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No change for part-time workers' pension rights

Preston & Ors v Wolverhampton Health Care NHS Trust & Ors
Fletcher & Ors v Midland Bank Plc (IDS Brief 584, March 1997, Court of Appeal)

Part time workers seeking back dated equal pension rights have received no comfort from the Court of Appeal. While there was celebration when part time workers won the right not to be discriminated against in pension schemes it is the next generation which will benefit.

Since pension rights become valuable by building up over time, in order to gain equality for part time workers now, they need to back date pension scheme membership to the date of discrimination. But UK Law only allows backdating in equal pay claims for 2 years from the date of the claim and that claims cannot be brought later than 6 months from the end of the contract of employment which breached the right to equal pay.

Yet many people only realised that they might have a claim for pension rights in September 1996 following the European Court of Justice six-pack of part time pension rights cases. They started cases within 3 or 6 months of this judgment.

The TUC has therefore backed a number of test cases to seek to improve the position of part timers (see LELR issue 2 page 8). Nearly 60,000 cases have been lodged in the Industrial Tribunal on behalf of part time workers who have, at some stage during their employment, been denied access to an occupational pension scheme.

The Court of Appeal has upheld the finding of the Employment Appeal Tribunal which ruled that the two year restriction on back pay in the Equal Pay Act is not in breach of community law. It also ruled that it was not unlawful for claims to be allowed only within 6 months of the ending of a contract of employment.

Even though most individuals were ignorant of their rights before the cases in September 1996, the court held that this was no basis for extending the time limit to allow the claims to be considered. This judgment is disappointing and the parties are appealing to the House of Lords to seek a reference to Europe on the points raised.

Watch this space.

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The state – we're in

NUT v Governing Body of St Mary's Church of England School
(IDS Brief 582/ February 1997)

European Directives can be directly enforced against voluntary aided schools because they are regulated by Acts of Parliament and a Board of governors is a public body with legal obligations, the Court of Appeal has held. The decision has important implications with more organisations to be treated as emanations of the state, giving more workers the direct benefit of European law.

"Is my employer an emanation of the state?" is hardly a question on the lips of the nation's workers. But the answer makes an important difference for employees' rights at work.

European law is the key. Most European laws relating to employment or health and safety are Directives: instructions to European Union governments to pass laws in their own country. If a government fails to pass the necessary laws, or passes laws which do not implement the Directive properly, it may be challenged in the European Court.

This is a slow process which would not immediately help workers who have been deprived of the rights they should have under the Directive.

The European Court of Justice plugged that gap in two ways. First, employees who work for a state employer can bring a claim against that employer using the Directive, even if it has not been implemented by the government (Marshall v Southampton & South West Hampshire Health Authority [1986] IRLR 140). This is because a state employer should not be allowed to take advantage of the state's failure to comply with European law.

Employees in the private sector cannot rely on this approach. Courts must interpret UK law in a way which complies with European Directives, but, if they cannot and employees lose out as a result, the employees' only possible claim is to sue the Government. This is based on the principle in the Francovich case [1992] IRLR 84.

In short, state employees have a direct remedy against their employers. This is particularly important where the UK does not pass laws in time (as with the Working Time Directive) or where the UK laws do not match up to the Directive they are supposed to implement (as with the TUPE Regulations and the Acquired Rights Directive).

This does not only benefit employees of central government. In various decisions local authorities, NHS Trusts and even privatised water companies (Griffin v South West Water [1995] IRLR 15) have been held to be, in the legal jargon, "emanations of the state".

The test was first set down in Foster v British Gas [1991] IRLR 268 and covers bodies which have been made responsible for providing a public service, where the service is under the control of the state and the body has special powers.

The NUT case concerned the amalgamation of two voluntary aided schools. The Tribunal dismissed claims for unfair dismissal and failure to consult. It said that TUPE did not apply because, at that time, TUPE only covered commercial undertakings. It rejected the argument that the school was an emanation of the state which would have meant that the Directive applied and the claims would succeed.

