THOMPSONS SOLICITORS

Labour & European Law Review

ISSUE 110 APRIL 2006

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EQUALITY ACTS

The Equality Act, which has just received royal assent, will introduce a new Commission for Equality and Human Rights (CEHR).

It will bring together the work of the Disability Rights Commission and the Equal Opportunities Commission from October 2007; and that of the Commission for Racial Equality from 2009.

The Government says the CEHR will be required to produce a regular "equality health check" for Britain; and will work with individuals, communities, businesses and public services to find more effective ways of giving everyone in society the chance to achieve their full potential.

WOMEN AND WORK

Wide-ranging action to tackle job segregation has been proposed in a long-awaited report from the Government's Women and Work Commission.

The report, *Shaping a Fairer Future*, sets out 40 practical recommendations to tackle job segregation and the pay gap, which still exists despite 30 years of equal pay legislation.

Proposals include a national World of Work programme to improve vocational training, provide work taster days for primary school pupils and use work experience to encourage girls to think about non-traditional jobs as well as promote apprenticeships for women, especially in sectors with skill shortages.

The report says that increasing women's employment and ending gender segregation would benefit the economy by as much as £23 billion – about two per cent of GDP.

The Commissioners are calling on the Government to:

- fund a £20 million package to enable women to change direction and raise skill levels
- introduce an initiative to promote quality part time work
- promote a localised approach to matching jobs and skills using community centres, schools and children's centres to recruit local women, to be piloted in five areas across the country
- provide support for the development and training of equality reps.

The Women and Work Commission was set up by the Prime Minister in 2004, charged with carrying out an independent review of the gender pay gap and other issues affecting women's employment.

For a copy of the report, go to: *www.womenandequalityunit.gov.uk/women_work_commission/shaping_fairer_future.pdf*

GENDERED DUTIES

Launching a consultation on the new gender equality duty, the Equal Opportunities Commission has said it wants public sector bodies to respond so that it can help them meet their obligations under the law.

The new duty, which comes into force in April 2007, requires public bodies to eliminate sex discrimination and promote equality in their services, policies, and employment and recruitment practices. Service providers and public sector employers will have to design jobs and services with the different needs of women and men in mind.

Specifically, the EOC is asking equality practitioners to give their opinions on the code of practice contained in the duty, which will explain how to implement it and integrate it into day-to-day operations.

The consultation closes on 15 May. For more details, go to: *www.eoc.org.uk/Default.aspx?page=18270*

DIRECT SERVICES

Although the European Parliament recently approved the Services Directive, which aims to open up the services sector to cross-border competition, it also agreed to remove the "country of origin" principle.

This said that a company offering its services in another country would operate according to the rules of the country in which it was based. This would have meant that a company based in the UK could offer its services in France, but still rely on UK rules.

Thanks to the amendment agreed by the Parliament, which has been welcomed by the TUC, service providers will be governed by the regulations of the country in which the service is being provided.

Trade unions and other critics feared that the directive would allow firms to relocate to countries with the lowest wages and the weakest consumer, environmental protection, employment and health and safety rules.

The directive could become law this year, but it will be a year or two after that before it is transposed in the national laws of member states.

Age multiplier

After considering what amendments would be needed to the rules on statutory redundancy payments to outlaw age discrimination, the Government has decided to keep the current three age bands.

In a written statement to Parliament, it said that this was a sensible approach because "a system using a single multiplier would leave a significant group of older workers substantially worse off than at present."

It has, however, decided to remove the lower and upper age limits in the redundancy scheme (at ages 18 and 65). To see the statement, go to: *www.publications.parliament.uk/pa/ld199900/ldhansrd/pdvn/lds06/text/60302-43.htm#column_WS41*

Unfair treatment

A dismissal is likely to be unfair if the employer did not dismiss other employees who had done something similar.

In Enterprise Liverpool plc -v- Bauress, the employment appeal tribunal has said that employers can react differently if there are differences in the behaviour of the employees.

