THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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Identifying the transfer

The sack first and ask questions later approach of many insolvency practioners is of great concern.

THOMPSONS SOLICITORS

Time limits in equality cases

Mills & Crown Prosecution Service v Marshall EAT IRLR 1998 494

The Employment Appeal Tribunal has upheld an Employment Tribunal's decision to allow a late claim under the Sex Discrimination Act 1975. The reason for the delay was that the Applicant and her legal advisers were reasonably unaware of her right to bring a claim until the law was "clarified" by the European Court of Justice decision in P v S [1996] IRLR 347.

Ms Marshall, a transsexual, was offered a post with the Crown Prosecution Service as a man. When she told the CPS that she intended to take up the position as a woman, the offer was withdrawn.

Ms Marshall did not complain of sex discrimination until the European Court of Justice held in P v S that the Equal Treatment Directive covered discrimination against a transsexual for reasons relating to a gender reassignment.

An Employment Tribunal exercised its discretion to allow a late claim on the basis that it was "just and equitable" to do so; the evidence in the case was well documented and the Respondents could not be prejudiced by a hearing.

The CPS argued on appeal that to allow a late claim would offend against the principle of legal certainty and relied heavily on the Court of Appeal's judgment to that effect in Biggs v Somerset County Council [1996] IRLR 203 CA. In that case Lord Justice Neill said "it would be contrary to the principle of legal certainty to allow past transactions to be re-opened and limitation periods to be circumvented because the existing law at the relevant time had not yet been explained or had not been fully understood".

Biggs concerned the question of whether part time workers could bring late claims of unfair dismissal after the House of Lords' decision in R v Secretary of State for Employment ex parte Equal Opportunities Commission [1994] IRLR 176 HL, declaring that the different qualifying periods for unfair dismissal protection for full and part time workers was unlawful.

In the Marshall case, the EAT neatly dodge the Biggs authority by distinguishing the statutory provisions to extend time in making complaints under the (now) Employment Rights Act 1996 for unfair dismissal and the Sex Discrimination Act 1975 for sex discrimination. The EAT say the words "just and equitable" in discrimination legislation giving power to extend time "could not be wider or more general...the discretion...is unfettered and may include a consideration of the date from which the complainant could reasonably have become aware of her right to present a worthwhile complaint".

A consideration of this aspect does not offend against the principle of legal certainty. The decision in Biggs was based upon a different statutory regime and did not bear on the question at issue.

Employment rights (dispute resolution) Act 1998

Some important changes have taken place or are scheduled to take place in the near future.

The following Sections came into force on 1 August 1998:

1. Section 1 - Change of name from Industrial Tribunals to Employment Tribunals.

2. Section 3 - Sit alone cases. The most important category is likely to be redundancy payment cases. However, Chairs have a discretion to appoint a full Tribunal and where there is extensive conflict of facts or assessments have to be made on issues such as reasonableness, parties will be able to argue that they would benefit from a full hearing. Examples would include breach of contract cases where the tribunal will need to assess whether the conduct amounted to gross misconduct, and redundancy cases where a determination of whether alternative employment was suitable or reasonable. It will be advisable to write to the tribunal beforehand asking for a full hearing so that wing members can be appointed in advance.

Gays abandoned: High Court u-turn on Royal Navy discrimination

R v Secretary of State for Defence Ex Parte Perkins. High Court. QBD. 13th July 1998 - reported in IDS Brief 619

As a result of the Armed Forces' policy banning homosexuality Mr Perkins was discharged from the Royal Navy in 1995 when it became known that he was gay. He sought judicial review of the Navy's decision to dismiss him and claimed that the policy was unlawful under Article 2.1 of the Equal Treatment Directive as it amounted to discrimination on grounds of sex.

The Secretary of State for Defence defended the action by arguing that the Directive did not cover discrimination based on sexual orientation.

Following the European Court of Justice decision in P v S & Another - that the Equal Treatment Directive protects transsexuals - the High Court in the case of Perkins took the view that the ECJ might rule in his favour.

The court made a reference to the European Court of Justice to determine the question of whether or not the Equal Treatment Directive extended to discrimination based on sexual orientation.

Following the ECJ judgment in Grant v South West Trains Ltd 1998 ICR 449 that a refusal to grant travel concessions to an employee's lesbian partner did not amount to sex discrimination under the Equal Pay Directive, the High Court reconvened to consider whether or not to withdraw the reference to the ECJ.

The question before the court was whether Grant was determinative of the issue whether sexual orientation discrimination was sex discrimination for the purposes of the Equal Treatment Directive.

