THOMPSONS SOLICITORS

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ACAS GUIDES

Acas, the conciliation service, has recently produced a number of free guides which may be of interest to trade union officials.

REDUNDANCY HANDLING

The aim of this booklet is to provide guidance on how best to handle redundancies. It emphasises the importance of planning labour requirements to avoid or to minimise the need for redundancies; the benefits of establishing an agreed procedure for handling redundancies; and the need for fairness and objectivity when selecting members of the workforce for redundancy.

Go to: *www.acas.org.uk/publications/B08.html* to download a copy.

COMMUNICATIONS AND CONSULTATION

People need to talk to each other, no matter where they work. This booklet is aimed at helping employers, employees and their representatives develop effective arrangements for communications and consultation. It describes:

- why communications and consultation are important
- who should take responsibility for communicating and consulting
- what kinds of information are required and when consultation should take place
- the main methods of employee communications and consultation
- the need for regular review of procedures and adequate training.

Go to: *www.acas.org.uk/publications/B06.html* to download a copy.

HOLIDAYS

Disagreements over holidays and holiday pay are common if entitlements are not clearly set out in writing. This leaflet, also available from ACAS, gives general information on:

- what the law says
- how a part-time worker's holiday is calculated
- rights of agency/casual workers
- how leave accrues
- what a worker can do if holiday entitlement is denied
- dealing with requests for extended leave

Go to: *www.acas.org.uk/publications/AL03.html* to download a copy.

SATISFACTION BRINGS A BOOST

Satisfied staff can give a significant boost to business, according to a new joint report from the DTI, TUC and CBI.

Managing Change: Practical ways to reduce long hours and reform working practices explores how firms can manage change to improve working patterns and address the long hours culture in the workplace.

The report is based on a series of nine masterclasses, held between July 2004 and June 2005 by the Equal Opportunities Commission. At each event, business champions – including Rolls Royce, PriceWaterhouseCoopers, BT and Unilever – shared their successes in promoting flexible working practices, while maintaining productivity.

More than nine million people now work flexibly in this country, and the number of employers offering flexible working has almost doubled compared to five years ago.

Go to: *www.dti.gov.uk/er/work_time_regs/LONGWORKINGHOURS.pdf* for a copy of the report.

SILENT SUFFERING

More than seven in ten pregnant women treated unfairly at work are suffering in silence, according to a recent report by the Equal Opportunities Commission (EOC).

The EOC's investigation of over 1,000 mothers also showed that women sacked for being pregnant are losing out on £12 million in statutory maternity pay every year. Replacing these women costs employers £126 million.

It wants the Government to implement three key recommendations:

- The provision of a written statement of maternity rights and responsibilities for every pregnant woman at her first antenatal visit, with a tear-off copy to give to her employer
- Employers to be allowed to ask women to indicate when they plan to return from maternity leave
- Greater financial support for businesses with fewer than ten employees, and access to HR support for small employers.

For a copy go to:
www.eoc.org.uk/cseng/policyandcampaigns/suffer_summary.pdf

Civil partnership

When the Civil Partnership Act comes into force on 5 December 2005, same-sex couples will be able to start the process to register as civil partners. They will then have similar rights (and obligations) to spouses.

To ensure they get those rights, the Government has to amend a whole raft of other legislation to implement the changes brought about by the Act.

It has therefore introduced a Statutory Instrument to bring the changes into force in December. Among other things, the Civil Partnership Act 2004 (Amendments to Subordinate Legislation) Order 2005 SI 2005/2114 makes changes to ensure that entitlement to paternity and adoption leave and pay are extended to civil partners. Likewise, the right to request to work flexibly.

Go to: *www.opsi.gov.uk/si/si2005/20052114.htm* to read the full order.

Time's up

An appeal will be out of time if the notice and the relevant paperwork are not received by 4.00pm on the date the 42-day period expires, the employment appeal tribunal (EAT) decided in the conjoined appeals of Woodward -v- Abbey National plc; JP Garrett Electrical Ltd -v- Cotton**.**

This overturns the earlier decision of *Clark -v- Midland Packaging Ltd* which said that an appellant would be in time, as long as they had started the fax transmission of the appeal notice before the 4.00pm deadline.

This is because the relevant EAT practice direction states that: *"When a date is given for serving of a document... the complete document must be received by the Employment Appeal Tribunal... by 4.00pm on that date. Any document received after 4.00pm will be deemed to be lodged on the next working day."*

The judge said that wording should be interpreted as meaning: *"recorded and received in the automatic fax log ... operated at the EAT."*

More time limits

This is a salutary tale of a solicitor who took things to the wire and lost. It applies equally to trade union officials.

In Agrico -v- Ireland, the claimant instructed solicitors shortly after she was dismissed. The lawyer was overstretched and had implemented a system whereby claims were lodged with the tribunal just before the limitation period expired.

In this case, the time limit expired on the Monday and the solicitor (who was going to be on holiday from Friday) told his secretary to fax the claim form on that morning. She, however, was ill on that day and did not fax it until the next day – a day late.

