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CONTENTS

Two year back pay rule in Equal Pay Pensions cases may be invalid.

Pensions and Equal Pay

Advocate General's Opinion in Magorrian and Cunningham v Eastern Health and Social Services Board and DHSS case C-246/96 (European Court of Justice, unreported 10/7/97).

In a crucial opinion, the Advocate General of the European Court of Justice in this case says the two year back pay rule in pensions equality cases is invalid. It is highly unusual for an Advocate General's opinion not to be followed by the full court so the opinion raises the hopes of thousands of women who could gain from the decision.

Mrs Magorrian and Mrs Cunningham were denied additional pension benefits when they retired because they had worked part-time and were not therefore entitled to Mental Heath Officer (MHO) status. Only full-time Mental Health workers could be called MHO's.

Although both women had worked full-time, when their family responsibilities increased they began working part-time and lost their MHO status. If they had been MHO's for twenty years they would have the right to a pension at the age of fifty-five, instead of sixty, and the MHO service beyond twenty years would count as double for pensions purposes.

The Northern Ireland Industrial Tribunal found that there had been discrimination of grounds of sex and a breach of the Equal Pay Act. But Section 2(4) of the Equal Pay Act limits a claim to up to two years before proceedings are started.

This would mean that Mrs Magorrian and Mrs Cunningham could only add two years service as part-time workers to their earlier period of full-time service: that alone would not add up to the twenty years needed to trigger the additional benefits. In order to attain the twenty years service they would need to rely on all their part-time service.

Two questions have been referred to the European Court of Justice by the Northern Ireland Industrial Tribunal:

1. Does the two year limit amount to a denial of an effective remedy under EC law?
2. Is the claim limited to 17th May 1990 being the date of the Barber judgment and the Maastricht Protocol No. 2 which cut off pension equality claims in relation to benefits payable in respect of periods of employment before 17th May 1990: would only service after that date count?

The Advocate General is also of the opinion that the limit in the Barber judgment [1990 ECR 1-1889] and Protocol 2 to the Maastricht Treaty does not apply: the purpose behind limiting retrospective claims was because employers and pension funds were reasonably entitled to assume that different pension ages for men and women were lawful, and the financial implications of retrospective claims to the pension funds were enormous.

But employers and pension funds have been on notice since 1976 and de Frenne v Sabena No. 2 ([1976] ECR 175 43/75) that Article 119 had direct effect and could cover both the right to belong to an occupational pension scheme and the right to receive benefits. The type of discrimination experienced by Mrs Magorrian and Mrs Cunningham was clearly covered by Article 119 and the employer is not entitled to rely on the Barber limitation.

Also, since the unfair treatment relates to admission to MHO status, rather than simply the right to benefits payable, the Barber limitation does not apply. The Advocate General's reasoning follows the case of Dietz [1996] ECR 1-5223 and reduces the impact of the Barber limitation.

The Advocate General's opinion states that the two years back pay limit makes it impossible in practice for Magorrian and Cunningham to exercise their right to an equal pension. Therefore national courts - in this case the North Ireland Industrial Tribunal - should simply ignore Section 2(4) of the Equal Pay Act and calculate the losses back to 8th April 1976.

If the European Court of Justice confirm the Advocate General's opinion in their judgment in this case, it will affect the rights of thousands of the part-time pensions cases on hold at Industrial Tribunal. Other issues remain unresolved, for example the six month time limit for bringing claims and whether the two year limit is involved for other types of Equal Pay cases, or just pensions cases. Levez and Preston & Ors will clarify some of the outstanding issues. But in the meantime, the future is looking wiser.

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Maternity Alliance Challenge the lower earnings limit

Banks v Tesco Stores Ltd and Secretary of State for Social Security (unreported) Ashford Industrial Tribunal case number 18985/95/c 4/6/97

The Maternity Alliance, an advice and campaign group, has been partially successful in its challenge to the lower earnings limit as it affects entitlement to Statutory Maternity Pay (SMP), in round one of what promises to be a long fight.