The Employment Appeal Tribunal took the same view, but this has now been overturned by the Court of Appeal. The Court said that the school was part of the state system. It was regulated by powers passed under Acts of Parliament. The governors were a public body with legal obligations.

The Appeal Court took a wide view. Foster does not set out a rigid three-part test. If the union and the employees did not succeed in their claim, the local education authority and the state would effectively benefit from the government's failure to comply with the Directive: exactly the situation which should be avoided.

This broad approach has important implications. It will mean that more organisations will be treated as emanations of the state and that more workers have the direct benefit of European law.

The most immediate impact will be that those workers can insist that their employers comply in full with the Working Time Directive even though the government has not yet passed a law to implement it.

Redundancy – employees can't fail to get the points

John Brown Engineering Limited v Brown [1997] IRLR 90 (EAT-Scotland)

Withholding the findings of a redundancy selection points system may make a dismissal unfair if the employee has no opportunity to know how he has been assessed, the Employment Appeal Tribunal in Scotland has held. Although there was an appeals procedure, the employers would not tell the employees either their marks or those of the employees with whom they were compared, making the appeal process a sham.

Trade unions and employees have had great difficulty challenging the use of points systems to choose who is dismissed. This decision puts a welcome constraint on the employer's discretion.

It is very difficult to challenge the application of a points system without knowing the points which have been allocated to individual employees, so a comparison can be made between those selected for redundancy and those who remain. The Court of Appeal in British Aerospace v Green [1995] IRLR 433 refused to order the employer to hand over this information.

This had the practical effect that, once a points system had been established, employees had no effective way of challenging the outcome unless they could show obvious flaws in their own marks. This presented particular difficulty where the overall scheme had been agreed with the union and it was only the application of the scheme to individuals which was challenged in the Industrial Tribunal.

The Scottish Court of Session in King v Eaton [1996] IRLR 199 stressed that redundancy dismissals may be unfair if there is inadequate consultation with the unions and that individual employees must be consulted.

In the Brown case, there was an agreement between the employer and the union on the criteria to be applied to decide on redundancy selection based on a marking system.

The EAT adopted the approach in the British Coal case [1994] IRLR 72 that fair consultation involves consultation when the proposals are still at a formative stage, adequate information on which to respond, adequate time to respond and conscientious consideration of the response.

This applies to consultation with unions and individuals. It may still be necessary to consult with individuals even where the consultation with the union is conducted properly.

The EAT said that withholding all redundancy selection markings may make a dismissal unfair if the employee has no opportunity to know how he has been assessed. An employer who chooses not to publish "league tables" of scores runs the risk of acting unfairly to employees.

The IT must decide if the employees were treated in a fair and even-handed manner. Withholding marks from each employee once the assessment had taken place meant the appeal was a sham. Consequently the dismissals were unfair.

This case has considerable practical significance. In every case, an employer runs the risk of an almost certain unfair dismissal finding if individual employees are not told their scores. Indeed, employers face a high risk of an unfair dismissal award if employees are not told the scores of those with whom they were compared.

This should also make it easier for unions and employees to obtain this information from the employers in Tribunal cases. It will be relevant to the fairness of the dismissal.

It will also be relevant to consultation: the Tribunal needs to consider the likelihood that the employee would have been kept on if a fair procedure had been followed and this is likely to involve consideration of the scores of other employees.

When some are more equal than others?

Tyldesley v TML Plastics [1996] IRLR 395
Strathclyde Regional Council v Wallace [1996] IRLR 670
British Road Services Limited v Loughran [1997] IRLR 92

Three recent cases have examined the employer's defence to an equal pay claim. Where an employee (usually a woman)can show that she does like work or work of equal value and yet is paid less than male colleagues, an employer may still successfully defend the claim. But only if he can show that the difference is explained by a genuine material factor which is not the difference of sex. And the employer may also have to go further to objectively justify the difference.

So what is required of an employer to show a genuine material factor defence and when must he also objectively justify the pay difference?

