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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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From the reaction in the media, the European Court of Justice decision on 11 March 1997 in Suzen represented the end of TUPE as we know it. This is far from the truth. The law would have been clearer, and more favourable for employees, if the Suzen judgment had never been made, but the implications of the decision itself are far less drastic than they have been portrayed.

The Court decided that the Acquired Rights Directive did not apply to a change from one cleaning contractor to another because there was neither a transfer of assets, nor a transfer of a major part of the workforce.

The case concerned a cleaning contract carried out by eight cleaners. The secondary school awarded the contract to a different company. The Court did not know whether the new contractor offered jobs to the existing employees, but we do know that they were not taken on.

The decision does not overturn the previous cases, in particular Schmidt [1994] IRLR 302 and Redmond [1992] IRLR 366. Schmidt was a transfer of a cleaning contract being contracted out for the first time involving only one member of staff and Redmond was the termination of a grant to one charity and a transfer of that subsidy to another charity. These decisions remain valid.

The Court confirms that there may still be a transfer without any contractual relationship between the outgoing and incoming contractors, but it says that the mere similarity of service with the old and new contractors is not enough to establish that the Directive applies: an undertaking means more than just an activity. The identity of an undertaking emerges from factors such as its workforce, management staff, organisation of work, operating methods or operational resources.

The impact of the case is far less dramatic than portrayed

Previous attempts to limit the scope of TUPE, in the courts and by the European Commission, have suggested that assets must transfer for the Directive to apply. The Court in Suzen does not accept that this is a prerequisite, particularly in labour intensive sectors. It would be illogical to focus on a transfer of assets in those cases.

It is helpful that the Court accepts that in labour-intensive activities "a group of workers engaged in a joint activity on a permanent basis may constitute an economic entity", that is an undertaking or part of an undertaking. This means there will be a transfer where the new employer takes over "a major part, in terms of their numbers and skills, of the employees specially assigned by his predecessor to that task".

There is a danger that UK courts may take Suzen as a signal to limit the applicability of TUPE. The Court of Appeal has succumbed to the temptation in the Betts case. The implications of these decisions are discussed on pages 4 and 5.

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Going Underground

London Underground Ltd v Edwards (No 2) [1997] IRLR 157

London Underground Ltd indirectly discriminated against a single parent with a young child, by introducing a shift system which did not satisfy her needs as a single parent, the Employment Appeal Tribunal has held.

Under the old shift system Mrs Edwards was able to work hours which were compatible with her parental responsibilities. The IT found the new rostering arrangements were a requirement or condition with which Mrs Edwards could not comply. LUL did not appeal this part of the decision.

The IT concluded that the proportion of female train operators who could comply with the new arrangements was "considerably smaller" than the proportion of male train operators. All of the 2023 men could comply compared with 95.2% of women (20 out of 21).

London Underground argued that this proportion was not "considerably smaller" and referred to the case of R v Secretary of State ex parte Unison (1996 IRLR 438) where the High Court said that if there were only a 4% disparity in the relevant groups it was too small to justify taking legal action.

The EAT disagreed. What is a considerably smaller proportion is a question of fact for the IT as "it would be a misuse of authority to take one proportion from one case and then use it as a yardstick or marker in another".

London Underground argued that the IT was not entitled to take into account the overall number of men relative to the number of women but only to consider relative proportions, or the fact that only one woman could not comply or that women are more likely to be single parents caring for children than men.

Again the EAT disagreed. The IT was entitled to take into account all those matters and the possibility that some kind of assumption may exist that a particular type of work is "mens work" and not "womens work" and to consider whether the number of women drivers was so small as to be statistically unreliable.

In assessing proportionate impact on such a small pool of women, the IT could take account of a wider view to include statistical evidence that women are more likely to have primary child care responsibility than men.

The discrimination was not justified. London Underground should have accommodated Mrs Edwards' personal requirements, she had been working for them for nearly 10 years and her family demands were of a temporary nature.

The EAT observed that Mrs Edwards might have had a case of direct discrimination as well as indirect discrimination by changing the roster, in a way which London Underground must have appreciated would cause her a detriment.

Employers should carefully consider the impact which a new roster might have on a section of their work force and should recognise the need to take a reasonably flexible attitude to accommodate the particular needs of their employees. This is a welcome decision which takes a realistic approach to the issues in indirect discrimination cases.

