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Unreasonable behavior not necessarily discrimination

"What is less favourable treatment?"

Disability and discrimination??

Ridley v Severn NHS Trust - unreported 21.1.98

Although an employer may act reasonably in accordance with the Employment Rights Act in dismissing an employee, the Disability Discrimination Act imposes much stricter duties on employers. The tribunal drew a distinction between the more stringent duties imposed on the employer by the Disability Discrimination Act compared to the broader concept of reasonableness under Section 98 (4) of the Employment Rights Act.

The case is an important reminder of the operation of the Disability Discrimination Act and how it can be used to good effect to protect the interests of employees.

Mrs Ridley worked as a Health Visitor for Severn NHS Trust from 1974 until in March 1995 when she injured her leg and was unable to return to work as a Health Visitor. She was absent from work from July 1995 until the Trust initiated discussions about her continued employment.

Mrs Ridley understood her only option was ill health retirement but an application for an ill health pension was unsuccessful. She contacted her MSF Representative who then endeavoured to get her redeployed with pay protection. Due to her long service Mrs Ridley would receive an extra five years pensionable service if she remained in post at full pay until age 60.

The Trust placed her on the Redeployment List, carried out a skills assessment and circulated her CV. Mrs Ridley asked them to consider using her extensive experience as a Health Visitor allowing her to undertake project work or other support services for Health Visitors but this was rejected.

Her employment situation was reviewed in October 1996 and she was given notice that her contract would terminate on the 23 January 1997. She appealed against dismissal. The appeal was heard on the 6 January 1997 and was unsuccessful. She was 58 years old at the time.

During her notice period the employment provisions of the Disability Discrimination Act came into effect and part of her appeal was that the Trust had failed to comply with the Act. Mrs Ridley felt the Trust had not tried hard enough to redeploy her and during her notice period heard on the grapevine of a job as a Receptionist at the Health Centre where she had previously worked.

She asked if she could be considered for this job prior to her appeal against dismissal but the Trust went ahead although they indicated that if she applied for the post she would be interviewed without competition. The Trust's Occupational Health department agreed that she was fit to do the post.

Mrs Ridley was rejected for somewhat vague reasons and brought a claim for unfair dismissal and disability discrimination. The Tribunal found that Mrs Ridley had been fairly dismissed.

The tribunal did, however, accept that the Trust had not taken any further action during the notice periods. It was critical of the fact that the Trust put the onus on Mrs Ridley to apply for suitable jobs from the Vacancy Bulletin instead of the large Personnel Department actively suggesting alternatives.

However they found this in itself was not sufficient to make the dismissal unfair on the grounds of capability as they had made sufficient enquiries into Mrs Ridley's wishes and medical condition. The Tribunal also considered that the length of time Mrs Ridley had been off sick - 16 months - was also important.

The Trust were found to have discriminated against Mrs Ridley for a reason related to her disability as they failed to comply with a Section 6 duty to make reasonable adjustments when she was rejected for the Receptionist post. The Tribunal found that the reasons for refusing Mrs Ridley the Receptionist post were not substantial and may have been remedied by training or some other adjustment and therefore they failed in their Section 6 duty.

The tribunal rejected the argument that the two Redeployment Policies operated by the Respondents offering pay protection on redundancy redeployment but not on sickness redeployment were also discriminatory for reasons related to disability.

Signing up to the Social Chapter

EC Council Directives 97/74/EC and 97/75/EC

Labour entered government committed to "signing up" to the Social Chapter. This involves participation in discussions on new Directives, such as the burden of proof in discrimination cases and the Part time Workers agreement. It also involves adopting Directives which previously did not extent to the UK.

The two Directives in this category are the European Works Councils Directive (94/45/EC) and the Parental Leave Directive (96/24/EC). The European Union has now adopted two Directives which extend the Works Councils and Parental Leave Directive to the United Kingdom.

These two Directives were adopted on 15 December 1997. They must be implemented in the UK by 15 December 1999.

The extension of the Parental Leave Agreement to the UK is straightforward. There are no modifications necessary to the agreement: merely the provision confirming that it now extends to the UK.

The position regarding the Works Council Directive is slightly more complicated.