Ms Tyldesley was an inspection supervisor. She earned £9,250 a year and won her claim of like work with a male supervisor recruited at a salary of £12,500.

The employers tried to explain the difference by saying that Mrs Tyldesley had not fully embraced a recently introduced total quality management system. Her comparator, they said, had previous experience of operating in a total quality management environment.

The Industrial Tribunal ruled that Ms Tyldesley was entitled to equal pay as the employer had not established a good and objectively justified ground for offering the man a higher rate of pay. The IT said it was necessary for the employer to show that they were pursuing measures that corresponded to a real need and were appropriate and necessary to meeting that need.

The Employment Appeal Tribunal has overturned this decision. It held that the IT had placed an additional burden on the employer that was not required. It is only necessary to objectively justify a pay difference where the material factor relied on to explain the difference is 1) itself a factor of sex, 2) is tainted by sex discrimination, or 3) is indirectly discriminatory.

Without one of these features, if the explanation given caused the difference in pay or was a sufficient influence to be significant and relevant, the explanation does not have to be objectively justified. The case has been sent back to the IT.

Tyldesley has been upheld and reaffirmed in the subsequent case of Strathclyde v Wallace. Ms Wallace was a teacher performing the duties of a principal teacher, but was not receiving a principal teacher's salary. In Strathclyde Regional Council there were 134 unpromoted teachers performing principal teachers duties, 81 of whom were men and 53 were women.

Nine women brought equal pay claims using a male comparator who had been appointed as a principal teacher and was receiving the higher salary. Once again the Tribunal found that they were performing like work and the case turned on the strength of the employer's defence.

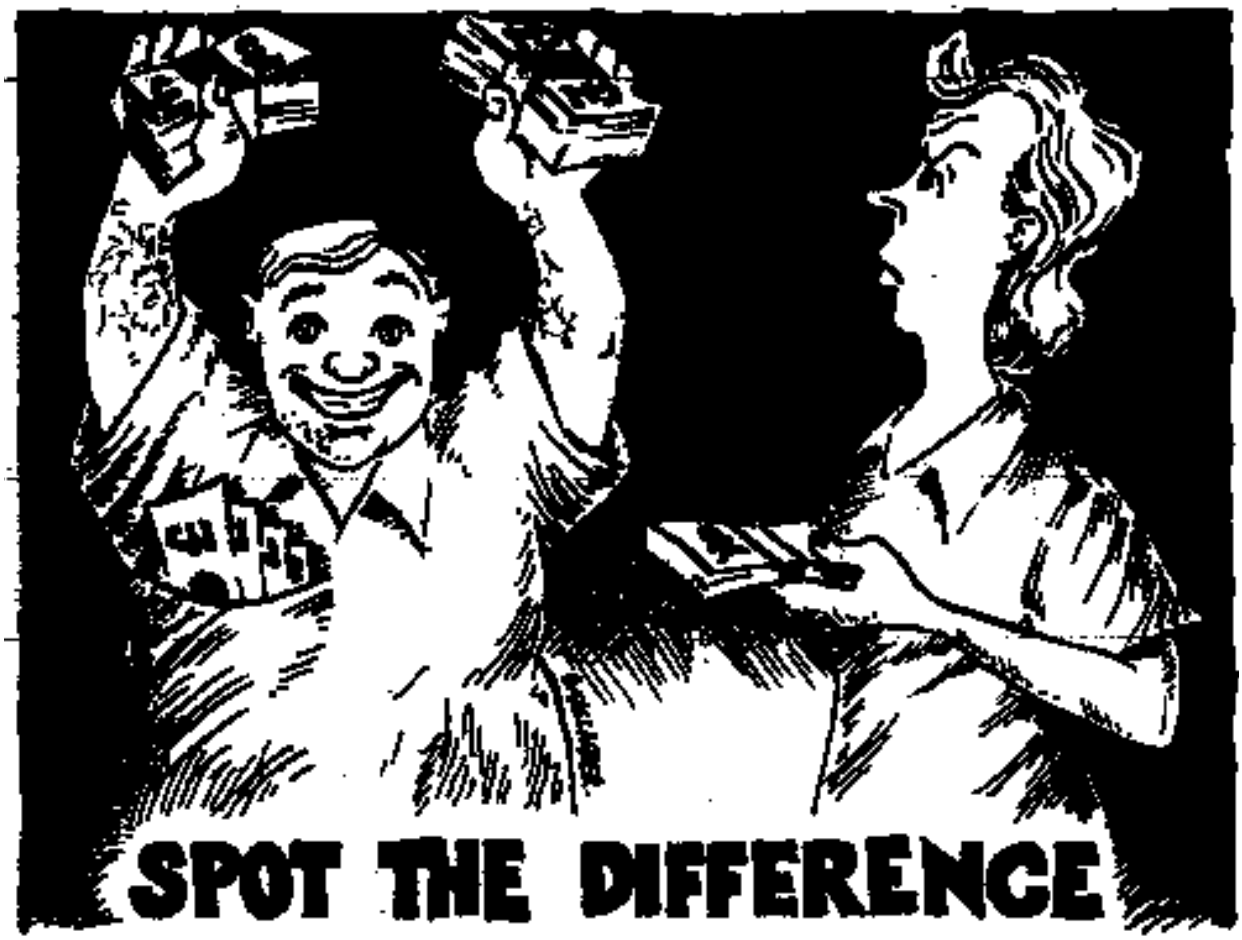
The employers relied on financial constraints and the promotion structure for teachers. The Industrial Tribunal rejected the material factor defence.