It was argued for Mr Perkins that the ruling on that point in Grant was not binding and that the decision in Grant was relevant only to the Equal Pay Directive and not to the Equal Treatment Directive.

It was also argued that Grant was inconsistent with the decision in P v S & Another and that, as the ECJ was not bound by its previous decision, it may find differently on the issue of sexual orientation discrimination in the case of Perkins.

Lightman J rejected all the above arguments and concluded that he had no option but to withdraw the reference to the ECJ despite his concerns about the policy in question. The Judge commented that the future of the policy must be uncertain and indicated that a further challenge to the policy may be possible in judicial review proceedings once the Human Rights Bill becomes law.

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3. Section 4 hearings by Chair and just one other member

4. Section 6 - jurisdiction in cases about political fund contributions.

5. Section 7 and 8 - ACAS Arbitration scheme. Nothing will actually happen because the ACAS scheme has not yet been prepared and this is unlikely to happen before April 1999.

6. Sections 9 and 10 - Compromise agreements

7. Section 12 - Dismissal procedure Agreements

8. Section 14 - Unfair dismissal and Disability Discrimination Act claims enabling tribunals to make an additional order for compensation for disability discrimination and unfair dismissal claims, to match that of sex and race (c/f ERA Section 117 (6)) and the prohibition against double compen-sation which was also overlooked in the Disability Discrimination Act 1995.

<u>The following were implemented on 1 October 1998:</u>

Section 11 - Settlement of redundancy cases by Conciliation Officer.

<u>The following will come into force on 1 January 1999:</u>

Section 13 - compensation and internal appeal procedures. It is not clear whether 1st January 1999 will refer to the EDT, the date the tribunal assesses compensation or the date the employee failed to use the appeal procedure/the employer refused to permit him/her to. Hopefully the commencement order will provide clarity.

Setback for redundancy rights

In the disappointing Judgment in Frankling and Others v. BPS Public Sector Limited, the Employment Appeal Tribunal has ruled that entitlement to enhanced redundancy benefits under Section 46 of the Whitley Council Agreement does not transfer under TUPE. This means that, where Trusts and other Health Service employers contract out services into the private sector, employees who are subsequently made redundant by their new employer in the private sector cannot claim the benefit of the enhanced redundancy provisions contained in Section 46. The effects of the Judgment will be felt throughout the public sector where similar enhanced redundancy provisions apply.

WHITLEY COUNCIL

Section 46 of the Whitley Council Agreement provides for two types of benefit. First, there is the premature payment of pension benefits from the date of redundancy up until normal retirement age. Ordinarily, these benefits would not become payable until the employee reached normal retirement age.

Section 46 also provides for the doubling of years of pensionable service, subject to a maximum of 10 added years. Entitlement to those benefits arises where employees with more than five years' service are made redundant at age 50 or over.

Regulation 7 (1) of TUPE excludes from transfer liabilities under or in connection with the contract of employment relating to an occupational pension scheme. However, Regulation 7 (2), in restricting the scope of Regulation 7 (1), means that any provisions of an occupational pension scheme which do not relate to benefits for old age, invalidity or survivors are not to be treated as a part of that pension scheme. This means that rights which do not relate to benefits for old age, invalidity or survivors do transfer and become enforceable against the new employer.

THE CASE

Mrs Frankling and her three colleagues worked in the payroll department of the Eastbourne Hospitals NHS Trust. The payroll department was contracted-out to BPS Public Sector Limited with effect from 1 September 1996 and it was accepted by all concerned that TUPE applied.

BPS then moved its payroll business to Glasgow and Mrs Frankling and her colleagues, who were all aged 50 or over with more than five years' service, were made redundant. BPS refused to pay them the benefits provided for under Section 46 of the Whitley Council Agreement.

Mrs Frankling and her colleagues, supported by UNISON, presented claims to the Employment Tribunal claiming damages for breach of contract. They claimed that their contracts of employment entitled them to the benefits provided for under Section 46 and that, even if the benefits were payable from the NHS Pension Scheme, entitlement still transferred because of Regulation 7 (2) of TUPE.

TRIBUNAL DECISION

The Employment Tribunal dismissed their applications finding that Regulation 7 (2) did not apply because the benefits provided for by Section 46 were, in its view, related to benefit for old age, invalidity or survivors. Mrs Frankling and her colleagues appealed to the Employment Appeal Tribunal.

The EAT dismissed the appeals on two grounds. It adopted a two stage analysis involving, first, investigation of the nature of the right as against the Trust before the TUPE transfer, and, secondly, the proper characterisation of benefits under Section 46 and whether or not Regulation 7 (2) applied.

