Published by Thompsons Solicitors.

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 17 DECEMBER 1997

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Ombudsman Challenges Lower Earnings Limit

"The implications of the Shillcock decision could be enormous."

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Tribunals can demand exchange of statements

Eurobell (Holdings) Plc v Barker and another (Times Law Reports 12/11/97)

The Employment Appeal Tribunal has ruled that Industrial Tribunals can order the exchange of witness statements before an IT hearing. An IT can also order that neither side can call a witness whose statement has not been exchanged beforehand, except with leave of the tribunal.

This is a very significant decision which will have a major impact on case preparation. We expect that tribunals will now increasingly order written witness statements to be exchanged before a hearing and representatives should be prepared.

Compulsory exchange of witness statements before a hearing has been a regular feature of High and County Court proceedings for some time now. It has generally been thought that although prepared and exchanged before a tribunal hearing, ITs had no power to instruct this to happen.

In 1994 the then President of Industrial Tribunals issued a practice direction mildly suggesting statements might be exchanged before a hearing and confirming that they could be read aloud at the hearing itself. This seemed to indicate a voluntary nature to the process.

But the EAT has ruled that part of the IT's general power to regulate its own procedure and to run the hearing as it thinks appropriate to clarify the issues and act fairly, includes the power to order that witness statements be exchanged. The sanction to enforce the procedure is to say that no witnesses can be called whose statements have not previously been exchanged.

The practice will certainly be easier for tribunals, particularly in complex discrimination and TUPE cases. But it will have the effect of making tribunals more legalistic and formal. It will also increase the preparation work and burden on Industrial Tribunal representatives on both sides.

TUPE: what next?

The Government is considering amendments to the Acquired Rights Directive. In *Transfer Rights: TUPE in Perspective*, the Institute of Employment Rights encourages the UK Government to clarify and strengthen the rights of workers faced with transfer of employment.

"The future attitude of a Labour Government towards TUPE is more positive for unions and employees, but perhaps less predictable", said Stephen Cavalier the report's author and head of Thompsons Employment Rights Unit.

"The move by Labour to award public contracts on the basis of best value rather than lowest bidder is welcome and will go a long way towards changing the cost-cutting culture of the past decade. Unions will need to be vigilant, however, and continue to campaign for improved rights for transferred workers."

The background to the paper is the marked shift in the last decade in employment from the public to the private sector. Under successive Tory administrations industries were privatised, decentralised, fragmented, market-tested, contracted out, outsourced and transferred.

Flexibility and adaptability replaced job security with the clear emphasis of Government policy was on cutting spending and developing a low cost labour market.

In that hostile climate the Acquired Rights Directive 1977 offered workers one of the few protections.

The directive's aim was to "provide for the protection of employees in the event of a change of employer, in particular to ensure that their rights are safeguarded". When the TUPE regulations were introduced into domestic law in 1981 the Tory Government said they did not cover public sector contracting out. In a recent court development the Labour Government accepted the Conservatives had failed to properly implement the directive and that the TUPE regulations failed to offer the protection to workers envisaged by the directive.

The Labour Government is now reviewing the operation of the TUPE regulations and are consulting about proposed amendments. Transfer Rights: TUPE in perspective, reviews the background to both TUPE and the original directive.

Stephen Cavalier explains how the courts have interpreted the directive and regulations and considers the political thinking behind the proposal for a revised directive. This is a clear and up to date guide to a complex area of the law set in its political context by an acknowledged expert in the field. Transfer Rights: TUPE in perspective, is available from the Institute of Employment Rights, 160 Falcon Road, London SW11 2LN. £8 to trade unions, £30 to others.

Age discrimination can be breach of contract

Secretary of state for Scotland v Taylor [1997] IRLR 608

An Equal Opportunities Policy outlawing discrimination is contractually binding the Employment Appeal Tribunal (Scotland) has decided. This means that discrimination on grounds of age, although not statutorily unlawful, would amount to a breach of contract.

Mr Taylor was a prison officer in Scotland. On the 1 April 1992, his employers issued a circular setting out an equal opportunities policy. This included an undertaking to offer opportunities on an equal basis "regardless of gender, race, religion sexual preference, disability or age."

The Scottish Prison Service introduced changes to its retirement policy under which the normal retiring age was set at 55 to achieve a younger workforce. Mr Taylor was dismissed when he reached the age of 55.

The Industrial Tribunal decided that this was a breach of his employment contract which outlawed age discrimination and the specific reason for the dismissal was to achieve a younger workforce.