Mrs Banks had worked as a part-time checkout operator for nearly a year. She earned just below the lower earnings limit and neither her nor Tesco paid any National Insurance contributions. As a result she did not qualify for SMP when she started maternity leave.

Neither did she qualify for Maternity Allowance or any Government means tested benefits or any contractual or company maternity pay.

But three days paternity leave on full pay is given to all Tesco male employees, regardless of their earnings or length of service, so too is two weeks adoptive leave.

Mrs Banks brought her claim on three grounds: firstly, challenging the failure to pay her equivalent to the company paternity paid leave scheme; secondly, arguing that the failure by Tesco to pay Mrs Banks equivalent to SMP was in breach of Article 119 of the Treaty of Rome; and thirdly, indirect sex discrimination.

The Article 119 equal pay claim is that the failure to pay Mrs Banks any payment undermines or jeopardises the purpose of maternity leave and therefore breaches Article 119 of the Treaty of Rome. She argued that the failure to pay at least equivalent to SMP was either an unauthorised deduction of wages under Part II of the Employment Rights Act 1996 or the Equal Pay Act 1970 when interpreted to comply with Article 119.

The Pregnant Workers Directive (92/85/EEC) states that the purpose of maternity leave is to protect women before and after they have given birth. The Directive also states that an "adequate allowance" must be paid during the fourteen week maternity leave, but "adequate" means at least equivalent to each EU country's minimum sick pay. Also each member state can lay down conditions of eligibility for receiving the statutory maternity allowance.

The UK Government argues that it has fully implemented the Pregnant Workers Directive by providing SMP with identical levels of payment as for statutory sick pay and the same eligibility criteria: to have been in employment for 26 weeks or more and to have been paid above the lower earnings limit (LEL). The problem is that over two million women in the UK earn below the LEL (around £61 per week), compared to a half a million men, and at Tesco 50,000 staff earn below the LEL, 97 % of them women.

Mrs Banks' case is that no pay at all is not an adequate allowance – and entitlement to SMP cannot be looked at in isolation. She argues that the failure to receive SMP together with the fact that she was not entitled to any other state or company benefits during maternity leave is a breach of the Pregnant Workers Directive. Mrs Banks could not directly use the Pregnant Workers Directive as Tesco is a private company rather than a state body; but can rely on Article 119 of the Treaty of Rome to eliminate discrimination in pay between men and women to overrule UK law which violates this principle.

> Over two million women in the UK earn below the LEL compared to half a million men

The Tribunal agreed with Mrs Banks in her claim for paid maternity leave equivalent to paternity leave. She was entitled to comparable parental leave to a man engaged on work rated as equivalent and her claim succeeded under the Equal Pay Act 1970.

But she has lost her claim to receive at least the equivalent of SMP. Importantly, the Tribunal agreed that SMP is pay for the purposes of Article 119 and wages in Part II of the Employment Rights Act.

The Tribunal also found that a nil payment of benefit could not be an "adequate" allowance under the Pregnant Workers Directive.

But her claim failed because discrimination on grounds of sex involve a comparison between the situation of men and women.

The conditions of eligibility for SMP do not involve that comparison but instead, a comparison of two groups of women: those who earn less that the LEL, and those who earn more. That, the Tribunal said cannot amount to discrimination.

The Maternity Alliance is likely to challenge the Tribunal decision and the way has also been paved for a direct attack on SMP eligibility under the Pregnant Workers Directive, and a challenge to the eligibility conditions for Statutory Sick Pay using indirect discrimination arguments, where comparisons can be made between the sexes.

TUPE transfer a matter of fact not law

DRB Maintenance Limited v. (1) Andrew Douglas and (2) Peter Andrew Douglas Unreported 22. 5. 97 EAT SCOTLAND

The Employment Appeal Tribunal in Scotland has shown that after Betts, TUPE still covers a wide range of situations. The two employees worked for a company called Baillie and Spence Limited. Their employers arranged that they would leave their employment to work with Amalgamated Maintenance Services Limited (AMS).