Trade unionists have feelings too

Cleveland Ambulance NHS Trust v Blane [Times, March 1997] (EAT)

The Employment Appeal Tribunal has upheld an Industrial Tribunal decision to award £1,000 for injury to feelings to an ambulance paramedic who had not been shortlisted for a management post because of his trade union activities. The case, brought by UNISON against Cleveland Ambulance Service, adds bite to laws which make it unlawful for employers to take action against employees that prevent or deter them from taking part in trade union activities or penalise them for doing so.

Although claims for breach of contract or unfair dismissal cannot lead to compensation for injury to feelings, claims for victimisation on union grounds are different. This is because compensation must be just and equitable "having regard to the infringement complained of". This goes beyond the financial loss suffered by the employee.

As with claims for race or sex discrimination, compensation for injury to feelings was payable and an award of £1,000 was appropriate in this case, the EAT said. This leaves open the possibility of higher awards for injury to feelings, bearing in mind recent developments in discrimination cases reported in previous editions.

The tribunal concluded there was a 25% chance Mr Blane would have been promoted but for the discrimination on union grounds. It awarded 25% of the extra pay he would have received.

This means it is not necessary for the employee to show he would have been promoted if he had not been victimised. Compensation will be assessed on the percentage chance of promotion.

UK in breach of the law

The Committee of Ministers of the Council of Europe has condemned UK union laws for breaching international law and says they should be changed. Although not legally binding, the recommendation of the Committee of Ministers has made it clear that the UK government will be expected to amend the offending legislation.

The Committee polices the European Social Charter signed in 1961 and which took effect with respect to UK law in 1965. The ruling is another embarrassment to the Government, previously condemned by the United Nations linked International Labour Office for stripping away union rights at GCHQ.

The committee condemned S.13 of the Trade Union and Employment Rights Act 1993 which allows employers to offer inducements to give up collective bargaining rights as an infringement of the rights to organise and bargain collectively. It could, the committee says, be used by employers to dissuade workers to become or to remain trade union members.

This section was hastily introduced by the Government after the Court of Appeal decided in favour of trade union members in the Wilson and Palmer case. The amendment made it lawful for employers to offer inducements to employees to give up union membership or collective bargaining. The case was later overturned in the House of Lords, but the punitive section remains.

The committee also condemned the legislation which restricts unions' rights to draft their own rules and procedures and opens them to heavy financial penalties if they do not comply. It also condemned the employers right to dismiss all those taking part in a strike and re-employ them selectively three months later.

EAT rewrites redundancy rules

Safeway Stores Plc v Burrell [1997] IRLR 200 (EAT)

What is the meaning of redundancy? The right to a redundancy payment is one of the oldest statutory employment rights and after 30 years the Employment Appeal Tribunal has reinterpreted the meaning of 'redundancy' and rejected 20 years of case law.

The definition of a redundancy situation is contained in Section 139 of the Employment Rights Act 1996. The area that has caused most problems is interpreting the meaning of the words:

'The fact that the requirements of that business for employees who carry out work of a particular kind... have ceased or diminished'.

What is 'work of a particular kind'? Courts have developed the so-called 'contract test', most notably in the Court of Appeal judgment of Cowen v Haden Limited [1983] ICR 1. They held that it is necessary to look to see whether there is a diminishing need for the kind of work the employee may be required to do under his or her contract of employment, not the particular kind of work which he or she was actually carrying out.

But this approach has been rejected in the case of Safeway Stores Plc v Burrell and the EAT have set out a three stage test to be applied.

1. Was the employee dismissed? If so,

2. Had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease of diminish? If so,

3. Was the dismissal of the employee caused wholly or mainly by the redundancy situation; ie. stage 2?

Stage 2 of the process involves looking only at the requirement for employees in general to perform work of a particular kind, not the terms of the individual employee's contract of employment. The EAT has held that you must look only at the work being performed for the employer. This avoids decisions based on the wording of the contract and focuses on the work actually done.

Stage 3 involves looking to see whether the redundancy caused the dismissal.

The EAT went on to say that the terms of an individual's contract of employment will be relevant only where an employee is redeployed under the terms of his or her contract and does not wish to move. In this case the cause of dismissal will not be redundancy (even though a redundancy situation arises), but the refusal to move or transfer. This could then fall into the conduct category of dismissals and be judged on its fairness accordingly. If the dismissal was unfair, the employee could receive a basic award and compensation for unfair dismissal.

The EAT has provided clear and logical guidance in this case. It remains to be seen whether the EAT judgment will be followed or if ITs will continue to adopt the older tests that Safeway v Burrell seeks to discredit. Time will tell.

