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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE **12** JULY **1997**

Sacked before she started

SARKER v. SOUTH TEES HOSPITALS TRUST NHS

An employee whose contract is ended before starting work can bring a claim for breach of contract the Employment Appeal tribunal has ruled. The offer of the job and its acceptance amounts to a contract of employment between the two parties although the employee may start work at a future date.

Once those terms were agreed, no further contract was required by the parties to confirm the employment relationship. The EAT reasoned that someone engaged under a contract of employment to start work at a future date could claim unfair dismissal if the contract was terminated by the employer for an unfair reason such as pregnancy or trade union activities. It was no different for claims relating to breach of contract.

The decisions clarifies the scope of Industrial Tribunal jurisdiction to hear breach of contract claims, which before 1994 could only be brought in the High or County Court. The Industrial Tribunal Extension of Jurisdiction Order 1994 allows Tribunals to hear money claims up to a maximum of £25,000 if they are outstanding or arise under the employment contract when employment ends.

But what does employment mean in this context? The EAT said an Industrial Tribunal would have jurisdiction to hear a breach of contract claim, although the employee had not actually worked a single day for the employers.

In this case Ms Sarker obtained employment as an ultra sound manager with an NHS Trust. On the 25 August 1995 she was sent a letter of appointment and a formal document setting out particulars of employment.

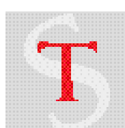
Both documents required two months notice from Ms Sarker to terminate her employment. She accepted these terms. However, before she started work, the Trust sought to increase her commitment to work for them to six months.

Following a telephone call between the parties, the offer of employment was withdrawn by the Trust and Ms Sarker commenced a claim for breach of contract for the notice she was due under the contract. The IT had ruled that it could not hear the claim because at the date of the alleged breach, there was no termination of employment because she had not actually started work. The Industrial Tribunal therefore rejected her claim on those grounds.

> An employee whose contract is ended before starting work can bring a claim for breach of contract.

Overturning this decision, the EAT said the claim did arise or was outstanding on the termination of employment. There was a contract, one that would start at a later date, and that contract had been broken the EAT ruled.

If you accept a job offer but the employer reneges before work begins, this decision opens the door for breach of contract or unfair dismissal claims. A breach of contract claim would be for the period of notice to which the employee was entitled. Unfair dismissal claims could face the hurdle of the 2 year qualifying period unless they were for an automatically unfair reason such as pregnancy or trade union activities.



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The electricity supply pension scheme case

The High Court has disappointed the members, pensioners and other beneficiaries of the Electricity Supply Pension Scheme who were hoping to receive improvements to their pensions. At the same time, the judgment makes life easier for employers hoping to use pension scheme surpluses for their own benefit and not for the purpose of improving benefits payable to members.

The case concerned two employers, National Grid (whose Fund had a surplus of £62.3 million) and National Power (whose Fund had a surplus of £303.4 million). These surpluses had to be dealt with at a time when all of the newly privatised companies had put in train large scale redundancy programmes.

Voluntary redundancy was encouraged by enhanced pension benefits available under the scheme. Those enhanced benefits would, normally, be paid for by separate, additional contributions paid by the employers. Instead, these surpluses were used, in part, to improve pension benefits; in part, to reduce the employers' future contribution rates; and in part, to pay for these additional contributions which would otherwise be payable.

In the case of National Grid, the trustees recommended that half of the surplus should be used to improve benefits and half to reduce employers' contributions and to fund these deficiency payments. National Grid, as the employer, decided to split the surplus 70:30 in its own favour. In the case of National Power, the employer decided to split the surplus 2:1 in its own favour, to which the Trustees agreed. In both cases, although the Trustees had the right to be consulted, the ultimate decision was the employers'.

The case centred on an employer's rights and obligations when dealing with a pension fund surplus, and the specific powers and obligations given to the Electricity Supply employers under the wording of this scheme. The Pensions Ombudsman had decided that the action of the employers in these cases was unlawful but, following a trend which is becoming all too common, the Court overruled his decision and decided that the companies' actions were perfectly lawful.