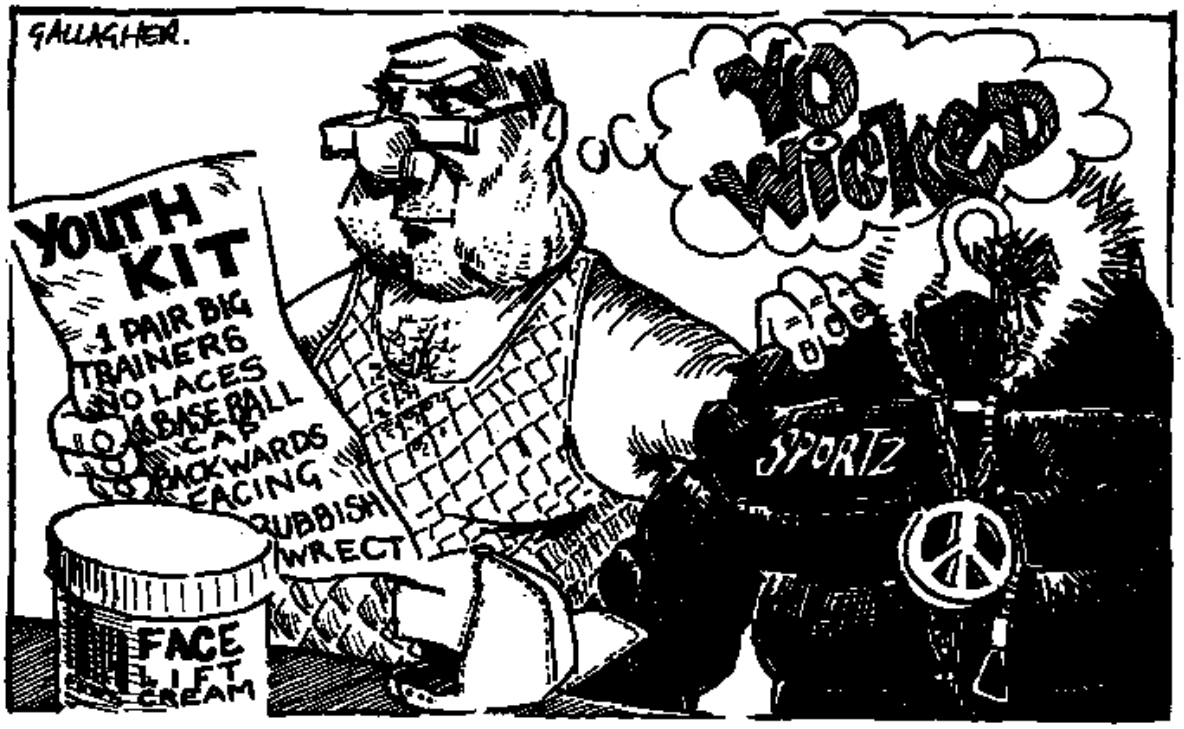
The Scottish Prison Service appealed. Whilst the EAT had no difficulty in agreeing with the Industrial Tribunal that the Equal Opportunities Policy was contractual – and as such part of the contractual rights incorporated into the contract – they rejected the employer's argument that the equal opportunities policy was only a mission statement. It was more than that.

However, the EAT found the Tribunal was wrong in finding that dismissal at aged 55 was dismissal on the grounds of age in breach of contract because the Prison Service sought to replace him with a younger person.

The EAT reasoned that the parties would not have contemplated the provision relating to discrimination on grounds of age would apply once retirement age had been passed, and employment was entirely discretionary after retirement age.

Age and retirement are inextricably intertwined. The employee's protection in respect of age discrimination subsisted in the contract only so long as he was working within the currency of the contract up to normal retirement age.

Nonetheless, this decision may have widespread implications. Many equal opportunities policies prohibit discrimination on a basis far wider than the statutory protection for sex, race and disability. This would lead to grounds for claiming breach of contract if employees are denied contractual benefits or treated less favourably because of, for example, sexual preference or age.



Disability D

The Disability Discrimination Act 1995, the employment parts of which came into force on 2 December 1996, is just over a year old. About 1000 Industrial Tribunal claims have been lodged, and of the 23 decisions issued of which we are aware, only eight have been successful. Can any conclusions be drawn? We review some of the cases below.