Section 46 specifically provides that its terms were to be implemented by statutory instrument. The relevant Regulations are the NHS Superannuation Scheme Regulations 1995 and the NHS (Compensation for Premature Retirement) Regulations 1981.

According to the EAT, the employer's duty, under the Superannuation and Compensation Regulations, is to provide the necessary funds to the pension scheme to make the relevant

payment to the employees. The pension scheme is then obliged to pay the benefits to the employees.

In other words, there is no contractual relationship between the employee and the employer for the payment of Section 46 benefit. Those benefits are not, therefore, rights or liabilities which arise under or in connection with the contract of employment and, quite apart from Regulation 7 of TUPE, do not transfer.

The Employment Appeal Tribunal then considered whether or not Section 46 benefits are within the scope of Regulation 7 (2) of TUPE. Mrs Frankling and her colleagues argued that entitlement to Section 46 benefits was triggered by a redundancy dismissal, and not by their age. As such, the benefits should not be treated as relating to old age, invalidity or survivors and should be covered by Regulation 7 (2).

Unfortunately, the EAT disagreed. It characterised Section 46 benefits as "benefits for old age" finding that the trigger event bringing about entitlement was irrelevant where the employees were effectively treated as having retired and their benefits were calculated by reference to age and years of service.

IMPLICATIONS

The decision is extremely disappointing and leaves a number of outstanding issues. In particular, as noted by the EAT, if benefits provided under Section 46 of Whitley are not covered by Regulation 7 (2), what type of benefits are? The answer may be that there is a restricted category of redundancy benefits payable in the civil service which might be within the scope of Regulation 7 (2), but this does seem an excessively restrictive interpretation of the way in which Regulation 7 (2) is intended to operate.

The trigger event giving rise to the entitlement is highly relevant in characterising the benefits. Mrs Frankling and her colleagues were made redundant. They did not retire.

WHY IT IS WRONG

We take issue with the EAT's finding that the fact that Section 46 benefits were to be implemented by statutory instrument meant that there was no corresponding contractual right to those benefits. There is no reason why entitlements under a statutory instrument should not co-exist with enforceable contractual rights and this is plainly the intention of the redundancy provisions contained in Section 45 and Section 46.

Indeed, the NHS Pension Agency's own advice is that Section 46 benefits are part of an employee's terms and conditions of employment.

At the same time, the Secretary of State's involvement has to be called into question. Even if the Employment Appeal Tribunal's analysis that Section 46 entitlements are founded exclusively in statutory instrument is correct, the Acquired Rights Directive imposes an obligation on member states to ensure that rights and obligations arising from a contract of employment, except rights to old age, invalidity or survivors benefits, transfer.

If our analysis is correct and Section 46 benefits do fall within the scope of Regulation 7 (2), then it appears that the Secretary of State may well have failed to fulfil his obligation to ensure that, after a TUPE transfer, employees are still entitled to benefits under Section 46, which they would have received if they had been made redundant before the transfer.

LOCAL GOVERNMENT

Similar provisions to these contained in Section 46 of the Whitley Agreement are to be found in local government and throughout the public sector. In local government, the position is complicated by the fact that entitlement to added years is only discretionary. However, the judgment will potentially apply to all such arrangements, particularly in relation to the characterisation of the payments as benefits for old age, which are therefore outside the scope of Regulation 7 (2) of TUPE.

WHAT HAPPENS NEXT?

The EAT recognised that the case may well go further. Mrs Frankling and UNISON are considering an appeal to the Court of Appeal.

In the meantime, where employees are made redundant following a contracting out exercise in the Health Service, or indeed throughout the public sector, they may wish to register an objection to any refusal to pay Section 46, or equivalent, benefits. Such employees should not sign any documents requiring than to waive any entitlements to bring future claims. This should protect their position pending the outcome of any possible appeal by Mrs Frankling and her colleagues.

RSI - dead or alive?

RSI Court cases are like buses, there either isn't one for ages or they arrive in a bunch. Recently there have been significant decisions from a County Court Judge in a test case involving Midland Bank workers, the High Court in a case brought by journalists against the Financial Times (FT) and the House of Lords delivered judgment in a case involving a secretary.

To understand the significance of the recent events, it is necessary to understand some of the background to the rows that surround RSI. The crucial issue has been the distinction between "pathological" RSI conditions and "diffuse" RSI conditions.

Pathological RSI conditions are those where the sufferer has physical evidence of their complaints: on examination a doctor can find lumps, bumps and swellings.

Diffuse RSI conditions are where the individual complains of pain and yet, on examination by a doctor, nothing physical can be found to be wrong. It is this second condition that is the most controversial - it is diffuse RSI that the insurance companies and employers would have everybody believe is purely psychological, "all in the mind", and nothing to do with work.