The narrow argument, because it turned on the wording of the specific scheme, is of wider significance. In short the Court decided that a power to "make arrangements" to deal with a surplus did not exclude the possibility of reducing employers' contributions or paying off a debt otherwise owed to the scheme by the employers.

The court found, however, that National Power should have paid for previous redundancy costs in a lump sum, and its decision to pay by instalments was "irregular". The National Power case has been reopened on this point.

The wider argument is much more significant. The Ombudsman had ruled that, when dealing with this surplus, the employers' obligations to respect the interests of beneficiaries were almost the same as the obligations owed by the trustees of a typical scheme to its beneficiaries. That would mean that the employers had to make their decision acting in the best interests of scheme members.

The Court held, however, that although the employers had an obligation of good faith owed to the scheme's members. This was not as high as the obligations owed by a trustee which is to act in the best interests of scheme members.

The difference is that whilst the employers were obliged to exercise their powers with a view to the efficient running of the scheme, they could also consider their own best interests.

It does not follow that in all cases, employers will now be free to use scheme surpluses for their own interests. In this scheme, the ultimate decision how to dispose of a surplus lay with the employers. In many other schemes that power rests with the trustees. The most common provision makes this a joint decision and in such cases the employer will have to grant enough benefit improvements to the scheme's members to persuade the trustees that their consent should be given.

Arguments about pension scheme surpluses will be put on hold for a

while. In their most recent valuations, most pension schemes have revealed a small surplus or, in some cases, a deficit. The problem will not go away, however, and the judge in this case made the point that some uniformity of approach is required: at the moment, each case turns upon the precise wording of the individual scheme's rules, and where they are obscure the destination of any surplus remains up in the air until a definitive ruling has been received from the Court.

The Pensions Act 1995 does not deal with this subject and the judge suggested that further legislation is required. He pointed out that continued uncertainty means that employers will be more inclined to pay the bare minimum contributions necessary to keep the scheme in balance (or even to keep it marginally in deficit) and they may be inclined to abandon their pension scheme altogether or to opt for cheaper solutions. The national Grid Pensioners have lodged an appeal. A hearing in the National Power case, on the instalments point will be held within the next few weeks.

One Law for the Rich?

Clark v BET plc [1997] IRLR 348 (High Court)

A case for a chief executive whose annual salary was £490,000 may appear to have little relevance for trade union members - but the principles applied to calculate compensation can be put to wider use. The points of interest centre on entitlement to pay increases and bonuses.

Mr Clark's contract said that his salary "shall be reviewed annually and be increased by such amount as the board shall in its absolute discretion decide". This may amount to a commitment to make some increase, but at first sight it seems difficult to construct a contractual entitlement as no method for calculating any increase is specified and the employer is given "absolute discretion". One may have expected that there could be no entitlement to insist on an increase as the term was too vague.

Not so. The judge said that this term amounted to an obligation to make an annual upward adjustment. This was a contractual right which the employee could enforce.

Mr Clark had been dismissed so the judge had to decide the increase which he would have received if he had remained employed. He said it would be a breach of contract for the employer to act capriciously or in bad faith and decide the increase should be nil.

Although this was in the context of a damages claim, it must also hold true for employees who remain employed and whose contracts contain a similar entitlement to a pay review. They are entitled to insist on a review, and insist it is carried out in good faith.

There may be important implications for employees who have transferred under the Transfer of Undertakings Regulations (TUPE) with contracts containing a similar term. The position is different from a continuing contractual obligation to grant a pay increase in line with a national scale (see Ball v BET, issue 7 and Whent v Cartledge [1997] IRLR 153), but the new employer in herits a contractual obligation to carry out an upwards review of pay, and must exercise its discretion in good faith. The court goes on to say that in any claim for damages for a failure to exercise the discretion, it should not be assumed that the employers would have exercised the discretion to give the least possible benefit.