In this case, an employee with 30 years' service who admitted his guilt was given a final written warning. Two new employees who lied about what they had done were dismissed.

The EAT said that it was within the band of reasonable responses for the employer to react differently, given the different circumstances in the two situations.

Commercial claims

Under the Commercial Agents (Council Directive) Regulations 1993, self-employed agents who sell goods on behalf of someone else have a statutory right to compensation.

Up until recently, the courts have, however, taken the view that the agent should only be awarded compensation of up to two years' earnings if the agency is terminated.

The Court of Appeal has now overturned this approach in Lonsdale -v- Howard and Hallam Ltd, saying that the measure of damages should be the loss of the agency business.

Discretionary time

A discrimination complaint can still be heard more than four months after the grievance relating to it was submitted, according to the employment appeal tribunal in Bupa Care Homes (BNH) Ltd -v- Cann **and** Spillett -v- Tesco Stores Ltd**.**

Under the mandatory grievance procedures, employees have to lodge a written grievance with their employer before going to an employment tribunal. However, the claim is barred if the employee delays doing this until a month after the end of the time limit – three months under the Disability Discrimination Act (DDA).

The employment appeal tribunal said that the original time limit referred to the period within which the tribunal could consider a complaint under the DDA, including exercising its "just and equitable" discretion. So, even though the grievance was submitted out of time, the tribunal could exercise its discretion to allow the complaint to proceed.

Age regulations

Regulations to outlaw age discrimination at work have been published by the DTI.

The regulations will:

- ban age discrimination in terms of recruitment, promotion and training
- ban unjustified retirement ages of below 65
- remove the current age limit for unfair dismissal and redundancy rights.

A copy of the final regulations will soon be available on the Stationary Office website. In the meantime, for a draft version, go to: *www.dti.gsi.gov.uk/er/equality/age.htm*

Contract apprenticeships

An apprentice who was dismissed without notice, following a transfer of his employer's business, was working under a contract of apprenticeship, not a contract of employment, according to the Court of Appeal in Flett -v- Matheson**.**

The Court said that the Modern Apprenticeship could constitute a common law contract of apprenticeship. The fact that the claimant worked under an Individual Learning Plan did not make any difference.

Serco **-v- Lawson**; Botham **-v- Ministry of Defence**;
Croft & ors **-v- Veta Ltd & ors**

WORKING ABROAD

It stands to reason that employees working in Great Britain can bring claims for unfair dismissal here. But what about workers elsewhere?

In Serco -v- Lawson; Botham -v- Ministry of Defence; Croft & ors -v- Veta Ltd & ors (IDS 799), the House of Lords said that, as a general principle, the claim must relate to "employment in Great Britain".

WHAT WAS THE LEGAL FRAMEWORK?

Section 196(3) of the Employment Rights Act 1996 said that employees could not claim unfair dismissal under section 94(1) if they "ordinarily" worked outside Great Britain.

Section 196 was, however, repealed in 1999 and not replaced. The three appeals to the House of Lords tested the territorial scope of section 94(1).

WHAT WERE THE FACTS?

Lawson: Mr Lawson, a British citizen living in England, got a security job working on Ascension Island in the South Atlantic with Serco, a UK-registered company, based in England. His salary (in pounds sterling) was paid into a UK

bank account, but he did not pay any UK taxes. The Court of Appeal said that Parliament could not have intended to give every employee the right to claim unfair dismissal, no matter where they worked, irrespective of how strong their connections were with Great Britain.

Botham: Mr Botham, a British citizen, worked for the MoD in Germany. He paid UK taxes and his contract was governed by the law of England and Wales. On the basis of the decision in *Lawson*, the Court of Appeal again said it had no jurisdiction to hear his claim for unfair dismissal.

Croft: Mr Croft worked as a pilot for Veta Ltd, a company registered in Hong Kong. His contract was also governed by Hong Kong law. But his permanent home base, where his flight cycle started and finished, was Heathrow.