The extension of the Directive to the UK means that employees based in the UK will now be counted when determining whether groups of companies meet the threshold requirements of the Directive. The Directive applies to groups of undertakings with at least 1,000 employees within the Member States, at least two group undertakings of different Member States and at least two group undertakings with at least 150 employees in two Member States.

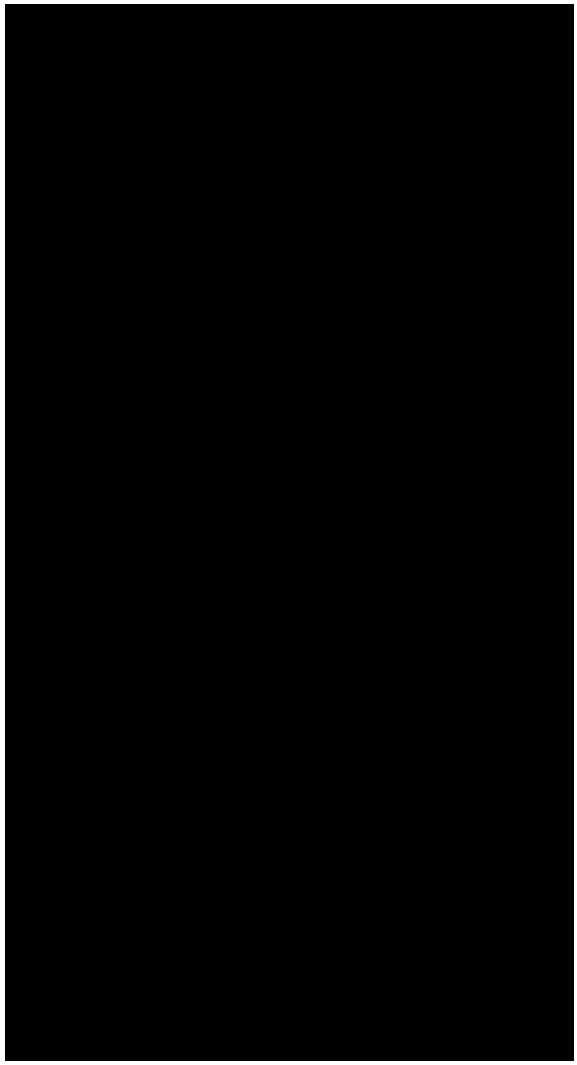
Under the original directive, groups of companies could satisfy the requirements of the Directive by reaching agreements, covering their entire workforce, providing for transnational information and consultation of employees. This only applied to agreements concluded before 22 September 1996.

There is now a new deadline for groups of companies which are now covered by the Directive only because of the extension to the United Kingdom. These groups of companies have until 15 December 1999 to reach agreements with employee representatives covering the entire workforce, providing for transnational information and consultation of employees.

Many UK based groups of companies have already entered appropriate agreements covering the whole of the European workforce, including the United Kingdom. The extension of the full provisions of the Directive to the UK and this further deadline is likely to mean that discussions will now take place between those groups of companies not previously covered who will see the advantages of reaching a voluntary agreement rather than strict compliance with the Directive.

The other technical change introduced by the new Directive is to increase the number of members of the special negotiating body to a maximum of 18, to allow for the fact that the UK is included.

The Directive reiterates that it may be implemented by collective agreements, rather than legislation, although this is unlikely to prove an attractive route for the UK Government.



Amending the acquired rights directive

DTI Public Consultation URN 98/513 (December 1997)

The UK commenced its Presidency of the European Union with Prime Minister Tony Blair's promise to lead in Europe. In this vein, the Government has taken on the substantial task of persuading the other European Union states to reach agreement on proposals to amend the Acquired Rights Directive: a task, which has proved beyond governments and the European Commission in the past.

It is true there is a significant difference: the Labour government does not share the Conservatives' antipathy to the very basis of the Directive. However, it is likely to take more than this change of focus to weld a political consensus from the disparate views of European governments on this controversial issue.

This may mean that the most immediate significance of the Department of Trade and Industry's consultation document is the indications it gives of the Labour government's attitude to the Acquired Rights Directive, the TUPE Regulations, contracting out and employment rights.

Thompsons produced a detailed response to the Government and has circulated it to unions. In this article, we summarise some of the main points in the consultation document.