In general, assuming the facts are there, pathological RSI cases are succeeding. It is diffuse RSI that has been the problem.

In any case, the facts that a lawyer will look for include:

- how quickly the condition developed;
- the age of the individual;
- the system of work e.g. how fast did they work?
- were there breaks and warnings?
- was there a bonus system or targets?
- were there complaints?
- did anyone else also suffer?

The history of diffuse RSI legal action suggests that Judges are, naturally, suspicious of those who claim injury but have no physical proof.

The first glimmer of hope for diffuse RSI suffers came in an academic study of keyboard workers which found evidence of tissue damage through the use of vibrometers. This though was a very small study and two more years research is needed before any firm conclusions - that could possibly be relied on in a Court case - can be drawn.

In the case that reached the House of Lords, Ms Pickford sued her employers, ICI, having developed writer's cramp which the DSS have as prescribed disease A4. Whilst the DSS has accepted writer's cramp as a prescribed disease, Doctors argue about whether it is caused by trauma or physical injury or whether it is psychogenic - all in the mind.

In Ms Pickford's case, the trial Judge who first heard the case was faced by her doctors arguing that the condition was caused by long periods of typing without any break or rest. On the other side the foremost RSI sceptic, Lucinda Lucire, argued that Ms Pickford's complaints were an indication of 'conversion hysteria' and her condition was all in the mind. The first Judge didn't find that the condition was all in the mind but he then failed to go on to find that it was organic/genuine.

It was the first Judge's failure in the Pickford case to effectively decide anything about the medical evidence that were the grounds for the appeal to the Court of Appeal (and ultimately got it into the House of Lords).

In the Court of Appeal, two out of three Judges were sympathetic towards Ms Pickford with the leading Judge commenting, in considering the dispute on the lack of a physical diagnosis in the case that:

"Even as late as the 1970s .. there was a tendency among some medical men to say that if they could not find any organic evidence of the patient's complaints of pain, it must be due to hysteria .. with advances in medical knowledge and improved medical technology, this approach has been to a large extent discredited ... there must be some reason or explanation why the mind has such a powerful effect on a body as to cause pain and disfunction in the Plaintiff's hand such that it prevents her from doing her typing".

Effectively the Court of Appeal said that if the trial Judge did not find that they believed it was all in the mind, it must be the case that they accepted the doctor called for Ms Pickford and that her condition was genuine.

ICI appealed to the House of Lords.

In a majority decision (one of the four Law Lords disagreed), Ms Pickford lost. She effectively lost on technical grounds - the House of Lords considered that the Court of Appeal had overstepped the mark: the trial Judge was far better placed than the Court of Appeal to assess the evidence.

Some reports in the media after the House of Lords' ruling suggested that there was no need to warn typists of the risk of RSI unless they used a keyboard for more than 75% of their working time. This isn't correct. What the Lords actually said was that writer's cramp was not a common condition, was very rare in typists and it was not the practice in industry at that time to give a warning of a vague condition which wasn't easily identifiable and indeed to have given one might have been counter-productive.

There is more hope for RSI sufferers from the Banking Insurance and Finance Union backed case of Alexander and Others v Midland Bank Plc which was heard in May 1998 but in which Judgment wasn't delivered until Mid June. This involved diffuse RSI conditions and, unlike in Pickford, the Bank workers were not suffering from a prescribed disease. But Midland Bank conceded that in no case was the sufferer consciously exaggerating and the Judge found the pain suffered by each of the claimants was genuine.

The five people involved in the Midland Bank test cases all worked at a District Service Centre which processed cheques and vouchers from banks and shops, recording the transactions on customers' accounts. Each of the workers complained that working on a machine known as an encoder led to the development of an RSI condition.

The system of work operated was demanding: there were targets for each of the encoders; there was a system to monitor when they signed on and off at the beginning and end of their shift and registered breaks in their work; an original tea break of 15 minutes every 2 hours was reduced to 10 minutes; employees were encouraged to compete against their colleagues in teams and there were calls over an address system to encourage them to work faster.

This pressure was combined with a fear (that the Judge found to be genuine) of potential redundancy. The Judge considered that each of the women were "under a considerable physical and mental strain".

Midland Bank received recommendations by a University and by physiotherapists to make changes to the work process. The recommendations of these experts were ignored.

The trial Judge agreed with the claimants' doctor that they were suffering from regional fibro-myalgia.