The EAT found that the IT had applied the right test, in the sense that they had not required objective justification but were merely unconvinced that the differences in treatment were caused by the factors relied on.

However, the case was overturned in the Scottish Court of Session (equivalent to the Court of Appeal) which found that the IT had in fact looked for objective justification of the system the employers relied on.

The Court of Session reiterated the approach set out in Tyldesley: a difference in pay explained by a factor not itself a factor of sex or tainted by sex discrimination should, in principle, be a valid defence.

This could reduce the scope of equal pay cases where there is no underlying apparently discriminatory pattern in the workforce. The



judgments appear to be saying that even if a factor which the employers seek to rely on cannot be supported on its merits, this will not undermine the genuine material factor defence, unless there is a taint of sex discrimination. The employer must also convince the tribunal that the reason put forward is genuine.

In the more encouraging decision of British Road Services v Loughran, the Northern Ireland Court of Appeal has set out when the more stringent test of objective justification of the employer's defence will be applied in equal pay cases. The NICA held that where a significant number of the claimant group are women, the employers will need to objectively justify the material factor relied on to explain the difference in pay.

In other words they will need to show the factor was necessary in that they were pursuing measures that corresponded to a real need and was appropriate and necessary to meeting that need. In short, they must not only explain the reason for the pay difference but satisfy the IT that it is a very good reason that actually works.

In the Loughran case 75% of the Applicants group - clerical workers - were women and all their comparators - warehouse operatives, were men.

The employers had tried to argue that where separate collective bargaining agreements were being used as a defence, objective justification would only be required where the statistical pattern was the same as in Enderby. In Enderby the Applicant's job was carried out almost exclusively by women and the comparator job, predominantly by men. The NICA rejected this narrow definition and upheld the original Industrial Tribunal decision in the women's favour.

How much for injury to feelings?

In last month's edition we reported the case of Johnson (1) where the Employment Appeal Tribunal upheld an Industrial Tribunal award of £21,000 compensation for injury to feelings, the highest award ever recorded. The EAT lamented the difficulty of ensuring consistency in the level of awards given the relative shortage of reported cases in this area.

An award of injury to feelings is not automatic - it is a matter for the discretion of the IT. The employee must prove the injury and that it resulted from discriminatory conduct.