The Court of Appeal said that he was employed in Great Britain and that he could therefore pursue his unfair dismissal claim.

WHAT GENERAL PRINCIPLES APPLY?

The House of Lords said that it would be a mistake to try to formulate another rule *"in the sense of the verbal formula that section 196 used to provide"*.

Instead, the "employment in Great Britain" test should be treated as a general principle, rather than a rule *"which must then itself be interpreted and applied"*.

But how should that principle be applied in a standard case? Under section 196, the issue of where someone "ordinarily worked" was established by looking at their contract.

However, this had produced some perverse results and their Lordships said that courts should look instead at whether the employee was actually working in Great Britain at the time of their dismissal as opposed to what their contract said.

WHAT ABOUT MOBILE EMPLOYEES?

The House of Lords then looked at employees who did not work in one particular place. It said the common sense approach *"of treating the base of a peripatetic employee as ... his place of employment, remains valid."*

Tribunals should go by the conduct of the parties and the way they have been operating the contract to decide where the base actually is, as opposed to just looking at the terms of the contract. In the case of Mr Croft, that meant he could pursue his claim.

WHAT ABOUT EXPATRIATE EMPLOYEES?

In general, the House of Lords said that *"the circumstances would have to be unusual for an employee who works and is based abroad to come within the scope of British labour legislation"*. But, they added, there were exceptions and provided two possible examples.

The first was a foreign correspondent for a British newspaper, who was posted abroad and lived there for many years, but remained a permanent employee of the newspaper.

The second was an expatriate employee of a British employer operating within an extra-territorial British enclave in a foreign country.

The second example applied to both Mr Lawson and Mr Botham, who were therefore entitled to pursue their claims.

INFORMED GRIEVANCE

Before transferring their business to someone else, employers are supposed to inform and consult their employees about it.

In Sweetin -v- Coral Racing, the employment appeal tribunal (EAT) said that if they don't, the compensation they owe will be assessed along the same lines as employers who don't consult in redundancy situations.

WHAT WERE THE BASIC FACTS?

Ms Sweetin had worked as a clerk (and, on occasion, the deputy manager) in the same bookmakers shop since 1980. In 1995 it was taken over by Toal's and, subsequently, at the end of September 2003 by Coral Racing.

Just days before the transfer, the regional manager visited the shop and suggested that the other clerk become the deputy manager. This was because the company had a policy requiring the deputy to fill in when the manager was away. Ms Sweetin was married to the manager and went on holiday with him.

A series of meetings then ensued, as a result of which Ms Sweetin understood she could not be deputy manager any longer, although no one actually said so. She was, however, told that her terms and conditions would remain the same.

She finally went off sick at the end of November 2003 and resigned shortly afterwards, saying that she had lost all trust and confidence in the company and claimed constructive dismissal.

The tribunal said she had not been constructively dismissed, but awarded her six weeks' pay as compensation for the company's failure to inform and consult her about the transfer.

WHAT DID THE PARTIES ARGUE ON APPEAL?

Ms Sweetin said that Coral Racing had an implied duty to deal with her grievance quickly and that she had lost all trust in them when things dragged on. They were therefore in breach of the implied duty of trust and confidence and, as a result, she had been constructively dismissed.

She also appealed against the tribunal's award of six weeks' pay for the failure to consult.

The company, on the other hand, argued that, in order to deal with a grievance quickly, it had to know there was one. The tribunal said that the company did not know about it until mid-November. Ms Sweetin had resigned shortly afterwards.

As for the failure to consult, this was an oversight, not a deliberate policy by the company and the tribunal had the right to take that into account when calculating compensation.

WHAT DID THE EAT DECIDE?

The EAT agreed with Ms Sweetin that there was an implied term that employers should deal with grievances promptly. But failing to do that did not automatically result in a finding that there has been a breach of the duty of trust and confidence.