The contract also contained a clause that Mr Clark would "participate in a bonus arrangement providing a maximum of 60% of basic salary in any year". The court had to decide what bonus he would have received, in order to assess his loss of income. The employers said he would have received no bonus at all or a bonus of 6%. The court said it would be a breach of contract for the employers to provide no bonus scheme or a scheme which made it impossible to achieve 60%. The court had to make a realistic assumption of the bonus Mr Clark would have received if the employers had fulfilled their obligation.

These considerations led the court to conclude that Mr Clark would have received pay increases of 10% per annum and a bonus of 50% of salary every year.

These are astronomical figures which few employees could hope to achieve, but the approach suggests that in assessing compensation for loss of a job, whether because of discrimination, unfair dismissal or injury, courts should not stick to the bare minimum increase which a contract appears to allow, nor should they assume that any discretion would be exercised in a way which minimises the payout.

These arguments could also be deployed by employees with similar contractual clauses whose employers decline to give any pay increase or bonus because of an exercise of discretion. This would seem to be of particular relevance if there has been a change of employer leading to a change of attitude.

There is no reason why these arguments cannot be deployed in favour of workers in all sectors who are "entitled" to discretionary pay increase or bonus. Subsequent cases will show whether this is so, or whether there really is one law for the rich.....

Maternity: Ill health and return to work following maternity leave

CREES V ROYAL LONDON INSURANCE [1997] IRLR 85 EAT

KWIK SAVE STORES LTD V-GREAVES [1997] IRLR 268

LEWIS WOOLF GRIPTIGHT LTD V CORFIELD EAT 1073/96 (UNREPORTED) 10TH APRIL 1997

McPHERSON V DRUMPARK HOUSE [1997] IRLR 277 (EAT (SCOTLAND))

It is a sad fact that many women suffer from ill health following child birth. So why is the law so unclear, muddled and confused on a woman's rights to return to work if, at the end of her maternity leave, she is too unwell to return?

In the last few months there have been at least three reported cases on the subject in the Employment Appeal Tribunal, two of which will go before the Court of Appeal. The Maternity Alliance Help Line receives on average four calls a week from women wishing to return to work after maternity leave but too ill to do so. Nonetheless the law remains muddled.

Here, we try to distil the current state of the case law and recommend how best to preserve employee's rights when problems arise. There are three main sources of rights for women returning from maternity leave: statutory, contractual and the right not to suffer from sex discrimination.

Statutory Rights

All women, regardless of length of service are now entitled to 14 weeks

maternity leave and, during that time, their contracts remain in force in all respects, other than remuneration. They must comply with the notification procedure set out in the Employment Rights Act in order to gain the rights. The statutory right does not allow any extension of the 14 weeks in the event of ill health preventing a return to work.

Women with the necessary length of service (two years service as at 11 weeks before the baby's due date) have the right to return to work at any time up to 29 weeks after the actual birth of their child. Again proper notice must be given, including giving notice of the proposed date of return, at least 21 days beforehand. If ill health prevents a return to work on the notified date of return, the return date can be extended by up to four weeks if a medical certificate is delivered before the date notified.

And if a woman is still ill? Here the position becomes much more complex as it begs the question of what 'exercising the right to return to work' actually means. Under the statute, Section 82 of the Employment Rights Act 1996 states that exercising the right to return is done by giving the requisite notice. But case law, since Kelly v Liverpool Maritime Terminals Ltd (Court of Appeal 1988 IRLR 310) has added an extra requirement of physical return to work as well.

In the cases of Crees Lewis Woolf, both Mrs Crees and Mrs Corfield sent in sick notes which the EAT said did not amount to the exercise of the return to work. In Mrs Greaves' case, she physically attended at work in order to hand in her sick note and then went home. Again the EAT did not consider this to be enough to have exercised the right to return. Without having exercised the right to return, the right is lost and so too is the right to claim unfair dismissal under the statutory rights.