In a previous case the EAT said injury "will often be easy to prove in the sense that no Tribunal will take much persuasion that the anger, distress and affront caused by the act of discrimination has injured the Applicant's feelings".(2)

The level of damages to be awarded will depend on the "level of distress and humiliation that the Applicant has shown to have been caused to him/her" and the employer "must take the victim as he or she is" so that what is measured is the effect of the discriminatory conduct on the particular employee. (2)

The employee's evidence on injury to feelings will be crucial.

Where this is backed up by medical evidence of injury, then awards can increase significantly. For example, an IT awarded a College Lecturer £15,000 for being called an "Irish prat" by a colleague after the Tribunal heard medical evidence of the employee's stress and subsequent illness (4).

Where an employer's behaviour after a complaint of discrimination has helped to reduce the hurt felt, this may have a downward impact on the level of award. In Orlando (3) the EAT took account of the employer's early admission of discrimination so that Ms Orlando was "spared the indignity and hurt of having to rehearse the nature of her treatment by the club".

Conversely, in the case of Johnson (1) the EAT awarded higher exemplary damages because the employer had initially attributed Mr Johnson's complaints to defects in his personality: a manager had said that Mr. Johnson was "obsessed with his colour" and "all his troubles were in his own mind".

In Johnson the EAT drew together the following principles for assessing levels of awards from previous case law:

1. Awards for injury to feelings are designed to compensate the injured party fully but not to punish the guilty party.
2. An award should not be inflated by feelings of indignation at the guilty party's conduct.
3. Awards should not be so low as to diminish respect for the policy of anti discrimination legislation, but should not be excessive as they would be regarded as untaxed riches.
4. Awards should bear some general similarity to the range of awards in personal injury cases.
5. Tribunals should bear in mind the value in every day life of the sum they have in mind and the need for public respect for the level of awards made.

What does all this mean in cash terms?

Early case law indicated that Tribunals would only award very low damages for injury to feelings, often as low as £50, although usually around a couple of hundred pounds. In 1988 two Court of Appeal decisions (5) opened the way for higher awards.

Mr Alexander proved race discrimination by the Prison Service in not allowing him to work in the kitchen because he was said to show the "anti authoritarian arrogance common in most coloured inmates". (5) The Court of Appeal substituted an award of £500 for the £50 initially awarded by the IT and indicated that £500 represented a

figure at the lower end of the appropriate scale.

Mrs Noone, a Microbiologist from Sri Lanka, was not appointed to a consultancy post on racial grounds (5). The Court of Appeal substituted an award of £3,000 after the EAT had indicated that they would have reduced the IT's figure of £5,000 to £1,000.

In Noone the Court of Appeal expressly took account of the statutory limit on compensation in discrimination cases (then £7,500) which limit, they said, was intended to cover not only sums for injury to feelings but also actual financial loss.

Although Noone, until Johnson, initially served as authority for higher levels of awards it had been used as a brake on the upward pressure on awards which followed the 1993 and 1994 abolition of the statutory limits on compensation.

In Orlando (3) a part-time barmaid dismissed for pregnancy related reasons was awarded only £750 damages for injury to feelings. In assessing the figure of £750 the tribunal had express regard to the Noone decision.

Ms Orlando appealed against the level of award arguing that since the removal of the statutory limit the tribunal had erred in law in referring to Noone. The EAT disagreed and said "we are not persuaded that the Court of Appeal was so linking the amount of an award for injury to feelings to the then limit on compensation that it can be legitimately argued that without the limit the award would have been higher".

By contrast in Johnson (1) the EAT stated that the award in Noone may well have been higher had there been no statutory limit and rejected the employer's argument that the effect of Noone was to make an award of £21,000 outside the appropriate range of awards for injury to feelings.

The most recent statistics on tribunal awards for injury to feelings indicate that since the removal of the statutory limit, awards increased by 45% in the year 1994 to 1995 with the median award for injury to feelings of £1,000 in 1993 increasing to £1,500 in 1994 and 1995 (6).