In particular, it said that employees cannot complain that their employer has failed to deal with their grievance if the employer doesn't know about it. In this case, she had not given her employers a chance to deal with her grievance once they found out about it, and her claim for constructive dismissal could not succeed.

Turning to the question of compensation for the failure to consult on a TUPE transfer, the EAT said that tribunals should approach the issue in the same way as in a redundancy situation. The tribunal in this case had therefore got it wrong.

Instead of assessing the extent of Ms Sweetin's loss, it should have focused on the "punitive and deterrent nature of any such award", as in the case of *Susie Radin Ltd -v- GMB & Ors* (LELR 90).

It should also have considered whether there were any mitigating factors, and having found that there weren't, should then have assessed the company's failure at the top end of the range of possible severity.

Given the circumstances, the tribunal should not have awarded anything less than the maximum 13 weeks' pay.

a brief overview of

TIME TO

It is 25 years since the Transfer of Undertakings (Protection of Employment) – better known as TUPE – Regulations became law in the UK.

The idea behind them (at least in theory) was to protect the rights of employees if their employer decided to transfer their business to someone else.

That meant, for instance, that employers could not make changes to the terms and conditions of transferred staff (such as reducing their pay), so that they could be harmonised with existing staff.

The regulations proved complex to implement, however, and in 2001 the EU issued a revised directive to clarify matters.

Fast forward to 6 April 2006 and those revised rules have finally been implemented in the form of the 2006 TUPE regulations.

In this article, ***Richard Arthur***, a solicitor from Thompsons Employment Rights Unit in London, summarises the main changes introduced by the new regulations and assesses their likely impact.

WHAT ARE THE MAIN CHANGES?

The new regulations have introduced a number of changes, such as:

- a new definition of a transfer
- clarification about transfer-related changes to terms and conditions
- clarification about transfer-related dismissals
- new provisions relating to insolvent businesses
- a new liability for a failure to inform or consult
- a new duty on a transferor to supply employee liability notification.

Apart from these revisions, the regulations remain more or less the same as before. There is very limited protection in relation to pension rights, which can be found in the Pensions Act 2004, but pension rights still do not transfer under TUPE.

WHAT CONSTITUTES A TRANSFER?

There are now two types of transfer under the new regulations.

The first are "standard transfers", which take place in the same way as transfers under the previous regulations: *"where there is a transfer of an economic entity which retains its identity."*

An "economic entity" is *"an organised grouping of assets or resources which has the objective of pursuing an economic activity, whether or not the activity is central or ancillary".*

The second is new and involves transfers when a client engages a contractor to do work on their behalf, including bringing the work "in-house".

Examples of these "service provision changes", as they are called, include contracts to provide labour-intensive services like office cleaning, workplace catering, security guards, refuse collection and machinery maintenance.

The changes can take three main forms – where services are being outsourced, insourced or assigned by a client to a contractor. They only apply, however, when there is an organised grouping of employees whose main job is to carry out the activities on behalf of the client.

They do not apply if the client buys in the services on a one-off basis and/or for a short time. And they do not include public administrative reorganisations and transfers.

