age of 18 and certain apprentices are exempted from the NMW, and a lower rate of £3.20 is to apply to 18 to 21 year olds and workers receiving accredited training within the first six months of starting a new job.

The Regulations also set out how the hours covered by the NMW for particular workers are to be calculated. This is a difficult exercise where workers do not have normal working hours - for example, workers who are paid on a piece work or commission basis and workers who live on the employer's premises and/or who need to be available for 24 hours a day. This is achieved by defining three categories of work: "time" work, "output" work and "non hours" work.

The Regulations provide for which elements of the overall remuneration package are to be taken into account when determining whether or not the NMW has been paid. The starting point is a worker's gross pay per hour, from which deductions and payments are then subtracted (such as overtime or shift premia and some allowances) to arrive at the pay per hour for NMW purposes. That rate of pay is then

compared against the NMW rate for the hours worked in each "pay reference period".

The Regulations also require employers to provide workers with an NMW statement setting out details of the rate of the NMW, and require employers to keep records to show whether or not the NMW has been paid.

"Time" work, "output" work and "non-hours" work.

"Time" workers are employed and paid wholly, or partly, on a time basis. Such workers work a certain number of hours, which may or may not vary, for which they receive certain payments.

"Output" workers are employed and paid wholly on a piece work or commission basis. For example, they may be paid according to the number of products they make or the number or value of sales they make.

"Non-hours" workers are employed on some other basis that is not time based but is also not piece work or commission work - for example, some care workers and youth hostel workers.

Hours for which the NMW must be paid

For NMW purposes, the hours of work covered by the NMW for "time" work are those hours actually worked.

For "output" work, there is a "default" mechanism, of using the actual hours worked, which must in any event be recorded by the worker.

Where the worker's hours are not controlled by the employer, the worker and the employer can agree, at any stage before the start of the pay reference period, to use an alternative system. This includes working out the average daily number of hours the worker is likely to work, based on a "fair estimate" of weekly hours, which is then multiplied by the total number of days in the pay reference period. The total is the "ascertained" hours.

The rate of the NMW is set at £3.60 per hour and a lower rate of £3.20 is to apply to 18 - 21 year olds.

Where the worker has worked for longer than the "ascertained" hours, then the hours for which they must be paid at least the NMW rate are the "ascertained" hours. Where the worker has worked for less than the "ascertained" hours, the hours covered are the actual number of hours worked.

A similar approach is adopted for working out the number of hours of "non-hours" work covered by the NMW. There is a default mechanism of using actual hours, which workers and employees can again contract out of. The alternative mechanism is based on a "realistic" average of daily working hours which is then applied to each day on which the worker works to arrive at the "ascertained" hours.

The pay reference period

The pay reference period is the averaging period to be used in calculating the hours worked and how much the worker has been paid. It is set at a month (i.e a "calendar month"), except where workers are currently paid by reference to periods of shorter than a month (eg a week, a fortnight, four week) in which case, the pay reference period for NMW purposes is the worker's existing pay period.

Only pay which is received during the pay reference period, or during the next pay reference period, counts for determining whether or not the NMW has been paid. So, where an annual bonus is paid in December, 1/12 of the amount of the bonus can be taken into account in respect of December's pay and a further 1/12 can be taken into account in respect of November's pay. However, no element of the bonus could be taken into account in determining whether or not the NMW had been paid in October.

Pay to be taken into account in a pay reference period

The starting point is gross pay received by the worker (before any deduction such as tax and national insurance), but leaving out of account payments such as loans, pensions, court awards and redundancy payments.

This amount is then reduced by:
(a) any amount paid for work done in the previous pay reference period (this prevents double counting);
(b) any payments for time when the worker was absent from work;

(c) any overtime or shift premium;
(d)any "allowance";
(e) certain tips and gratuities;
(f) reimbursement of, for example, travel expenses;
(g) certain "deductions" ;
(h) certain payments made by the worker to the employer; and
(i) deductions for living accommodations in excess of specified amounts.

The figure arrived at is then divided by the number of hours covered by the NMW for a particular pay reference period to determine whether or not the NMW has been paid.

"Allowances", tips and gratuity and "deductions"

"Allowances" which represent "compensation" for "non standard" work done in "unusual" circumstances, which are not consolidated are deducted from pay. Other allowances are included.

Service charges, tips, gratuities or cover charge are deducted from gross pay provided that they are not paid through the payroll. If they are paid through the payroll, they will count towards NMW pay.

"Deductions" by the employer which are to be subtracted from gross pay are deductions where a worker has had to purchase, for example, tools or parts for her or his equipment needed for her or his work. Relevant "payments", which cover the same type of expenditure, exclude the same amounts for NMW purposes where the amounts are not actually deducted at source by the employer, but are actually paid subsequently to the employer by the worker.

There are, however, exceptional "deductions" and "payments by the worker" which do count towards NMW pay. These are deductions or payments:
(a) on account of a worker's misconduct;
(b) to recover repayment installments in respect of a loan or advance of wages; and
(c) to buy shares or securities;

In addition, payments by a worker to their employer for goods or services do count towards NMW pay unless the worker is required to make that purchase through their employment. For example, if a Bank required a worker to bank with it, any charge levied on the worker for the supply of banking services would not count for NMW purposes and would be deducted.