Both men carried out small building works. They were the only two people who did this type of work and the intention was that they would continue that role with AMS. They were not paid any redundancy payments nor were they given any notice of their termination of employment.

They remained in employment until June 1996 when they were both made redundant, paid redundancy payments and pay in lieu of notice on the basis of their four continuous years of employment with AMS (now called DRB).

The men claimed additional redundancy payments based on their length of service with Baillie and Spence as well as AMS. The Industrial Tribunal found that the movement of the Respondents from their former employer to AMS was a transfer within the meaning of the TUPE Regulations.

At the EAT the employers argued on the basis of Suzen that mere movement of staff from one employer to another was not sufficient for there to be a transfer. They also argued that the tribunal ought to have made a finding of fact as to what happened to the equipment that the men used in their employment once they started work for AMS.

In a significant move, the EAT demonstrated the limited effect of the Betts decision. This case was different because in Betts once the transfer took place the old employer did not retain the assets or employees. It shut down the business.

The DRB case demonstrates the continuing breadth of TUPE and should act as a warning to employers who believe they can avoid TUPE by arrangements which do not involve the transfer of assets.

The EAT in Scotland expressed themselves entirely satisfied that the tribunal was entitled to categorise the two men as an identifiable economic unit which undoubtedly emerged under the umbrella of a new employer in the same state. They held that was sufficient to justify the finding that a transfer took place without an express finding as to whether their assets went with them.

Stigmatised by work

Malik v Bank of Credit and Commerce International [1997] IRLR 462

In a landmark decision the House of Lords have decided that employees can bring claims for damages for financial losses suffered because of the stigma attaching to their reputations as former employees of BCCI which put them at a disadvantage in the labour market.

This case could have implications for people working in the financial services sector and people working in areas where their reputation and ability to get future work is, to an extent, reliant on their former employer's reputation.

In the House of Lords, the Malik case was considered on the basis of a series of assumed facts. Firstly, that BCCI operated in a corrupt and dishonest manner. Secondly, that the employees were innocent of any involvement. Thirdly, that following the collapse of the Bank, its corruption and dishonesty became widely known. Fourthly, that the employees were at a handicap in the labour market because they were stigmatised by reason of their previous employment by BCCI. Fifthly, that the employees had suffered loss as a result.

Whilst this series of assumed facts are fairly unusual it does not mean that these facts will have to exist in every case for damages to be recoverable.

The House of Lords set down a three part test to decide whether, in principle, damages for loss of reputation should be recoverable: (1)that conduct by an employer is in breach of the implied term of trust and confidence; and (2) that prejudicially affects an employee's future prospects and this gives rise to continuing financial losses; and (3) it was reasonably foreseeable that such a loss was a serious possibility.

The House of Lords also said that "in principle, so far as the recoverability of continuing financial losses are concerned, there is no basis for distinguishing (a) wrongful dismissal following a breach of the trust and confidence term (b) constructive dismissal following a breach of the trust and confidence term, and (c) a breach of the trust and confidence term which only becomes known after the contract is ended for other reasons". The Malik case fell into the final category as the employees did not know about the corruption in the business until after they had been dismissed due to the collapse of the Bank.

Now it has been established that stigma damages are recoverable and these claims can be added to unfair dismissal and wrongful dismissal applications. There will be much further litigation involving these claims from now on.

Equality in Amsterdam

The Amsterdam Treaty introduced new provisions into the EC Treaty, including a number of changes to the "social chapter" provisions (the Protocol on Social Policy to the Maastricht Treaty, and the Agreement attached to it) which referred to equality and discrimination. Discrimination has been extended to include religion or belief, disability, age or sexual orientation.

All forms of discrimination

The changes also embrace positive discrimination and equal value. The package adds up to a welcome move forward by the European Union in this area.

In response to the long-standing criticism that the Treaty failed to address the growing problems of different forms of discrimination, a new Article 6a has been introduced in the EC Treaty which widens the defined areas of discrimination:

"Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation".