Definition of Disability

In deciding who is disabled within the meaning of the Act, there have been some positive IT decisions. Interestingly most of the decisions so far have concerned people with physical as opposed to mental disabilities. In **Greenwood v United Tiles Limited (1101067/97/C)**, the applicant, who suffered from diabetes, was held to be disabled; in **O' Neil v Symm & Company Limited (2700054/97)** it was accepted that ME or Chronic Fatigue Syndrome was a disability, as was epilepsy in **Holmes v Whittingham & Porter (1802 799/97)**.

Howden v Capital Copiers (Edinburgh) Limited (400005/97) is a useful case. The applicant suffered from abdominal pains for which no exact diagnosis had been supplied by doctors. Nonetheless the Tribunal concluded that despite the lack of diagnosis he was as a matter of fact disabled under the Act.

The only successful application for a person with a mental disability that we are aware of is **Walton v L I Group Limited (1600562/97)**, where the applicant had learning difficulties. The IT reached a conclusion that he was disabled without hearing the applicant's evidence, and without having access to any medical evidence, but simply based on the evidence of the applicant's parents and the fact that he was in receipt of Disability Living Allowance.

However, not producing any medical evidence can be dangerous. In **Rowley v Walkers Nonesuch Limited (2900173/97)**, the claim was unsuccessful where the applicant suffered from a back injury.

Although Ms Rowley had been off work for seven months at the time of her dismissal, the IT's conclusion was that there was no evidence to suggest that her physical impairment had a substantial and long term adverse affect on her: "The employers in late 1996 could not predict the future, but at that time we would not say that the condition of which we have heard came within that definition."

Similarly in **Hopkins v ERF Manchester Limited (2400863/97)** the IT specifically referred to the lack of medical reports available to them in reaching the conclusion that the applicant's rheumatoid arthritis did not render him disabled under the Act. However, this decision is probably wrong in that Mr Hopkins' arthritis was undoubtedly a progressive condition, so automatically qualifying him as disabled.

Discrimination

In relation to findings of discrimination, **Fozard v Greater Manchester Police Authority (2401143/97)** is useful even though ultimately the claim was unsuccessful. Ms Fozard suffered from learning difficulties which affected her ability to spell. She applied for a word processing job but was not given an interview on the basis that her application form contained three spelling mistakes. The company argued that they had not known of the applicant's disability when rejecting her application. The Tribunal concluded that their lack of knowledge was irrelevant: "It is not necessary for the respondents to know that their reason for rejection related to the disability provided that the applicant can show that it did so [relate] in fact." This clearly is the correct legal conclusion under section 5 of the Act which, unlike Section 6, contains no requirement of the knowledge of the disability on the part of the respondent.

Interestingly most of the decisions so far have concerned people with physical as opposed to mental disabilities.

The decision in **Hardy v Gower Furniture Limited (1802093/97)** contains a straightforward finding of discrimination where the applicant was selected for redundancy by reason of his sickness absence, having been absent from work for over a year. The tribunal found that there was no genuine redundancy, and that redundancy was simply being used as an excuse to dismiss him.

;crimination

Reasonable Adjustments

Tarling v Wisdom Toothbrushes Limited (1500148/97) is one of the few successful cases where the employer was held liable under the Act for a failure to adjust under Section 6. Mrs Tarling was dismissed due to her failure to meet production targets.

She suffered from a club foot which caused her pain and discomfort at work where she was required to stand for long periods at a time. The company sought advice regarding suitable chairs for her, and were told that she might be better able to do her job using a "Grahl" chair costing around £1000.

Instead of following this advice they simply dismissed her. The basis of the IT's finding of discrimination was that by not following the advice sought, they failed to make a reasonable adjustment.

In **Williams v Channel 5 Engineering Services (2302136/97)** the applicant, who was profoundly deaf, applied for a job as a television tuner. To apply he had to undergo a three day training course.

He required special adjustments to be made to the procedures to enable him to complete the course. This caused delays so that by the time he had completed the course, there was no longer a need for tuners in the area.

The company defended the case on the basis that they had adjusted the course to his requirements within a reasonable time. The IT disagreed, finding they had discriminated.

The delay was caused by their not having in place adequate systems to identify and respond to a need to adjust. "The whole tenor of the Act read with the Code of Practice is that employers should avoid discrimination and plan ahead by considering the needs of possible future disabled employees."

Sickness Absence

A number of the decisions concern dismissals for sickness absence, with the employers giving as the reason for dismissal the sickness absence as opposed to the disability. Contrary to the O' Neil decision (reported LELR issue 13), in **Clark v Novacold (18901661/97)** the IT concluded that there should be no distinction between the two, and dismissal for sickness absence does in fact relate to the disability and accordingly is prima facie unlawful.