Right to an NMW statement and records to be kept by the employer

All workers will be entitled to receive an NMW statement from the employer. The statement is likely to be in prescribed form and will contain information about the level of the NMW and the worker's rights to access to the records kept by their employer.

The record keeping requirements are targeted on those workers at most risk of being paid less than the NMW. For workers who earn at least £12,000 gross per annum, in installments of at least £1,000 per month, employers will need to keep records that are sufficient to show that they are paying workers at least at the NMW rate.

For workers earning less than the threshold, employers will have to keep more detailed records to show how hours worked had been calculated and the elements of pay which have been taken into account.

In either case, in the event of dispute, the burden of proof is on the employer to show that at least the NMW has been paid for hours covered.

Enforcement of rights

The NMW Act provides for six criminal offences by employers: refusal or willful neglect to pay the NMW; failing to keep NMW records; keeping false records; producing false records; intentionally obstructing an Enforcement Officer and refusing to give information to an Enforcement Officer.

A worker who believes that she or he has not been paid at the NMW rate is entitled to present a claim to the Employment Tribunal for payment of the difference between the NMW rate for the hours covered and what they have actually been paid. The NMW Act also provides workers with a right not to be subjected to any detriment on the ground that they have either qualified for the NMW or sought to enforce their right to the NMW or the employer has been prosecuted for an offence under the NMW Act.

If an employer fails to provide a worker with an NMW statement, the worker can present a complaint to the Employment Tribunal asking for a declaration as to the terms of that statement. If the employer fails to allow access to records, the worker can also apply to the Tribunal, which can award a sum equal to 80 times the hourly amount of the NMW.

Calculating compensation

Heggie v Uniroyal Englebert Tyres Ltd 1998 IRLR 425 (EAT)

This case attempts to clarify the approach to unfair dismissal compensation and in what order the percentage reductions for contributory conduct and employer's payments are deducted when calculating the compensatory award. This can have an enormous impact on the level of damages awarded.

The relevant legislation is section 123 of Employment Rights Act 1996.

Mr Heggie was dismissed by his employers because of his level of absences. The Employment Tribunal found that in view of the level of Mr Heggie's absences, dismissal was not a sanction within the band of reasonable responses.

The Employment Appeal Tribunal accepted that the tribunal had applied the correct test and concluded their decision that Mr Heggie had been unfairly dismissed was also correct. The original tribunal, in assessing the level of compensation, decided that the percentage reduction for contributory conduct from the initial compensation figure should be made before the employers were given credit for payments made by them in relation to wages in lieu of notice.

Mr Heggie appealed against the decision. The order in which these deductions were made greatly reduced the final compensation figure. The EAT had to consider the case law which had developed on the subject.

This begins with the cases of UBAF Bank Limited v Davies 1978 IRLR 442 and Parker and Far Limited v Shelvey 1979 IRLR 434 which held that any reduction for contributory conduct should me made after the deduction of any excess payment made by the employers. This approval is more favourable to employees, as it means the reduction is made to the net figure.

However in the case of Clement-Clark International Limited v Manley 1979 ICR 74 the EAT took the alternative view that the order for deduction should be that any percentage deduction for contributory conduct should be made before the deduction of any excess payment made by the employers.

The subsequent cases of Derwent Coach Works v Kirby [1994] and Digital Equipment [1998] IRLR 134 (Court of Appeal - LELR issue 19) eventually came down in favour of the employer's interpretation in Clement-Clark.

The Heggie case gave the EAT the opportunity of reviewing all this confusing case law. It came to the conclusion that a reduction for inadequate consultation, or for contributory conduct should be made before any reduction in relation to any payments made by the employer. The EAT justified taking this line on the basis of the overriding consideration of justice and equity set out in section 123(1).

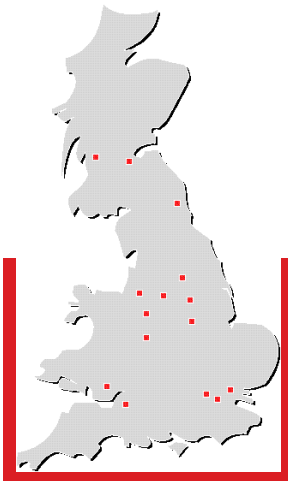
The EAT rejected the approach of Morrison J in Digital that the calculation should be carried out as in loss of earning cases with a percentage deduction only being made after the deduction of any excess payment.

The EAT accepted that to adopt the reasoning of Morrison J would mean that the employers were not getting full credit for the payment they made. They argued it was illogical that the employer who made payments should lose part of the benefit of such payments to the extent that the employee's conduct contributed to the dismissal.

Whilst it is difficult to argue with the view that the employer should obtain full credit for payments he makes, it does appear that by placing the reduction for contributory conduct before giving credit for such payments, the employer will be receiving proportionately higher credit for any payments he makes, and is arguably receiving more than full credit for such payments.

The employee's compensation will often be completely wiped out. Viewed from that perspective it is difficult to see how this approach meets the requirement of justice and equity in section 123(1).

Consideration of the order of deduction in contributory conduct cases by the Court of Appeal would hopefully bring an element of certainty to this whole area.



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PRINTED BY **TALISMAN PRINT SERVICES**