The analysis of the current case law raises more problems than it solves. For how long is a returning woman required to attend at work in order to have validly exercised her return? What if the perfectly fit new mother is injured in a road traffic accident on the way to her first day back at work? Does this comply with the Pregnant Workers Directive which prohibits placing women in a worse position than would have been the case had they not recently given birth? However until these issues are resolved in the Court of Appeal in the two cases of Crees and Greaves, the statutory requirements are being strictly construed.

To minimise difficulties, it is best not to inform your employer too far in advance of your intended date of return (provided always that the minimum 21 days notice is given).

Contractual Rights

If the statutory right to return is lost - either by failure to give proper notification or the failure to physically return on the notified return date of the four week extension, this does not mean that the contract automatically terminates. The woman's contract may still be in existence. If the employer fails to allow her to return on her recovery to full health, or dismisses her beforehand, she will still be able to bring a claim for unfair dismissal, provided the contract is still in existence.

To establish that the contract is still alive first look at the terms of the contract itself: if that is silent or of no help, examine closely all the facts of the case. Is there anything in the behaviour of the employer or the employee which shows the contract is still alive? Does the woman receive invitations to the staff party, contractual maternity pay, internal staff memos, retain the use of a company car? Is she still listed on the internal telephone list? What has been said in speech or in writing about her continued absence? Look for evidence to construe the contract as continuing.

The delivery of a sick note alone will not necessarily mean the contract continues. Nor will the payment of SMP alone show the contract is in existence, since SMP is a statutory requirement.

It is advisable for women who are unable to physically return following the end of their maternity leave to write when they send their sick notes. The letter should state that they remain an employee and will be absent from work through sickness. If the woman is entitled to statutory maternity pay she should say in the letter that she is claiming this as an employee. If the employer does not then contradict the woman's assertion, it will be evidence of the contract remaining in existence.

If a contract is in existence, so too will the rights to claim unfair dismissal if the woman is dismissed.

Sex Discrimination

Even where a woman has lost her statutory and contractual right to return there may still be a claim for sex discrimination depending on the circumstances. It may be possible to argue that a pregnancy related dismissal will be sex discrimination, without needing to find a male comparator. Much will depend upon the outcome of Brown v Rentokil in the European Court of Justice. Pregnancy related dismissal will be looked at in greater detail in a future bulletin when we will report the very recent ECJ judgment of Larsson v Dansk Handel.

It might also be possible to show that the woman is treated less favourably than the employer treats, or would treat, a male comparator. Check to see how long comparable men are entitled to by way of sick leave and whether a comparable man would have been dismissed for illness.

In Mrs Corfield's case the EAT found that she had been dismissed in circumstances where a man would not have been dismissed. The relationship between Mrs Corfield and her employer had broken down. Because Mrs Corfield no longer had a statutory right to return to work, the employer used this as an excuse for terminating her employment. That excuse would not have been open to an employer in the case of a male comparator. So, since a man would not have been dismissed in similar circumstances, therefore Mrs Corfield had been less favourably treated on grounds of her sex.

Part time workers rights

A new European Directive on part time working has been approved by the European Social Partners, the European TUC and the European equivalent of the CBI under the procedure allowed for by the Social chapter. Our own TUC and CBI participated in the negotiations. It now needs only to be accepted by the Social Affairs Council of Ministers to become law within two years.

If passed, it would for the first time establish a legal right to equal treatment for part time workers. At present, part time workers rights have been achieved through using sex discrimination law and rights are often won on a piecemeal and case by case basis.

The 'Agreement on Part Time Working' establishes the principle that part time workers should not face discrimination solely because they work part time, unless different treatment is justified on objective grounds. It is a significant breakthrough in Europe's attempts to protect atypical workers.

It will have the effect of shifting the burden of proof in part time workers' cases away from the employee to the employer.

All the national statistics show that the vast majority of part time workers are women and the research, including the TUC research shows that six out of ten part time workers do not get the same contractual rights as their full time counter parts.

But, the burden of proof is currently on the employee to prove discrimination in each case in order to achieve parity with full time workers. Although discrimination against part time workers can rarely be objectively justified by an employer, it is not always easy to prove the discrimination.