The question of justification is clearly going to play a major part in these cases. In **Samuels v Wesleyan Assurance Society, (2100703/97)** the IT found that it followed from the finding of unfair dismissal, that the employer could not justify the discrimination under the Act.

In **O'Dea v Bonart Limited (1700168/97)** the claim concerned the threatened withholding of discretionary sick pay. Mr O'Dea had taken substantial time off work by reason of his disability, and his employers wrote to him saying that any further sick pay would only be paid at the management's discretion.

In rejecting Mr O'Dea's argument that this letter amounted to discrimination under the Act, the IT found that the treatment was justified in that it was "a proper exercise of the respondent's discretion having regard to the amount of sick pay the applicant had received over the years". This decision suggests that the Act may be interpreted by IT's as not imposing any obligations on employers to pay additional sick pay.

Given that so few of the decisions have been successful, it is difficult to reach conclusions about likely levels of compensation.

Compensation

Given that so few of the decisions have been successful, it is difficult to reach conclusions about likely levels of compensation. Mrs Tarling was awarded £1,200 for injury to feelings, Mr Howden was awarded £1,000 and Mr Holmes £4250 even though as a result of his dismissal he had to be admitted to hospital with depression: all dissapointingly low awards in the circumstances.

Looking Forward

On a more positive note, the Labour Government has announced that at Disability Rights Commission, similar to the EOC and the CRE, is to be established within the next eighteen months. In addition, a task force is to be set up to look at ways of strengthening the Act, and is likely to be considering the Act's exclusion of small employers with less than twenty employees. It has been estimated that this exclusion currently affects some 17% of the workforce.

Changing Hours: The Limits of Flexibility

SmithKline Beecham plc v Johnston, EAT/559/96 (7 February 1997)
National Semiconductor (UK) Limited v Church, EAT/252/97 (Scotland) (1July 1997)

Hussman Manufacturing Limited v Weir, EAT/309/97 (Scotland) (30 July 1997))
IDS Brief 599, October 1997

The current debate on employment law centres on "flexibility" versus "regulation". This can be stylised as the American unregulated model as against the social protection laws of the European Union.

There are those who advocate a "third way", notably the former US Labour Secretary Robert Reich who advocates managed change in working conditions in return for greater job security, an approach which has its attractions for the UK Labour government.

The greatest legal obstacle in the face of this approach in UK employment law is the contract of employment. The contract is inherently inflexible.

It is presented as an agreement between the employer and the individual employee which can only be changed by mutual agreement. It does not evolve with changed circumstances.

If agreement cannot be reached, the only legally effective way that the employer can insist on change is by dismissal of the workforce with an offer to employ on the new terms. This is a confrontational approach, not likely to promote industrial harmony, damaging for the employees and leaves the employer open to Industrial Tribunal claims.

The greatest legal obstacle in the face of this approach in UK employment law is the contract of employment. The contract is inherently inflexible.

Some employers try to allow themselves the right to make unilateral changes to contracts. They do this by including in the contract a mechanism for making changes.

In some circumstances this may succeed, for example the right to terminate a bonus scheme in Airlie v Edinburgh DC [1996] IRLR 516(EAT). The cases considered in this article concern clauses where employers tried to give themselves the right to make changes to hours of work.

Increased Hours

In one case (SmithKline Beecham) the contracts contained a clause allowing a change to a "continental shift system" and required employees to be "flexible across all shifts" and stated that "should production requirements change you will be expected to work any pattern needed to meet those requirements." The continental shift system was introduced leading to a working week of 43 hours.

The employers unilaterally introduced a new system in 1995 which involved a reduction to a 40 hour week. The employees did not agree.

The Employment Appeal Tribunal said that the "flexibility clause" allowed the employer to organise the working hours as it saw fit, but that did not entitle it to vary the number of hours constituting the normal working week, which would have the effect of reducing basic pay. The employee was entitled to a basic weekly wage based on a fixed number of hours and the flexibility clause did not override that contractual right.

Decreased Hours

In National Semiconductors the employers reorganised the workforce so that their hours increased

from 25 to 42 per week, and changed from working at weekends to working throughout the week. The employees rejected this change and resigned.

The contract of employment said "production requirements may change from time to time and it is a condition of employment that you should be able, with due notice, to change to other shifts/positions."