Where are we now?

Suzen v Zehnacker Gebaudereinigung GmbH Krankenhausservice (European Court of Justice, 11 March 1997)

Betts v Brintel and KLM (Court of Appeal, 26 March 1997)

European Commission Explanatory Memorandum: Guidelines on the Application of the Acquired Rights Directive

Evans v East Riding of Yorkshire (Industrial Tribunal, 18 February 1997)

Where does the Suzen judgment leave us? The Court effectively re-emphasises the importance of applying the factors listed in the Spijkers case [1986] CMLR 1119 which is the basis of all ECJ decisions on TUPE. The Court in Suzen rejected the view of the Advocate General that the Directive should not apply to contracting out.

The fear is that the decision will encourage contractors to attempt avoidance strategies. Contractors may think they can avoid the consequences of TUPE by refusing to take on assets or staff. This, of course, would not assist contractors when an in-house service is first put out to tender as this will still be covered by the Directive, following Schmidt. Even second stage transfers will present difficulties for transferees. In many cases the assets will be necessary to carry out the work or the only intangible asset will be the monopoly right to carry out the service under the contract in return for reward, which will inevitably continue after the transfer. Indeed, the employees' skills are themselves an intangible asset.

A contractor who refuses to take on employees to avoid TUPE takes a considerable risk. Under the Directive, employment contracts transfer whether the new contractor likes it or not (Rotsart de Hertaing [1997] IRLR 127) - a point which the Suzen decision does not take properly into account. It is no excuse for an employer to say that if he had known that TUPE applied he would have had a good reason to dismiss the staff (BSG v Tuck [1996] IRLR 134).

Even if an employer wanted to refuse employment to the existing staff, he would find it hard to do so in a way which avoided TUPE liability. Suzen says that the Directive will apply where a "major part" of the staff transfers. This may be less than a numerical majority. It may be one or more key staff whose expertise is important to the contract, for example managers, supervisors or staff with particular skills. This is consistent with the idea that the skills of existing staff are an intangible asset.

These staff are likely to transfer in most cases. In many sectors, it will be open to contractors and those awarding contracts to ensure this occurs by making staff transfer a stipulation of the contract. The current exception is local government because of statutory restrictions which would make this unlawful "anti-competitive" behaviour.

Bear in mind also that the ECJ said that the identity of an undertaking can also be derived from the way in which work is organised, operating methods or operational resources - some if not all of which will remain substantially unaltered following a change of contractor.

The ECJ goes too far in saying that "the mere loss of a service contract to a competitor cannot by itself therefore indicate the existence of a transfer". But, even if this proposition is accepted, it does not alter the fact that in most cases the change of contract in these circumstances will be covered by the Directive. The Court in Suzen recognised this in its reference to "a group of workers engaged in a joint activity on a permanent basis" as a part of an undertaking capable of transfer.

CHOPPERS CHOPPED

The Court of Appeal appears to overlook a number of aspects of the Suzen decision in the case of Betts. The case concerns a contract to provide helicopter services to Shell oil rigs. The contract was operated by Brintel but was then awarded to KLM.

In 1995 the High Court supported the argument of the unions that this was a transfer covered by TUPE. The Appeal Court has overturned this decision and, in doing so, relied on Suzen which was decided a few days before the appeal hearing.

The Court of Appeal accepted that the provision of the helicopter service constituted an undertaking, but it defined the undertaking as including substantial assets,

many of which did not transfer. It distinguished the case from labour-intensive contracts such as cleaning (as in the case of Dines [1995] ICR 11) and said that because only limited assets transferred, the undertaking did not retain its identity and was not transferred.

The Court was dismissive of the fact that KLM declined to take on staff in an effort to avoid TUPE. This is contrary to the policy behind the Directive. In taking this approach, the Court also failed to appreciate the distinction between the transfer of "a major part" of the workforce, as required by Suzen, and the transfer of a majority: a small number of significant employees may amount to a major part even if they are not the numerical majority of the workforce.

It is worth emphasising that the Court did not overturn any previous UK decisions and reaffirmed the importance of the test in Spijkers [1986] CMLR 1119 although the Court describes Suzen as a "shift of emphasis, or at least a clarification".

AS CLEAR AS MUD

The Suzen decision is a political decision attempting to reconcile the previous cases with the pressures on the court from governments and employers to limit the application of the Directive, particularly in the sphere of contracting out. This can be seen from the European Commission's attempt to modify the provisions of the Directive and, now, from the Commission's "Explanatory Memorandum" on the interpretation of the Directive issued on 11 March 1997 -the same day as the Suzen decision. Coincidence? Certainly not.