In predominantly female work places it can be difficult to obtain the statistical evidence required to show disparate impact against women. In equal pay cases it may be difficult to find actual comparators where all the so called 'women's work' is done exclusively by part timers. Male part timers will rarely be able to prove indirect discrimination.

The agreement also heralds a breakthrough in seeking to establish protection from discrimination by reference to the pattern of work rather than a characteristic of the worker.

The agreement arose from the ashes of the Atypical Workers Directive. After years of negotiation between the member states the Atypical Workers Directive was vetoed by the UK Government in November 1994. It required unanimous approval in order to be passed.

The Atypical Workers Directive would have covered part time, fixed term and temporary workers. The Part Time Workers Agreement could therefore pave the way for protection for other categories of workers in due course.

The predictable objections to the Agreement have been raised by, in particular, the small business lobby. They argue that the extension of rights will cost part timers jobs and that the Directive would hurt most those it is seeking to protect. These are old arguments which are swiftly dealt with. They were identical to the objections raised by the business lobby and the then UK Government in the Equal Opportunities Commission judicial review proceedings.

The House of Lords were not convinced that the discriminatory threshold for acquiring protection from unfair dismissal and the right to a redundancy payment could be justified and so the two tier system was removed. Since part timers gained the same statutory rights in employment as full timers, the statistics show that it has not affected the overall number of part time jobs available.

For example, in small companies employing 50 or less employees, since part time workers acquired the same statutory rights as full time workers, not only have the numbers of part time workers increased, but they have in fact increased at faster rate than the increase in full time jobs with small employers. The pattern is the same for larger employers.

If passed, the principal of non-discrimination will cover 'employment conditions'. This will include all contractual terms, like paid sick and holiday leave, contractual staff discounts, occupational pensions and contractual pay, bonus and shift allowances.

It may also include non-contractual provisions such as ex gratia payments, working conditions and issues of equal treatment. The precise meaning of 'employment conditions' has yet to become clear.

All part time workers will be covered by the agreement. A part time worker is one who has 'an employment contract or employment relationship'. It is therefore wider than the definition of employee for the purposes of the Employment Rights Act 1996 (Section 230) which refers only to an employment contract.

The definition is more akin to

that in the Sex Discrimination Act and Race Relations Act which covers employment under a contract of service, apprenticeship, or a contract personally to execute any work or labour.

The pro rata principle will apply to part time workers employment conditions where appropriate. If an employer can objectively justify different treatment for part time workers, they may have a defence to a claim. Objective justification is likelt to be a heavy burden with the employer needing to show that less favourable treatment of part timers corresponds to a real need on the employer's part; be appropriate with a view to achieving that objective or reason and, be necessary to that end (the 'Bilka Kaufhaus test').

There is also limited scope for member states - after consultation with the social partners, and where justified by objective reasons and where appropriate - to make access to particular conditions of employment subject to conditions such as a period of service, time worked or earnings qualification (Clause 4.4).

The Agreement places an obligation to identify and review obstacles which might limit opportunities for part time work and, where appropriate, to eliminate them. Employers and trade unions will need to review collective agreements to identify obstacles which may limit opportunities for part time work as well.

Under the Agreement employers are required to give consideration to requests by workers to transfer from full to part time work and vice versa. They must also give consideration to providing information on the availability of part time and full time work in their establishment to facilitate transfers from part time to full time and to facilitate access to part time workers at all levels of their enterprise.

It will be for Members states to decide how best to implement the Directive and they are at liberty to maintain or introduce more favourable provisions than those set out in the agreement. The agreement cannot be used as an excuse for reducing the general level of protection afforded to part time workers and the agreement will not affect specific community legislation, particularly in relation to equal treatment and opportunities for men and women. It would still be possible to bring both sex discrimination and equal pay cases on behalf of part time women workers, should any gaps be left by the agreement.

If passed, member states will have 2 years to adopt the agreement, with the right of one additional year to comply if there are particular difficulties of implementation involved.