Scope of the Directive

The last few years saw the UK and Germany leading persistent attacks by EU governments on the breadth of the Directive's application. The Commission published proposals aimed at restricting the scope of the Directive and, in particular, limiting the circumstances in which it would apply to contracting out.

The Commission was forced to admit defeat after the intervention of the European Parliament. Labour has "no wish ... to narrow the coverage of the Directive". It recognises the difficulties in interpreting the Directive following the Suzen decision (see issue 10) and floats the idea of an amendment which would see all contracting out covered by the Directive. This is tempered by concerns about "burdens on business" and the difficulty of drafting a definition acceptable to other EU states.

This caution has attracted criticism from unions and contractors' associations, who have jointly called upon the UK government to take action through UK legislation to clarify the situation in this country. That option appears to be ruled out by the consultation document, which means that the current level of legal uncertainty is likely to persist.

Share transfers

It is disappointing that the DTI comes down against an extension of the Directive to takeovers by share transfer. The House of Lords Select Committee had supported this change. It is of particularly important that employees and their representatives are informed and consulted on the implications of takeovers. Contrary to the DTI's assertions, there should be little difficulty in finding a suitable definition of when there has been a change of control of the business.

Insolvency

The Government supports the principle of "flexibility" in the application of the Directive to transfers of an insolvent business, but expresses caution at some aspects of the Commission's approach.

It is welcome that the UK recognises the need for a proper assessment of costs and benefits before proposing any relaxation of protection for workers affected by the transfer of an insolvent business: this has been conspicuously absent from past Commission proposals based only on assertions and anecdotal evidence.

The UK is right to question the efficacy or logic of a distinction based upon the intended outcome of different types of insolvency proceedings and to proceed from the basis that the Directive should apply in all insolvency cases. The Government is wrong to reject the protection against fraudulent insolvency proceedings.

The emphasis on allowing a transferee to acquire an insolvent business without acquiring pre-transfer debts is a sensible approach and should be sufficient in itself. The proposals to allow collective agreements to permit dismissals or reductions in pay and conditions present the danger that employees will suffer in the absence of adequate safeguards.

Changes in terms and conditions

The Government raises the possibility of extending the "flexibility" of the insolvency provisions to enable changes in terms and conditions where the transfer is the reason for the change. This would be permitted where there was agreement between employers and unions or "other appropriate employee representatives".

This is controversial. The Government rightly recognises the concern that individual employees would not have adequate protection against adverse changes. This is a particularly significant issue when the Government has proposals for employee representation where no union is recognised: do not deal adequately with providing protection for employers in those circumstances.

Any employee representatives must meet the test of independence stipulated in the proposed new Article 6A of the Directive.

Pensions

The House of Lords Select Committee proposed an amendment to oblige transferees to provide comparable pension entitlement. The Government recognises this would "remove an exclusion which is arguably inconsistent with the underlying aims of the Directive" and considerably simplify the position.

The Government takes the view this amendment would not impose a significant additional burden on employers, as the Government interprets the current law on constructive dismissal as requiring employers to offer comparable pensions. This practice is followed in transfers from the public sector and it is fair it should be made universal.

This positive approach is welcome, although the Government needs to be persuaded that technical legal problems can be overcome. They can be: the bigger problem is likely to be persuading the Commission and other governments that the amendment is necessary or desirable.

Information and consultation

The consultation document fails to acknowledge the purpose behind the requirement that information and consultation tale place "when" a transfer and consequent measures are envisaged. This means that the process must begin at that stage: a much better test than assessing after the event whether the consultation began "in good time".

The Government should be applauded for resisting any exemption for transfers involving small numbers of employees, but misses the chance to assist contractors by preventing transferors from seeking to avoid liability by blaming a lack of information from the authority awarding the contract.

A cautious step in the right direction

The tone and general thrust of the new approach is a significant improvement on the attitude of the last government. The sensible acceptance of strengthened provisions on sanctions and legal remedies reflects this. However, the recognition that reform is necessary on the crucial areas of contracting out and pensions is diluted by a cautious approach which diminishes the prospect of achieving the necessary consensus and militates against decisive action at domestic level.