The Explanatory Memorandum is not legally binding, but it is an indicator of the approach the ECJ is likely to take to the cases on the Directive which are in the pipeline.

The Memorandum is described as a "useful tool for a better understanding of Community law in a very complex area which it is not always easy to interpret". As with Suzen, the Memorandum stresses the continuing validity and importance of the existing cases including Schmidt, but it wrongly states - inconsistently with Suzen- that there can only be a transfer where there is "the transfer of an organised set of assets by means of which the activities ... can be carried on in a solid manner". This involves a misquote and a misinterpretation of the Rygaard decision [1995]IRLR 51 which applies only to one-off works contracts. This misinterpretation is reflected in the Suzen judgment.

The Memorandum is useful in restating that even agreed changes in terms and conditions are invalid where the reason for the change is the transfer itself, which supports the approach of the Employment Appeal Tribunal in Wilson v St Helens BC [1996] IRLR 320 - which is shortly to be heard in the Court of Appeal.

As against this, the Memorandum is wrong to state that the Directive prohibits only dismissals where "the only reason is the transfer". If the dismissal is for a reason connected with the transfer it is automatically unfair, even if there are other reasons, unless the employer can establish an economic technical or organisational reason entailing changes in the workforce.

Perhaps the most significant aspect of the Memorandum is the list of thirteen cases on the Directive pending before the European Court. Those wishing for certainty and stability in the interpretation of TUPE are unlikely to have their wishes fulfilled.

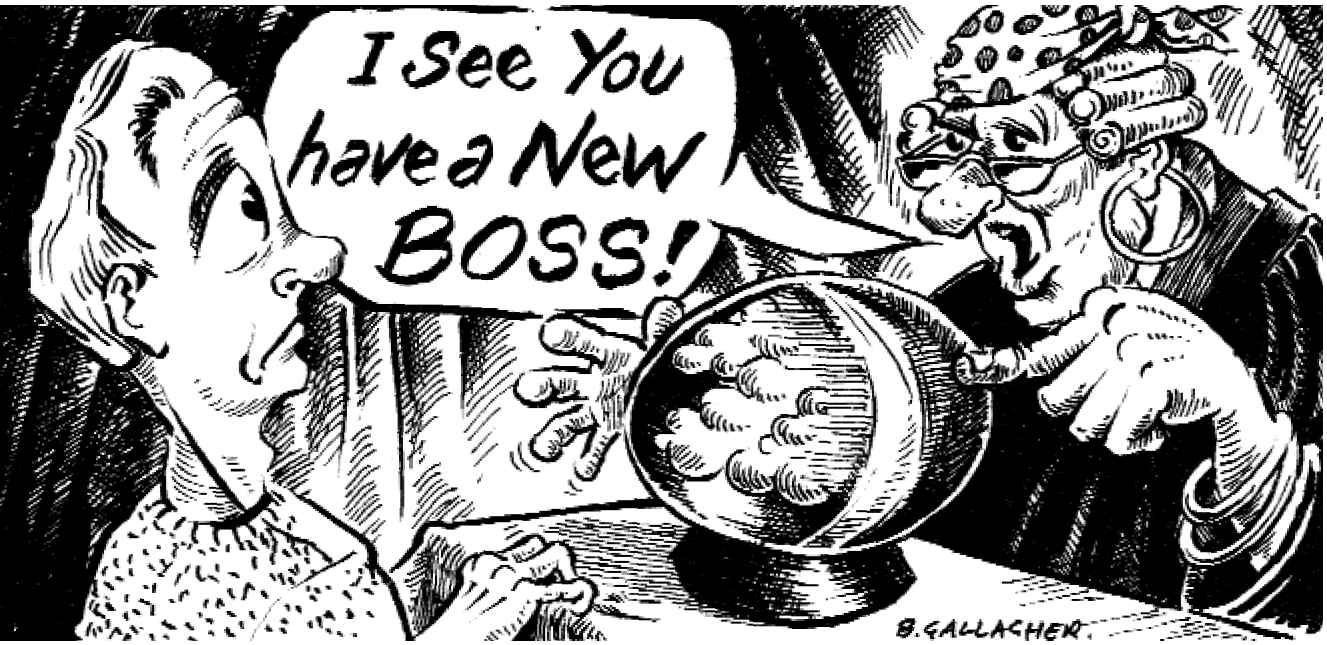
CLARITY BEGINS AT HOME

It is to be hoped that the UK courts will continue to adopt a pragmatic and expansive approach to the applicability of the Directive. It took some time for the message to get across, but once the courts took on board the purposive approach of the Directive, they applied it in a logical manner which confirmed its application to most contracting out, in the decisions following Dines [1994] IRLR 336. They rejected arguments that subsequent European Court decisions significantly narrowed the application of TUPE - see the response to Rygaard in BSG v Tuck. The appeal court's approach in Betts, however, does not give immediate cause for optimism.