Reinforcing the focus on sex discrimination

Specifically regarding sex discrimination, a supplement has been introduced in Article 2 of the Treaty:

"The Community shall... promote... a high level of employment and social protection, equality between men and women, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States".

All these were already present in Article 2 (as amended by the Maastricht Treaty), save for the reference to equality between men and women. This addition may be significant, when coupled with the expanded new Article 119 allowing for positive action.

Further, there is a supplement to Article 3 of the EC Treaty in the form of a new paragraph:

"In all the activities referred to in this Article, the Community shall aim to eliminate inequalities, and to promote equality, between men and women".

This is again a reinforcement of positive action, but specifically recognising the policy of "mainstreaming", which means sex equality is not seen as a separate issue, but integrated into all policy dimensions of the EU.

Equal value

A new Article 119 is based on the Agreement, Article 6, but paragraph 1 changes Article 6, and thereby also Article 119 of the EC Treaty, to include "equal value":

"Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied".

This confirms the present position, since the European Court of Justice, by holding that the Equal Pay Directive 75/117 "in no way alters the content or scope" of Article 119, effectively extended it to include equal value (Jenkins v. Kingsgate, Case 96/80 [1981] ECR 911).

Mandate for new equality measures

The Amsterdam Treaty inserted a wholly new paragraph into Article 119:

"3. The Council, acting in accordance with the procedure referred to in Article 189b, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value."

Previously, such measures as the Equal Pay Directive 75/117 had to be adopted under Article 100 of the Treaty, which authorised "directives for the approximation of such laws, regulations or administrative provisions of the Member States as directly affect the establishment or functioning of the common market". In future, Directives will no longer have to be tied to "market legitimacy". It is replaced by a provision allowing for the proposal of directives with the explicit mandate of ensuring the application of the EC law on sex equality. The procedure is that of co-decision (Article 189b), giving the European Parliament a greater voice in determining sex equality policies.

Positive action

A second new paragraph inserted by the Amsterdam Treaty is a revised and expanded version of Article 6(3) of the Maastricht Agreement: (new wording underlined)

"4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex [formerly: women] to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers".

This new provision seems to go beyond its predecessor authorising positive action: the Equal Treatment Directive 76/207, Article 2(4):

"This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)".

More important, it is now a Treaty provision, not merely a Directive. It may be particularly timely in light of recent decisions of the European Court of Justice in Kalanke and Marshall, widely interpreted as hostile to positive action measures.

First fruits: a new directive

The arrival of the new Labour government has finally allowed for the passage of the proposed directive on the reversal of the burden of proof in sex discrimination cases. This aims to ensure that measures taken by Member States under the principle of equal treatment are made more effective; particularly, to enable victims of discrimination to assert their rights through tribunals and the courts.

In the presence of the new UK representative, on 27 June 1997 the Council of Social Affairs Ministers reached political agreement on the directive. It is subject to the co-operation procedure and has still to be reviewed by the European Parliament. When approved, it will enter into force on 1 January 2001. It states:

"Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged by failure to apply to them the principle of equal treatment establish, before a court or other competent body, facts from which it can be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no contravention of the principle of equal treatment".

This reinforces the position in UK law, which allows the court, when there is a prima facie case of discrimination taking place, to draw an inference of discrimination unless the respondent can provide another explanation (North West Thames Regional Health Authority v, Noone [1988] IRLR 195 (CA); King v. Great Britain-China Centre [1991] IRIR 513 (CA)).

The directive applies to the situations envisaged by Article 119 (equal pay) and those under the directives on equal treatment, access to employment, health and safety of pregnant workers and parental leave. But a statement from Commissioner Padraig Flynn regretted that social security cases were excluded from the definition of indirect discrimination. The scope of the directive will be reviewed two years after it comes into force.

The minimum wage and bargaining in Australia

The UK Labour Party was elected on a manifesto commitment to establish a statutory minimum wage. This will be set 'according to the economic circumstances of the time' on the advice of an independent low pay commission.