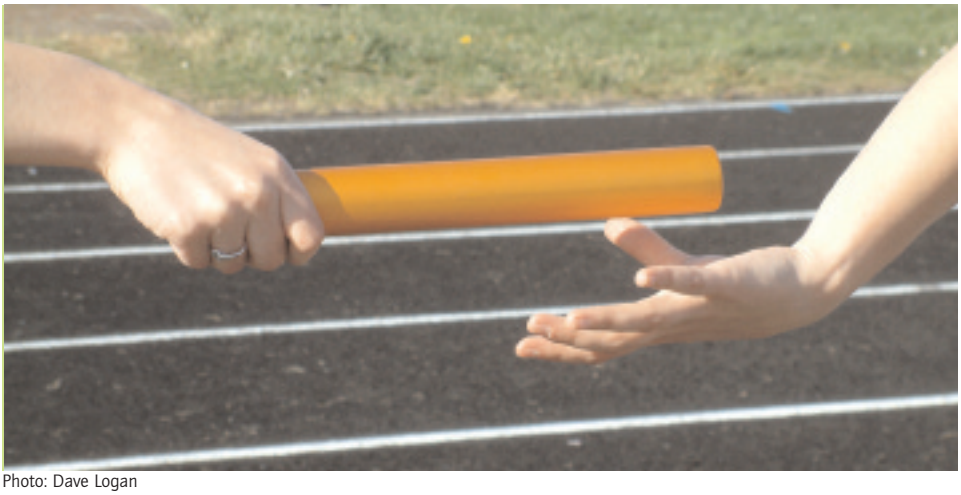

Photo: Dave Logan

TRANSFER

The "professional service" exception proposed in the draft regulations has been dropped from the final version.

WHAT CHANGES CAN BE MADE TO TERMS AND CONDITIONS?

Employers cannot make changes to employees' terms and conditions if the "sole or principal" reason for the change is:

- the transfer itself, or
- a reason connected with the transfer that is not an "economic, technical or organisational (ETO) reason entailing changes in the workforces".

The regulations do, however, allow changes to be made if the reason is an ETO reason connected with the transfer, but is not the transfer itself. It remains to be seen whether permitting variations in this way actually complies with the acquired rights directive.

WHAT TRANSFER-RELATED DISMISSALS ARE ALLOWED?

As with transfer-connected variations, dismissals are automatically unfair if the reason or principal reason is:

- the transfer itself, or
- a reason connected with the transfer that is not an ETO reason.

There is bound to be lots of debate for both transfer-connected variations and dismissals, as to when the reason for a variation (or a dismissal) is the transfer itself (in which case there can be no escape for the employer through an ETO), as opposed to a reason connected to the transfer.

The new regulations confirm that employees who are made redundant (where the reason is not the transfer itself) are entitled to redundancy payments.

WHAT ABOUT INSOLVENT BUSINESSES?

The regulations introduce two new mechanisms with the stated objective of encouraging "business rescue".

As a result, pre-transfer liabilities under statutory insolvency schemes (such as for redundancy payments) do not transfer. The schemes become responsible for those payments.

In addition, employers who are subject to certain types of insolvency proceedings can agree "permitted variations" to contracts of employment with "appropriate representatives".

"Permitted variations" are where:

- the sole or principal reason is the transfer, or a reason connected with it that is not an "ETO" reason, or
- the variation is designed *"to safeguard employment opportunities by ensuring the survival of the undertaking"*.

WHAT ABOUT A FAILURE TO INFORM OR CONSULT?

Under the new regulations, employers who fail to inform or consult their staff are both jointly and severally liable. That means that unions can decide whether to pursue the incoming or outgoing employer.

WHAT IS EMPLOYEE LIABILITY INFORMATION?

In order to help the new employer, the outgoing employer now has to provide something called "employee liability information".

Unfortunately, that information does not have to be provided to unions. The outgoing employer must supply the employee liability information not less than 14 days before the transfer.

The information must be "as at" a date not more than 14 days before it is supplied, and must contain the following in relation to employees assigned to the undertaking to be transferred:

- identity and age
- particulars of employment
- information on grievance/disciplinary procedures activated by employees
- information on court or tribunal cases within the last two years, and claims that may be brought
- information on collective agreements.

COMMENT

So, although the wait is over and it is clear that more transactions will be covered by TUPE, the new regulations do not clear up all the uncertainty – for example, in relation to the definition of a transfer, or the extent to which the directive permits variations to contracts of employment. As a result, the number of tribunal cases is unlikely to go down dramatically.

INDIVIDUALLY CONTRACTED

It is not always easy to know if someone is an employee or a worker. And the difference matters because employees enjoy far more rights than workers.