The EAT in Scotland decided that this allowed a change in the time of shifts, but not an extension of hours. The EAT considered that an employer is only entitled unilaterally to increase working hours if there is an express term in the contract permitting him to do so.

The Message

The message from the two cases – one concerning a reduction in hours, the other an increase – is clear: an employer will only be able to make a unilateral change in the number of hours worked if the contract expressly permits him to do so. Clauses allowing variations in hours will not be enough – they permit a reorganisation of existing hours, not an increase or decrease.

The position may be contrasted with a case where the terms of a collective agreement allowed the employers unilaterally to move an employee from one shift to another (Hussman). The EAT in Scotland said that as the contract permitted this change, the employee could not claim that the consequent reduction in pay through loss of unsocial hours payments amounted to an unlawful deduction from wages.

Discrimination and Reasonableness

Even where there is an express clause it may be discriminatory if it has a disproportionately adverse impact on women who cannot comply for child-care reasons (see for comparison Meade-Hill v British Council. A flexibility clause may also be subject to an obligation on the employer to act reasonably, as with a mobility clause.

These cases illustrate the uncertain and unsatisfactory position where an employer attempts to draft a contract allowing for future changes. It is quite right that the Tribunals should restrict employers from adopting contracts which allow them unilaterally to to re-write major terms such as hours or pay. The proper approach for securing change to meet changed circumstances is through consultation and negotiation. This in turn is best achieved at collective level, rather than seeking the agreement of each individual employee. Recognition and collective bargaining with trade unions is the most appropriate method of securing flexibility whilst protecting the interests of the workforce.

Automatic for the Workers

Senior Heat Treatment Ltd v Bell (1997) IRLR 614

At the heart of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) is the automatic transfer of staff to the new employer. This is usually the outcome which the majority of employees would prefer, but not always.

Employees who do not wish to transfer have very little option. If they object to the transfer of their employment they are treated as though they have resigned. They cannot claim unfair dismissal or a redundancy payment.

It is possible to reach agreements with employers which enable the employees to leave and receive a redundancy payment, but the Senior Heat Treatment case is an example of where the employers got it wrong. Employees were given the option of (a) redeployment with the existing employer (Lucas Bryce), (b) transfer under TUPE to the new employer (Senior Heat Treatment), or (c) "opting out" of the transfer and receiving a redundancy payment.

Employees who accepted option (c) and received a redundancy payment were then offered jobs with Senior Heat Treatment, which they started without any gap in service. They were dismissed by Senior Heat Treatment a few months later. The Industrial Tribunal said that they were covered by TUPE, that they had continuity of service through the transfer to Senior Heat Treatment and that they were entitled to redundancy payments based upon their total length of service with the two companies.

The Employment Appeal Tribunal upheld the Industrial Tribunal decision. The actions of the employees in "opting out" did not amount to an objection which would be counted as a resignation.

At the time the employees exercised the option, Lucas Bryce knew that the employees had accepted jobs with Senior. In those circumstances, "opting out" could not amount to an objection to transferring to Senior.

This is a sensible interpretation. The employees had no principled objection to transferring: they did in fact take up employment with Senior. This more pragmatic approach is preferable to the approach in Hay v George Hanson (see issue 3) where the Scottish EAT took a very broad view of what amounted to an objection and, in the process, deprived the employee of all rights. An employee should only lose the protection of automatic transfer when she or he unequivocally objects to taking up employment with the new employer.

This left the issue of the redundancy payment. The employees had already received a payment when they left the service of Lucas Bryce. Did this prevent them claiming a redundancy payment based on their accumulated service with the two companies? No it did not.

The reason is that there was no redundancy when their employment with Lucas Bryce ended: their jobs transferred under TUPE. This meant that the payment they received was not a statutory redundancy payment and therefore did not break their continuity of service when calculating their redundancy entitlement with Senior. The employees were entitled to the full redundancy payment from Senior and the so-called "redundancy payment" from Lucas Bryce could not be set off against this.

In this case, Senior were looking to take on the benefit of the employees and their experience without the burden of accumulated redundancy rights. They were not able to do so, nor were they able to take the benefit of the payment made by Lucas Bryce.

Employers will not be able to circumvent TUPE in this way and will only be able to avoid the transfer of rights and liabilities where dismissals prior to the transfer are for economic, technical and organisational reasons. In other words, the adjustment of liability between the old and the new employer is a matter for any contractual arrangements between the two employers.

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DESIGNED BY DW DESIGN, LONDON
PRINTED BY TALISMAN PRINT SERVICES, RA