There is support for the positive trend of cases in the Industrial Tribunal decision of Evans v East Riding which said that local government reorganisation in the UK is covered by TUPE despite the European Court decision in Henke [1996] IRLR 701.

The Tribunal was satisfied that a UK local authority is very much an economic entity. Nuances from the Suzen decision and the Memorandum should not deflect the UK courts from this type of pragmatic approach.

Telepathic transfer



Secretary of State for Trade and Industry v Cook [1997] IRLR 150 (EAT)

Contracts of employment automatically transfer to the new employer where there is a transfer of an undertaking, the Employment Appeal Tribunal has finally accepted. And the EAT went on to say that its decision in a previous case, which undermined this principle, was wrong and should not be followed by Industrial Tribunals.

In the last edition of LELR we reported on the European Court of Justice decision in Rotsart de Hertaing. The Court stressed that, where there is a transfer of an undertaking, employees' contracts automatically transfer even if the transferee refuses to employ the affected staff.

We commented that this confirmed the view that the Employment Appeal Tribunal had been wrong in its previous decision of Photostatic Copiers v Okuda [1995] IRLR 11. In that case the EAT said that employment contracts do not transfer where the employee has not been notified of the transfer or the identity of the transferee.

Happily in the Cook judgment, the EAT has now taken the opportunity to say that the Photostatic Copiers decision is wrong and should not be followed by Industrial Tribunals.

The EAT points out that if the Photostatic Copiers judgment was right, employers could avoid the impact of the TUPE Regulations. All employers would need to do was fail to tell employees about the transfer or the identity of the new employer. The contracts would not then transfer and the employees' only remedy would be a claim for unfair dismissal against the old employer which may be insolvent.

This EAT decision confirms that contracts, and liability, transfer automatically. But this may not always be beneficial for the employee.

In Cook it meant the employees could not recover payments under the state redundancy fund because liability transferred from the insolvent old employer to the solvent new employer, whose identity they did not know when they were dismissed.

This does mean that employees may find contracts of employment transferred without their knowledge. This deprives them of the opportunity to object to transfer, but (as the EAT points out) this is a pretty useless right as it involves resigning and giving up any claim to unfair dismissal or redundancy.

The EAT points out that an employee who discovers the contract of employment has transferred after the transfer could resign anyway, and may also be able to claim constructive dismissal if the new employer has concealed the true position.

This must include the right to resign and claim constructive dismissal after the transfer where the change of the identity of the employer is, of itself, a significant detrimental change for the employee (TUPE Regulation 5(5)). A Tribunal may well conclude that concealment of the identity of the transferee reinforces the employee's argument on this point.

The employee has the additional protection that there must be information and (usually) consultation in all cases where a transfer occurs, even if only one employee is affected. If an employee is transferred without his knowledge, he will be able to bring a claim for failure to consult and, if he is dismissed or has his terms and conditions reduced, he will be able to bring a claim under TUPE against the new employer.

There would seem to be little advantage to employers in concealing transfers. Employees' legal rights will be protected anyway and an employer who infringes those rights and conceals the fact of transfer will have no prospect of successfully defending a claim. A Tribunal will be bound to conclude that dismissals of employees in those circumstances are connected to the transfer and automatically unfair and that attempts to reduce terms and conditions are invalid.

TUPE and derecognition

Whent and others v T. Cartledge Ltd [1997] IRLR 153 (EAT)

Employers bidding for public service contracts have adopted a number of strategies in attempts to avoid the impact of the Transfer of Undertakings Regulations (TUPE). One by one these strategies have been undermined by successive decisions.

Contractors have recently concentrated their attacks on limiting the effects of TUPE.

This involved cuts in terms and conditions, but the scope for this approach has been greatly restricted by the Employment Appeal Tribunal decision in Wilson v St Helens BC [1996] IRLR 320 which outlawed changes made as a result of the transfer. The appeal in the Wilson case is due to be heard by the Court of Appeal on 9 May 1997.