In Cornwall County Council -v- Prater, the Court of Appeal said that someone employed on a series of individual contracts can still be an employee, as long as they can show "mutuality of obligation" for each of them.

WHAT WERE THE BASIC FACTS?

Mrs Prater had worked as a home tutor for the council since 1988. The council was not under an obligation to offer her work, nor was she obliged to accept it but she had worked more or less continuously for them from 1988 to 1998.

In 1992, she was given a document, which said that she was "employed by the Education Authority." The council deducted her tax and national insurance at source and at the end of each financial year, she received a P60 form.

In 1998 Mrs Prater successfully applied for a part-time post with the council as a home tutor. She did the same job as before, but became entitled to holiday pay, sick pay and payment for travelling time.

The council accepted that, as from 1 September 1998, Mrs Prater was an employee.

WHAT DID THE TWO PARTIES ARGUE?

Mrs Prater claimed, however, that each time the council had engaged her to tutor a child from 1988 onwards, she had been working under a series of individual contracts of employment.

She said that the gaps between the contracts constituted "temporary cessations of work" and were bridged by the provisions in section 212 of the Employment Rights Act 1996 (ERA).

The council argued that she had simply been employed as a casual worker on a series of short, fixed term teaching engagements. These did not amount to employment contracts, it said, because she did not have to take the work nor did the council have to offer it. In other words, there was no "mutuality of obligation".

WHAT DID THE TRIBUNALS DECIDE?

The tribunal decided, however, that there was because the periods of work were so long and so open-ended. Once Mrs Prater agreed to teach a child, she did so for as long as she felt was necessary. There were no regular reviews.

On that basis, the tribunal distinguished the case from the House of Lords decision in *Carmichael -v- National Power f(2000, IRLR 43)* in which the periods of work were short, and both parties were aware of that from the outset.

The employment appeal tribunal agreed that each assignment constituted a separate contract of employment.

WHAT DID THE COURT OF APPEAL DECIDE?

The Court of Appeal said that Mrs Prater had been engaged on a number of self-contained contracts with the council over the period 1988 to 1998. During that time she was paid to teach individual pupils who could not attend school, for whatever reason.

It reasoned that had she been engaged to teach pupils in a classroom under a single, continuous contract, she would have been an employee. The fact that she was engaged to teach the pupils out of school on an individual basis under a number of separate contracts was irrelevant.

Nor did it make any difference that, after the end of each engagement, the council did not have to offer her another teaching job, and she did not have to accept it.

The important point was that once she entered into the contract, she was under an obligation to teach the pupil and the council was under an obligation to pay her. *"That was all that was legally necessary to support the finding that each individual teaching engagement was a contract of service."*

Section 212 of the ERA took care of the gaps between the individual contracts, with the result that she had continuity of employment.

A POINT IN TIME

The whole point of the fixed term directive was to stop employers offering workers successive fixed term contracts instead of indefinite contracts.

In Mangold -v- Helm (2006, IRLR 143), the European Court of Justice (ECJ) has said that member states cannot generally modify the fixed-term provisions so that workers are treated differently on the ground of age.

WHAT WERE THE BASIC FACTS?

In June 2003, Rudiger Helm engaged 56-year-old Werner Mangold on a fixed-term contract from 1 July 2003 to 28 February 2004.

His contract stated in point two of paragraph five that: *"the duration of the contract shall be based on the statutory provision which is intended to make it easier to conclude fixed-term contracts of employment with older workers ...."*.

It went on to state that *"the parties have agreed that there is no reason for the fixed-term of this contract other than that set out in para. 2 above."*

Shortly after he started work, Mr Mangold claimed that paragraph five in his contract did not comply with the European framework agreement on fixed-term contracts. Nor did it comply with the age discrimination provisions in the framework employment directive 2000/78.

WHAT DID GERMAN LAW SAY?

Under the German law implementing the agreement, fixed-term contracts were limited to two years and allowed contracts to be renewed a maximum of three times only, in order to promote employment.