As the Government goes about this task it is perhaps useful for British unions to reflect on the recent experience of their Australian counterparts in the area of wage fixing and collective bargaining.

Australia has never had a statutory minimum wage of the type that will be adopted here in Britain. In fact, Australian unions have fought vigorously in recent years against laws setting down 'minimum pay and conditions' enacted by conservative state governments around the country.

Generally they have done so with good reason, as in the Australian context, these state wage mechanisms have tended to provide for the initial establishment of a minimum pay rate by Ministerial fiat, and for review only once annually (again, by the relevant Minister and without provision for representations to be made by the industrial parties). The result has been the establishment of fairly paltry minimal levels which are then left to wither rather than being updated to meet changing economic circumstances.

However, what Australia has had for many years at the federal (national) level is a system of compulsory conciliation and arbitration which has produced a framework of regulation by industrial 'awards'. These not only specify the minimum wages and conditions of employment for workers covered by them, but have also operated, in effect, as the minimum terms and conditions of employment for non-award employees in many industries.

> The award 'safety net' provided a sound basis for collective bargaining, putting Australian unions in a relatively strong position from which to commence the bargaining process.

Until the election of the conservative Liberal/National Coalition Government in March 1996, the intent of government policy was that awards should provide a 'safety net' of secure, relevant and consistent wages and conditions of employment, above which bargaining could take place at enterprise level. One way in which awards were updated was through the wage increase that flowed from the decisions of the Australian Industrial Relations Commission in 'National Wages Cases'. Held at least annually, wages cases have provided unions with an opportunity to seek and justify increases in award wages in key industry sectors. Employers could of course oppose these claims, and the Commission would then decide what increases (if any) should be awarded, having regard to prevailing economic conditions and the needs of the low-paid.

In addition, federal law briefly (from 1994 to 1997) allowed unions to make applications for the setting of minimum wages under the ILO's Minimum Wage-Fixing Convention, although these provisions were not widely used.

While there has long been above-award collective bargaining at industry level in Australia, the phenomenon of 'enterprise bargaining' is relatively recent. It has become a prominent feature of Australian industrial relations in the 1990's, with successive amendments to federal legislation encouraging parties to federal awards to negotiate enterprise agreements, and unions increasingly relying on such arrangements rather than awards as the primary vehicle for delivering wage increases to their members. It is

estimated that some 65% of eligible employees are now covered by enterprise agreements at the federal level.

So how have Australian workers fared in recent times under this system of enterprise bargaining conducted above the floor of a de facto minimum wage? Economic data suggests that wages growth on Australia is slowing, with average earnings increasing by only 4.1% in 1994-95 compared to around 8% in 1986-87.

The real picture, however, emerges from a comparison of various industry sectors. This shows while some workers (such as those in the mining, construction, and warehouse and distribution industries) have done very well since the advent of enterprise bargaining, some 20% of the workforce (for example, machinists in the textile and clothing industries, labourers employed outside construction, and cleaners) has not received a pay increase in the last five years, other than through adjustments to the award 'safety net'.

Responding to this growing disparity between workers who have secured annual wage increases of up to 15 per cent through enterprise bargaining, and the remainder who (unable to access increases through bargaining) have become reliant on 'safety net' increases, the Australian Council of Trade Unions launched a claim in pursuit of a 'living wage' in July 1996. Essentially seeking to close the gap between these two groups, the claim sought the establishment of a minimum weekly wage of A$380 (around £170) for workers not already receiving that level of pay, and increases of A$20 (£9) per week for other workers who had not received an increase through enterprise bargaining. Earlier this year the federal tribunal handed down its decision on the claim, granting this group of low-paid workers a wage increase of only A$10 (£4.50) per week.

In assessing the effectiveness of Australia's awards system and the process of enterprise bargaining that has grown around it, it must be remembered that (although average wages growth has slowed, and disparities have emerged) workers received significant non-wage benefits over the period of the Labour government from 1983 to 1996. Under successive 'Accord' agreements between the ACTU and the federal Government over this period, the 'social wage' delivered support for workers and the unemployed through the 'Medicare' health system, superannuation and occupational health and safety legislation, workplace child care, and direct payments to struggling families.