A significant factor in the Judge's decision to accept that the complaints of the individuals were genuine was that to find otherwise he would had to have found that they were vulnerable to psychiatric or psychological conditions when in fact Midland Bank's own appraisal of them was that they were enthusiastic, committed, hardworking, co-operative people who enjoyed their work and were keen to work even after the onset of their aches and pains. The Judge concluded that: "Superficial though this assessment might be, there was not substantive evidence suggesting vulnerability".

In the FT case the dispute was about the introduction of a new computerised system to write, sub-edit, and ultimately print the paper: was it introduced with proper training? Were there adequate chairs? Did the journalists get breaks?

The Judge who heard the case made the point in his judgment that this was not a case about RSI - the point in issue was whether there had been any injury and if so what had caused it? The Judge found that there was no fault in the system of work operated by the FT and in any event the Plaintiffs' complaints were psychological.

All three cases show the challenges facing the diffuse RSI sufferer in bringing a personal injury claim. The decision in Pickford highlights the hurdles the individual has to clear and the importance of convincing the Judge that a condition is genuine.

Whilst the Midland Bank case suggests that diffuse cases can be won. But the demanding nature of the work system and the lack of vulnerability of the sufferers may make it a hard act to follow.

The FT Judgement was harsh but it proves, yet again in an RSI case, the importance of knowing all the medical history of a potential claimant and studying an employers' system of work in detail. You need to be sure that the system of work is unsafe and have good evidence of that.

One thing of which we can be sure: we haven't seen the end of RSI by any means.

Leaving employment - reason for giving resignation

Holland v Glendale Industrial Ltd [1998] ICR 493 Employment Appeal Tribunal

If an employee resigns from his job as a result of his employer's fundamental breaches of his contract, but gives a different reason for leaving, can the employee then claim constructive dismissal? No, says the Employment Appeal Tribunal.

To be able to claim constructive dismissal an employee should give a reason for leaving to his employer which is consistent with constructive dismissal. In doing so the EAT reaffirm existing case law including Norwest Holst Group Administration Ltd v Harrison [1984] ICR 668 and Walker v Josiah Wedgwood [1978] ICR 744.

Mr Holland was originally employed in a local authority parks department. He was parks foreman for a section of the Borough and was paid as a chargehand.

The parks department was contracted out and Mr Holland transferred retaining his status and extra pay. Then Glendale took over the contract and he transferred again.

Glendale were not given all the details about his employment or that he was, in practice, a chargehand. His pay was cut and a younger man given the job of chargehand.

A staff assessment gave a derogatory assessment of Mr Holland's ability and performance. Mr Holland resigned saying that he was fed up and was going to take early retirement. Mr Holland told the Employment Tribunal that his pride would not permit him to reveal the true reason for his resignation.

The tribunal found that the reason Mr Holland gave for leaving - that he intended to retire early - was a sham. They found that he left his job following repudiatory breaches of his contract and that he had not reaffirmed his contract.

The tribunal said that if the law requires the employee to show the real cause of his leaving, and that he in fact left for that reason, Mr Holland would have proved constructive dismissal. However, they went on to say that "the law also requires that the Applicant should make clear to his employer a reason for leaving which is consistent with constructive dismissal".

On behalf of Mr Holland it was argued that there was nothing in the doctrine of constructive dismissal which required an employee to assert why he is leaving. The question to be decided is one of causation - did the employee leave as a result of the employers' conduct within the meaning of the Employment Rights Act S95(1)(c).

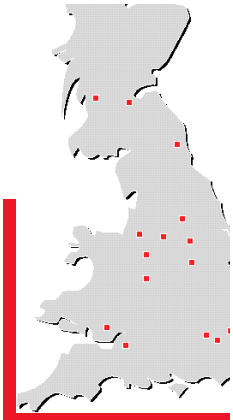
The section says:

"An employee is dismissed by his employer if (and .... only if) ..... (c) the employee terminates the contract .... (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct"

The EAT's view was that S95(1)(c) should be considered in the light of the ordinary principles of contract law: where one party to a contract repudiates it, and the other party wants to rely on the repudiation, the latter must make clear by words and/or conduct that the repudiation is accepted.

In Mr Holland's case his employer's also appealed on the grounds that no reasonable tribunal acting reasonably could have concluded that Glendale were in breach of the relationship of trust and confidence between employer and employee. The EAT did not accept that the tribunal was wrong and went on to say that it was not necessary for an employee to establish that the employer had been guilty of deliberate actions intended to destroy the employment relation. It is enough if their conduct was likely to destroy or seriously damage the relationship.

Constructive dismissal cases are notoriously difficult for employees to prove. This decision of the EAT does not change that. Those advising employees should make sure that if a worker is intent on resigning and claiming constructive dismissal they should make clear, preferably in writing, the real reason for the resignation is in response to the employer's conduct.



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