The law also said that employers could not enter into a fixed-term contract if it was closely connected to a previous indefinite contract between them and their employee. This was presumed to exist where the interval between the two contracts was less than six months.

Under paragraph 14(3) of TzBfG, however, German law said these conditions did not apply to anyone over 60. From 1 January 2003, the limit was lowered to 58, but also stated that, until 31 December 2006 (when the age discrimination legislation comes into force), it would be set at 52.

The Munich Labour Court asked the ECJ if these provisions were compatible with European law.

WAS IT OKAY TO LOWER THE AGE TO 58?

The ECJ said that the German provision lowering the age from 60 to 58 above which fixed-term contracts could be agreed without restrictions, did not contravene the framework agreement. It said that these were justified by the need to encourage the recruitment of older people in Germany.

WHAT ABOUT LOWERING IT TO 52?

However, the age discrimination provisions did not allow the introduction of a domestic law whereby employers and employees could agree unrestricted fixed-term contracts once the worker had reached the age of 52.

The ECJ said that, although article 6(1) of the legislation allowed member states to treat people differently on grounds of age, they had to be able to justify any differences on the basis of *"a legitimate aim, including legitimate employment policy, labour market and vocational training objectives, and if the means of achieving that aim are appropriate and necessary."*

Accepting that the purpose of the legislation was to encourage the employment of older workers – a legitimate public interest objective – the ECJ said that the means used could not be regarded as appropriate and necessary in this case.

The result of the legislation was that anyone over 52, whether or not they had been unemployed, could be offered an indefinite number of fixed-term contracts until they reached retirement age. This put them in danger of being excluded from stable employment on a long-term basis.

As there was no evidence to show that this provision was necessary to achieve the stated policy objective, the ECJ concluded that *"it must be considered to go beyond what is appropriate and necessary."*

Fighting fire with ...the law

Under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, part timers have to be treated the same as full timers, if they do similar work and are employed on the same type of contract.

In *Mathews & ors -v- Kent and Medway Towns Fire Authority & ors*, the House of Lords has decided that retained (or part-time) firefighters qualify to make a claim under the regulations.

The employees' union, the FBU, instructed Thompsons to act on their behalf.

WHY DID THE PART TIMERS COMPLAIN?

The retained firefighters claimed that they were being treated less favourably than full timers:

- by being denied access to statutory pension arrangements
- by being denied increased pay for additional responsibilities
- in the way their sick pay arrangements were calculated.

WHAT DID THE LOWER COURTS DECIDE?

The employment tribunal and the appeal tribunal decided (LELR 85) that the retained firefighters were employed under different types of contract from the full timers – group (f) rather than group (a).

In addition, they said they were not engaged in the same or even broadly similar work because the full timers carried out a number of additional responsibilities.

The Court of Appeal (LELR 92) agreed that the two groups were not engaged in the same or even broadly similar work because the full-time firefighters had a "fuller, wider job" than retained firefighters, and "measurable, additional job functions", which accounted for the differences in qualifications and skills.

It decided, however, that the two groups were employed under contracts that fell into group (a).

DO THEY HAVE THE SAME CONTRACTS?

The House of Lords said: *"that the question [of] whether a full-time worker is employed under the same type of contract as a part-time worker is to be approached broadly."*

An "over precise" view would undermine the whole point of the regulations and would allow employers to exclude employees from the regulations by setting different terms and conditions.

The job for the courts was to decide whether both workers were employed under contracts that fitted into one of the categories. In this case, it agreed that both groups were employed under category (a).

It said that paragraph (f) existed simply as a "catch-all" to fill any gaps left by the preceding categories, emphasising that it was *"not designed to allow employers to single out particular kinds of part-time working arrangements and treat them differently from the rest."*

DO THEY DO SIMILAR WORK?

The House of Lords said that the fact that full timers perform some extra tasks does not mean their work cannot be "the same or broadly similar" to the part timers.