The agreement is a welcome step forward to provide a comprehensive floor of rights for part time workers to prevent discrimination and reduce the difficulties in establishing rights for part time workers through using the sex discrimination legislation. We should know in October whether it has gained approval from the Social Affairs Council of Ministers.

Fixed term contracts - waiver clauses

BBC v Kelly-Phillips (25.6.97)
EAT/1397/96 unreported

Housing Services Agency v Cragg
EAT/460/96 unreported

The Employment Appeal Tribunal has dealt a blow to the growing fixed-term contract culture among employers that are aimed at reducing the rights of workers. The EAT is clear as far as unfair dismissal is concerned but created an anomaly in redundancy cases.

The two cases involved the use of waiver clauses in employment contracts aimed at excluding the employee's rights to claim unfair dismissal or a redundancy payment on the expiry of the fixed term without renewal.

In an unfair dismissal claim the waiver clause is only valid where the contract is for a fixed term of one year or more (meaning it is not valid in contracts of less than twelve months). In redundancy payments cases the waiver clause is only valid in contracts of two years or more (meaning it is not valid in contracts of less than two years). (is this statute, where does this come from?)

The approach which the EAT has taken differs between clauses which seek to exclude unfair dismissal rights and those which seek to exclude redundancy payments.

Ms Kelly - Phillips had been employed by the BBC on a series of fixed term contracts starting in September 1993. For each contract there was a waiver clause excluding a claim for unfair dismissal.

The longest contract was for a period of one year from September 1994 until September 1995. At the end of August before this contract expired she was offered "an extension beyond the 5th September 1995 until 31st December 1995", a period of nearly four months.

When this contract expired she left the BBC and claimed unfair dismissal. The BBC argued that this extension meant the fixed term was for more than a year and therefore her claim for unfair dismissal was excluded.

The EAT did not accept this. They asked themselves under what contract of employment was Ms Kelly-Phillips dismissed on 31st December 1995. They found that it was the contract made at the end of August 1995 which ran for four months.

They therefore concluded that as the contract was for a fixed term of less than one year the BBC was unable to claim the benefit of her contracted-out protection. In doing so they adopted the "final contract test" first advanced by Lord Denning in BBC v Ioannou [1975] ICR 267. This means that you look at the last contract and if that is for less than a year the right is not excluded.

In the Cragg case the issue was whether the employee had waived his right to a redundancy payment. Tony Cragg's first contract of employment was not a fixed term contract, he was then employed running a private sector leasing scheme funded by the Government on a three year basis.

He did not at first receive a new contract but did sign a waiver clause excluding his right to claim unfair dismissal and redundancy pay. In December 1991 he entered into a new fixed term contract for a period of more than two years, he also signed a new waiver. There were the three extensions of the contract until the employment ended on 31 March 1995. Tony Cragg then applied for a redundancy payment which was refused on the grounds that he had waived his rights.

The Industrial Tribunal found that he was entitled to a redundancy payment. The employers appealed. The EAT looked at the language and legislative history of what is now s197 Employment Rights Act and in particular s197(5) which refers to a fixed term being renewed. They also looked at the various precedents and said they were adopting an independent approach to the issues regarding themselves as bound only by statute.

They found in Tony Cragg's case that there was a two year fixed term contract, followed by a succession of renewals, each accompanied by a waiver agreement, resulting in a fixed term contract for two years or more for the purposes of s197, and that he was therefore excluded from claiming a redundancy payment. In their decision the EAT said they were drawing a clear distinction between the unfair dismissal and redundancy payment waiver provisions that will create an anomaly. It will.

In short in unfair dismissal cases if the final contract is less than one year, a waiver clause will not operate to exclude the right to claim unfair dismissal. In redundancy cases if the initial contract containing the waiver is for two or more years is then renewed or extended by shorter contracts each covered by a waiver then there is no entitlement to a redundancy payment.

The BBC is applying for leave to appeal to the Court of Appeal, Mr Cragg is not appealing.

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