The Australian experience suggests that it is in the area of bargaining above the minimal that there are real gains to be made for unions and their members. The award 'safety net' provided a sound basis for collective bargaining, putting Australian unions in a relatively strong position from which to commence the bargaining process. Similarly the minimum wage, when it is operational in Britain, will not only ensure that the low-paid are guaranteed a decent minimum hourly rate of pay, it will also strengthen the hand of unions in collective bargaining negotiations.

With only 37% of British employees covered by collective agreements, it seems that the minimum wage may present a real opportunity to improve both the wage levels attainable through, and the spread of, collective agreements in this country.

Wrongful interference with a contract: what does it take?

TimePlan Education Group Limited v NUT [1997] IRLR 457 CA

The Court of Appeal has revisited wrongful interference with contractual rights or inducement to breach of contract. Inducement to breach contract is one of the old industrial torts – or wrongs – dating back to the turn of the century. In many circumstances, a valid industrial action ballot will protect a union from this, although not where it would amount to secondary action.

The case concerns a dispute between the National Union of Teachers (NUT) and TimePlan, a supply teacher agency which mainly recruits Antipodean teachers for work in the UK. The NUT's dispute with TimePlan is over the rates of pay paid by TimePlan to its teachers which the NUT say undercut nationally agreed pay rates and the School Teachers Pay and Conditions Act 1991.

When the NUT saw that TimePlan was using the New Zealand Teaching Union (NZEI) Journal to advertise to recruit teachers, they raised their concerns with NZEI, their sister union. Ms Hufford, Deputy General Secretary of the NUT, wrote to NZEI setting out the nature and background to the dispute with TimePlan and suggested that NZEI "might consider it inappropriate to carry the advertisements [of TimePlan] in the future".

NZEI did pull the advertisements from the next issue of the journal, and by doing so breached their contract with TimePlan. TimePlan sued the NUT for having wrongfully interfered with their contract with NZEI.

The Court of Appeal restated the five conditions, each of which TimePlan had to prove, in order to succeed in their case:-

- That the NUT did persuade, procure or induce a third party - ie. NZEI - to break a contract with TimePlan;
- That the NUT had knowledge of the contract between NZEI and TimePlan - knowledge of its existence, rather than the detailed terms would be sufficient;
- That the NUT intended to persuade, procure or induce a breach of contract by NZEI;
- That TimePlan had suffered more than nominal damage;
- As the NUT said their criticisms of TimePlan were true and justified, TimePlan had to succeed in rebutting the justification argument.

The High Court Judge found in favour of TimePlan. Although stopping short of granting an injunction, he ordered an Inquiry into the damages to be paid by the NUT to TimePlan as a result of the breaches by NZEI.

The Court of Appeal has now overturned the High Court Judge's order. The case turned on whether there was evidence that NUT had knowledge of the contract between TimePlan and NZEI and whether they had intended to persuade, procure or induce NZEI to breach their contract with TimePlan.

The case highlights the importance of the care to be taken in any correspondence where the issue of wrongful interference might arise, and the need to meticulously prepare evidence before any trial.

Importantly, the Court of Appeal found that Ms Hufford's letter was mild and the words "you might consider it inappropriate to carry the advertisements in future" could not be taken as an intention to wrongfully interfere with the contract. The fact that the letter succeeded in persuading NZEI to pull the advertisements was not sufficient to make the case against the NUT.

Also, Ms Hufford had given evidence in the Court about her ignorance of the contract between NZEI and TimePlan for continuing adverts. This and other evidence in the case suggested that the NUT did not know about the contract and so the original judgment of the High Court was flawed in this respect as well.

This case is a victory for common sense and a restatement of basic principles - that in order to succeed in a claim, the Plaintiff must establish that all the ingredients of the tort have been committed.

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