Otherwise, it pointed out, courts will simply give *"too much weight to differences which are the almost inevitable result of one worker working full time and another working less than full time."*

This was the mistake that the lower courts had made. Instead of focusing on differences, they should have looked at whether the work done by both groups could be described as broadly similar, despite the fact that the whole-time firefighter had a "fuller and wider" job.

CONTRACTS UNDER THE REGULATIONS

(since amended to remove the distinction between fixed-term and non-fixed-term contracts)

(a) employees employed under a contract that is neither for a fixed term nor a contract of apprenticeship
(b) employees employed under a contract for a fixed term that is not a contract of apprenticeship
(c) employees employed under a contract of apprenticeship
(d) workers who are neither employees nor employed under a contract for a fixed term
(e) workers who are not employees but are employed under a contract for a fixed term
(f) any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract

Critical remark was wrong

Anyone elected as a trade union representative of a recognised trade union has certain legal rights. For instance, the right to time off for their trade union activities and the right not to be penalised for carrying them out.

In Doherty -v- British Midlands Airways Ltd (2006, IRLR 90), the employment appeal tribunal (EAT) said that the tribunal misdirected itself when it made findings about issues that had not been raised during the hearing.

Ms Doherty's union, the GMB, instructed Thompsons to act on her behalf.

WHAT WERE THE BASIC FACTS?

Ms Doherty had worked for British Midlands as a ticket agent for seven years when she was elected the GMB local representative in May 2000.

She brought two claims against the company, which were heard in May 2002 and April 2003. In the first, she argued that the company was trying to stop her from carrying out her union activities, and she was awarded just over £2,000.

In the second, she claimed that the company was penalising her for carrying out her trade union duties, following a letter from her manager in which he told her that she could not have time away from work for her union activities without his "express permission". He also suspended all her other union time. She was awarded nearly £6,000.

Following this decision, the company and the union asked ACAS to get involved, but Ms Doherty was not involved in any of the subsequent meetings.

In July 2003, she claimed that the "last straw" was a manager telling a GMB member that he could not speak to her unless it was outside working time.

She felt that she was being bullied by the company, which was placing obstacles in her way at every chance. She resigned and claimed constructive dismissal.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal said that, although it could identify one fundamental breach of her contract by the company, it did not think that was the reason for her resignation.

Instead, it said that she resigned because she was "furious and her anger increased over the following weeks as the extent of the conciliation attempts and her complete exclusion from them became apparent."

It said that when she realised "her ambitions to advance in the trade union were likely to be thwarted", she resigned.

Ms Doherty appealed against the decision, and the company cross-appealed that it had not fundamentally breached her contract.

WHAT DID THE EAT DECIDE?

The EAT said that the tribunal was wrong to decide that Ms Doherty had not been constructively dismissed.

First of all, it said that the facts did not bear out the tribunal's criticism of Ms Doherty or her supposed ambitions within the union.

As the company had not raised any of these points itself, Ms Doherty had not been asked about them at the tribunal.

The EAT said that, if it was going to criticise her in its judgement, the tribunal should have flagged the issues up in advance and given her the chance to answer them.

The EAT also criticised the tribunal for not fully dealing with the series of cumulative acts that she had relied on to substantiate her claim of constructive dismissal. As it had not done that, the EAT remitted the issue to another tribunal for her case to be re-heard.

Finally, it said that the tribunal was wrong to decide that the company had been guilty of a fundamental breach of contract by the employers. Their cross-appeal would, therefore, be allowed.

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DESIGN & PRODUCTION **WWW.REXCLUSIVE.CO.UK**
PRINT **WWW.DSIGROUP.COM/TALISMAN**
ILLUSTRATIONS **BRIAN GALLAGHER**
PHOTOGRAPHS **REPORT DIGITAL**
FRONT COVER **PAUL BOX/REPORT DIGITAL**

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19926/0406/1097