Whilst there have as yet been no reported decisions under the Disability Discrimination Act 1995 it is expected that levels of awards for injury to feelings will reflect the level of awards in sex and race discrimination cases. In a very recent case, to be reported in the next issue of LELR it was held that there may be awards for injury to feelings in trade union victimisation cases (7).

Footnotes

No. 1
H.M. Prison Service and Others v Johnson [1997] IRLR 162

No. 2
MOD v Cannock [1994] IRLR 509

No. 3
Orlando v Didcot Power Station Sports and Social Club - EOR D.L.C.D. No. 26 Page 9.

No. 4
Bryans v Northumberland College of Arts and Technology and Others.

No. 5
Alexander v the Home Office [1988] IRLR 190
Noone v Northwest Thames Regional Health Authority [1988] IRLR 195.

No. 6
EOR No. 62 June 1996

No. 7
Cleveland Ambulance Service v Blane, (Times, March 1997, EAT)

EAT puts right a TUPE wrong

Rotsart de Hertaing v J Benoidt SA and IGC Housing Service [1997] IRLR 127 (ECJ)
Secretary of State for Trade and Industry v Cook (EAT) 13 December 1996, IDS Brief 583

The European Court of Justice confirmed in its ruling in Rotsart that TUPE Regulations automatically transfer the employment contracts of those employed in the part transferred. The old employer and the new employer cannot avoid this by trying to reach a different outcome.

This means that contracts transfer even if the potential new employer refuses to take on the staff. The old employer and the new employer cannot reach an agreement between themselves which seeks to avoid this, nor can they agree to postpone the date on which the transfer of employment contracts occurs. The transfer of employment contracts occurs automatically on the same day that the transfer of undertaking occurs.

This is not in itself surprising. The Directive is intended to safeguard employee rights and it should not be possible for employers to reduce those rights. But it is worth reflecting on the consequences.

A transfer which is automatic would not require the consent or agreement of any of the parties: old employer, new employer or employee. This means an employee can be transferred without their knowledge.

The Employment Appeal Tribunal previously decided that there was no transfer of employment contracts unless the employee was given notice of the transfer (Photostatic Copiers v Okuda [1995] IRLR 11). This is wrong. If it was correct it would be alarming because employers could deny employees their rights on a transfer simply by not telling them about the transfer. There is of course an obligation to inform employee representatives of all transfers. Fortunately, the EAT now shares this approach and in a recent decision declared that the Okuda case was wrongly decided (Secretary of State v Cook, IDS Brief 583).

The decision also reinforces the approach in the case of Wilson v St Helens BC [1996] IRLR 320. In that case, an agreement to change terms and conditions was invalid because it conflicted with the TUPE Regulations, even though no-one thought TUPE applied at the time.

It must mean that a dismissal for a reason connected with the transfer is not only unfair, but also cannot validly prevent the transfer of contracts of employment to the transferee. This is important because the EAT tried to get round Wilson in Meade [1996] IRLR 541by saying that because the employees had been dismissed and re-employed, they could be employed on less favourable terms. They could not insist on their old contracts, but only claim compensation for unfair dismissal.

This does mean that employees will be transferred whether they want to be or not. They do have the right to object (Regulation 5(4A)), but if they do so they will be treated as resigning. They will not be entitled to redundancy or unfair dismissal. This can operate very harshly (see Hay v George Hanson [1996] IRLR 427)

The position is different for employees who are faced with a substantial detrimental change in working conditions. They can resign and claim unfair dismissal. In those circumstances their contracts will not be transferred. A reduction in remuneration will be regarded as a substantial detrimental change, according to the Merckx case in the European Court [1996] IRLR 467.

This applies even if remuneration is reduced without changing the contract. An employee who is paid commission or profit-related pay who transfers to an employer where she will be able to earn less commission or profits will be lower has this option available. The same approach can be applied where the new employer refuses to offer a comparable pension.

Resigning and claiming unfair dismissal in those circumstances is hardly a viable option for an employee, but it does enhance the bargaining position of employees who do not want to transfer but would rather receive a redundancy payment or remain with their existing employer.

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