Liberty, Equality, Maternity

Mrs Heather Crees v Royal London Mutual Insurance Society Limited and Mrs Janet Greaves v Kwik Save Stores Limited, Court of Appeal Judgment - 27/2/98

In test cases brought by MSF and USDAW, the Court of Appeal has delivered a landmark Judgment that will protect the rights of working mothers. They have upheld a woman's right not to be unfairly dismissed if she is unable to physically return to work following the end of her maternity leave period, provided she has sufficient continuous service to have a right to return to work (2 years at 11 weeks before the expected week of birth) and has complied with the notification requirements.

The judgement could potentially benefit 25,000 women a year, on the basis of the Government's statistics of the number of women who give ill health as the reason for failing to return to work after maternity leave. (DSS Research Report number 67, Maternity Rights and Benefits in Britain 1996).

Women who are ill during maternity leave will be able to exercise their right to return to work and take up any contractual benefits, such as sick pay to which employees would be entitled. Women will need to decide if they would prefer to remain on maternity leave or exercise the right to return to work.

Mrs Crees and Mrs Greaves had protection against unfair dismissal because of their length of service. Mrs Greaves had worked for Kwik Save for over 16 years and Mrs Crees had worked for Royal London Insurance for over 3 years when they commenced maternity leave.

They had therefore acquired the right to 29 weeks absence from work after the birth of their babies as well as the 14 week general maternity leave period available to all women, regardless of length of service. Both women had complied with all their contractual and statutory obligations to notify the employer of their intention to take maternity leave and return to work after the birth of their children.

Both women had given the employer their intended date of return under what is now Section 82

of the Employment Rights Act 1996 (ERA). Both women were then certified sick by their doctors on the date they had given as their notified date of return to work ending their maternity leave and exercising their right to return.

Under the statute there is an entitlement to a four week postponement of the return to work if a woman is unwell and gives her employer a doctor's certificate before the notified date of return. Although Mrs Greaves had not complied to the letter with this Sub Section (now Sub Section 4 of Section 82) she was treated as having exercised the right to obtain the postponement.

Mrs Crees complied completely with the postponement entitlement. When both women remained too unwell to return to work following the four week extension, Mrs Crees was told that she had forfeited her right to return to work and that her contract of employment had terminated with immediate effect. She was denied the right to an appeal and when she brought a claim for unfair dismissal. The Industrial Tribunal held that there was no dismissal because she had not validly exercised her right to return to work and her rights had therefore been extinguished.

Mrs Greaves was not told immediately that she would not be permitted to return on her recovery to health, but two months later when she remained unwell, was told that her employment had already terminated as she had failed to exercise her right to return to work.

Both cases were lost in the Employment Appeal Tribunal. The issue before the Court of Appeal concerned the exercise of statutory rights to return, and did not consider in detail whether Mrs Crees' and Mrs Greaves' contracts subsisted during their extended maternity leave.

Essentially the appeal court had to decide whether a physical return to work was necessary in order for a woman to have validly exercised her statutory right to return to work, given to women who have given birth, subject to length of service. If the right had been exercised then both women would have been protected from unfair dismissal.

The Court of Appeal, drawing from the House of Lords Judgment in Brown v Stockton on Tees Borough Council [1989] AC noted that the purpose of the legislation is to provide 'special protection for the security of employment of pregnant women' and forms 'part of social legislation passed for the specific protection of women and to put them on an equal footing with men'(Lord Griffiths' Judgment in Brown v Stockton).

The judgment could potentially benefit 25,000 women a year

The Court of Appeal repeat and approve Lord Griffiths' Judgment:

'I have no doubt that it is often a considerable inconvenience for an employer to have to make the necessary arrangements to keep a woman's job open for her whilst she is absent from work in order to have a baby, but this is a price that has to be paid as part of the social and legal recognition of the equal status of women in the workplace'.

The Court of Appeal ruled that the language of the right to return to work and the unfair dismissal provisions should be construed in the context of the statutory purpose identified by the House of Lords, both as to the result to be achieved and the means by which it is to be achieved, subject to the women employees complying with the detail of the provisions on notification and information.

Applying that interpretation the legal position does not therefore require an actual physical return to work in order to exercise the legal right to return. An actual presence at work on the notified day of return is not necessary for the exercise of the right to be complete and effective.

Provided all the notification requirements have been complied with and the notified date of return given, nothing more is required to be done for the right to be exercised. It follows that both Mrs Crees and Mrs Greaves had a right to claim that they had been unfairly dismissed as they were not permitted by their employer to return to work.