Many employers chose to preserve existing terms for transferred staff, but deny them any pay rise. This was undermined by the EAT decision in BET v Ball (see issue 7) which said that where the right to a pay rise was enshrined in a collective agreement which was incorporated into individual contracts, the new employer was bound to meet the pay rises even where he did not participate in the process which set the new rate.

This has been taken a step further in the GMB's case of Whent, involving the transfer of the street lighting department of Brent Council. Following the transfer, the new employers derecognised the GMB and wrote to all employees saying that all recognition arrangements and collective agreements no longer had effect.

The employees all had contracts saying their "rate of remuneration ... will be in accordance with" the national conditions in the collective agreement, the NJC terms. The employers persuaded the Industrial Tribunal that withdrawing from the collective agreements meant that the collective bargaining machinery no longer applied to them and they were not bound by subsequent pay increases.

The EAT overturned that conclusion. The NJC terms were incorporated into individual contracts. This meant the employers could not take away the employees' rights simply by terminating the collective agreements. The mechanism for fixing pay was a term which became part of the individual contract. The employees were entitled to receive pay rises in line with NJC rates following the transfer.

The employers complained that they would be bound by the NJC rates ad infinitum even though they had terminated the collective agreement. The EAT said this was wrong. The employers could still negotiate changes or force changes by dismissing employees and re-employing them on worse terms.

This would be subject to the restriction that if those changes were connected with the transfer they would be invalid and dismissals connected to the transfer would be automatically unfair. This is as it should be. If the transfer had not occurred, there would not have been pay cuts, pay freezes or sackings, so the transfer should not provide a reason for those steps.

The combined effect of the Wilson, Ball and Whent decisions means that many employees transferred to private companies remain entitled to pay rises in line with the public sector bargaining arrangements, even where employers have tried to deprive them of those rights.

House of Lords refers two year limit case to ECJ

R v Secretary of State for Employment, Ex Parte Seymour Smith and Another (unreported) House of Lords March 13th 1997

Is the rule requiring 2 years' service before an employee can bring a claim for unfair dismissal against the law? The House of Lords has just referred the question to the European Court of Justice for a ruling whether the 2 year rule breaches equal pay law and Article 119 of the Treaty of Rome.

The House of Lords has also struck out the decision of the Court of Appeal 1995 ICR 889 that the 2 year rule indirectly discriminated against women between 1985 and 1991 and is incompatible with the Equal Treatment Directive. The appeal court had found that the 2 year qualifying period had a considerably greater adverse impact upon women than men over that period. The Equal Treatment Directive requires that there should be no discrimination whatsoever between men and women in the employment field.

The reasoning by the House of Lords was that the declaration made by the Court of Appeal served no useful purpose. It did not enable employees to sue for unfair dismissal with less than 2 years service. Neither did it require UK law to be changed to reduce the 2 year period.

The House of Lords also pointed out that the Court of Appeal judgment only concerned the discriminatory effect of the 2 year rule between 1985 and 1991 and that the figures since then show that the gap between men and women who qualify for employment protection rights, has narrowed. They did not say whether the gap has narrowed so much as to no longer show a considerably adverse impact upon women.

It is likely to be another 2 years before a definitive ruling emerges from the European Court of Justice. What is the position in the meantime?

Most Industrial Tribunals are not prepared to wait until the final outcome of Seymour Smith. They are hearing cases for unfair dismissal brought by employees with less than 2 years service.

The cases are being dismissed on the basis of the 2 year qualifying period as it presently stands. In some cases costs are even being awarded against the Applicants bringing the cases.

The Employment Appeal Tribunal is generally taking a more liberal line and has until now agreed in most cases to delay hearing appeals against IT decisions awaiting the outcome of Seymour Smith (Street v Peacock, unreported EAT/217/96).

It is likely that Industrial Tribunals will continue to refuse to postpone Seymour Smith type cases and that there will soon be a further Judgment from the EAT to clarify the approach it intends adopting.

Meanwhile, the dilemma remains. Should employees with less than 2 years service lodge claims for unfair dismissal? The difficulty is this: until the ECJ rules, UK Industrial Tribunals are likely to continue to throw out cases relying on the law as it stands now. But if the ECJ finds the UK Government has breached Article 119 by imposing the 2 year service requirement, individuals may have lost valuable rights if they have not brought a claim within 3 months of their dismissal.

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