The critical point, the Court of Appeal said, is that the process of exercising the right to return to work is complete before the notified day of return actually arrives: it is complete once the appropriate notices have been given before the notified day of return.

The Court of Appeal went on to say that the argument put forward by the employers produced 'results so absurd and unjust that it cannot have been a part of the scheme of protection for female employees to allow an employer to do what was done to both Mrs Crees and Mrs Greaves without incurring liability'. Employers cannot take advantage of the temporary illness of a female employee to deny her the statutory right to return to work and to deny her the right to claim that she had been unfairly dismissed in not being permitted to return to work.

The Court of Appeal did not feel bound by the decision in Kelly v Liverpool Maritime Terminals, [1988] IRLR 310 which concerned a woman who had not complied with the statutory notification requirements.

The case was won without relying on either the Pregnant Workers Directive or UK or European sex discrimination or equal pay legislation. Although the Pregnant Workers Directive was argued, the Court of Appeal did not rule on it, as they held there was protection under domestic law without needing to rely on European law.

The case is also a timely reminder that the maternity rights legislation must be construed in accordance with the principle of protection of women and to place them on an equal footing in the workforce as men.

Digital Compensation doesn't add up

MOD V WHEELER [1998] IRLR 23
DIGITAL EQUIPMENT V CLEMENTS (Nº2) [1998] IRLR 134

The thorny problems of calculating compensation for unfair dismissal and unlawful discrimination continues to exercise top legal brains. The Court of Appeal considered both issues separately in the Digital Equipment and MOD v Wheeler cases.

We reported the two EAT decisions in Digital Equipment (LELR numbers 4 and 8) and welcomed the Employment Appeal Tribunal decision as a fair and logical conclusion. The Court of Appeal has rejected the EAT's decision leading to a significant reduction in compensation for the employee concerned.

Digital Equipment concerns the calculation of compensation for unfair dismissal where an employer had paid a severance payment in excess of the statutory redundancy payment. The law concerned is Section 74(7) of the Employment Protection (Consolidation) Act 1978 (now s123(7) Employment Rights Act). This section states: "If the amount of any payment made by the employer to the employee on the grounds that the dismissal was by reason of redundancy .... exceeds the amount of the basic award ... that excess shall go to reduce the amount of the compensatory award".

In Mr Clements' case the Industrial Tribunal found that if a fair procedure and proper consultation had taken place there was a 50% chance that Mr Clements would not have been selected for redundancy. The tribunal also found that Mr Clements' losses were £42,000. The excess of the redundancy payment over the basic award was £20,000. How should they take account of the 50% chance of retaining his employment and the excess of the redundancy payment?

The Court of Appeal decided that the language of s74(7) is clear: that Parliament intended that the employer who paid compensation for redundancy on a more generous scale than the statutory scale, was entitled to full credit for the additional payment against the amount of the loss which made up the compensatory award.

In Mr Clements' case therefore the 50% chance of him being retained was to be applied to his total loss leaving £21,000. The excess of the redundancy payment is then taken away leaving Mr Clements with only £1,000 in compensation.

In MOD v Wheeler the Court of Appeal considered the correct approach to the assessment of compensation in cases where the claimant has or should have mitigated her loss by obtaining other employment. The MOD case concerned the long running saga of compensation to women dismissed from the Armed Forces due to pregnancy.

> The position on calculation of compensation for unfair dismissal is now clearer following The Court of Appeal decisions

In this case the Court of Appeal said that the general principle to apply when assessing compensation is that, as far as possible, complainants should be placed in the same position as they would have been in but for the unlawful act. The Court of Appeal found that the correct way to assess compensation is to take the sum that the claimant would have earned in the Forces, deduct from that sum the amount she has, or should have earned elsewhere, and then apply the percentage discount (as to whether she would have returned to work and completed her engagement) to the net loss. This is a fair result leading to compensation for the women concerned.

It is unfair that the result of the Digital case means that where employees have been unfairly selected for redundancy, but paid in excess of the statutory redundancy payment, their compensation may be wiped out. It is unjust that compensation for dismissal should be treated less forwardly than compensation for tribunal losses caused by discrimination.

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