The employment appeal tribunal overturned the decision of the tribunal, saying that there was no good reason why the claim form could not have been presented in time.

Government 'response'

Following a consultation on draft regulations amending the Sex Discrimination and Equal Pay Acts, the Women and Equality Unit has just published the Government's response.

The amendments are necessary because of changes to a European directive.

Although the Government says it considered the submissions made by stakeholders, including the EOC, TUC, CBI and ACAS, the vast majority of the proposed regulations are essentially unchanged from their draft form.

Go to: *www.womenandequalityunit.gov.uk/publications/etadgovtresponse.oc* to read the Government response.

Wrong post code clarifies review powers

When the claimant in Sodexho -v- Gibbons **failed to pay her deposit, the tribunal made an order to strike out her case.**

It then turned out that the order to pay the deposit had not reached her solicitors because she had given the wrong post code for their office.

When the money was immediately paid, the tribunal reviewed its decision and allowed the claim to proceed. The question was – did the tribunal have that power?

The employment appeal tribunal (EAT) has said that, although the original order requiring the payment of the deposit cannot be reviewed, the order striking out the claim can be.

AWARD PROTECTION

In the event of redundancy, the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A), says that employers have to consult with the union (or directly with their employees) to try to avoid dismissing anyone or, at least, keep the numbers to a minimum. If not, they may find themselves subject to a protective award.

In Amicus -v- GBS Tooling Ltd (2005, IRLR 683), the employment appeal tribunal (EAT) said that tribunals have the discretion to reduce the size of that award if there are mitigating factors. It is irrelevant whether those factors pre or post-date the decision to dismiss.

WHAT WERE THE BASIC FACTS?

Towards the end of 2003, the two main customers of GBS Tooling (accounting for about 70 per cent of its business) gave notice that they were transferring their business overseas.

The company had a series of meetings with the union, starting in December 2003, setting out the situation. An administration order was made on 26 January and on 19 February, production ceased. The company wrote to most of its employees the next day to tell them that their employment had been terminated.

The union claimed that the company had failed to consult and made a claim for a protective award (see box). The company accepted that it had failed to consult after 19 February.

WHAT DID THE TRIBUNAL DECIDE?

The tribunal relied on the guidance in *Susie Radin Ltd -v- GMB* (LELR 90), in which the Court of Appeal made clear that if there has been no consultation, tribunals should only reduce the maximum period if there are mitigating circumstances.

In this case, the tribunal said that, because the company had kept everyone informed, the protective award should be for 70 days, not the maximum period of 90 days.

The union appealed, arguing that, once the tribunal had concluded that there had been a failure to comply with section188, it had no option but to make the maximum award. The fact that the employers had consulted prior to the date of the proposed redundancies was not a mitigating factor.

WHAT DID THE EAT DECIDE?

The EAT agreed with the tribunal that it was within its discretion to take into account what the company had done before 19 February. There was nothing in the statute to say that the mitigating factors had to come after the date on which the proposal to dismiss crystallised.

The guidelines laid down by the Court of Appeal made clear that tribunals have to consider the seriousness of the employer's breach and any mitigating circumstances put before it. The fact that these employers had consulted was one such factor.

It said that the Court of Appeal's guidance indicated that *"a company which has deliberately set out to be secretive would appear to fall into a different category from ... a company which ... has simply failed to disclose it at the right time and in the right context."*

SECTION 189 TULR(C)A

(1) Where an employer has failed to comply... a complaint may be presented to an employment tribunal on that ground.

(2) If the tribunal finds the complaint well-founded it shall make a declaration to that effect and may also make a protective award.

(4) The protected period:

(a) begins with the date on which the first of the dismissals to which the complaint relates takes effect, or the date of the award, whichever is the earlier, and

(b) is of such length as the tribunal determines to be just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of s.188; but shall not exceed 90 days...

TUPE TRANSFER TROUBLE

Under the Transfer of Undertakings (Protection of Employment) Regulations 1981, the transferor has an obligation to consult staff as soon as possible about a potential transfer.

Failure to do so leaves the transfer company liable to pay compensation of up to 13 weeks.

But what happens when the transferor denies that there has even been a transfer? In Amicus -v- Friction Dynamex Ltd (2005, IRLR 724), the High Court said it had jurisdiction to extend an interim injunction freezing the assets of the companies to which the original company was transferred in case they tried to dissipate them.

WHAT WERE THE FACTS?

Friction Dynamex Ltd, based in Wales, was owned and controlled by Craig Smith, an American citizen. In August 2003, the company went into administration, but rose "phoenix-like out of the ashes" to be transferred into the ownership of two other companies, Dynamex Friction Ltd and Ferotec Realty Ltd. These were also allegedly under the control of Mr Smith.

Amicus, which represented some of the dismissed employees, claimed that there had been a TUPE transfer of Friction Dynamex Ltd to the two companies. As a result, Mr Smith should have consulted with the union over a number of redundancies.

WHAT DID THE TWO PARTIES ARGUE?

The union argued that as it was inevitable that compensation would be ordered at the substantive hearing before the tribunal, it asked for the continuation of an earlier interim injunction ordering the two companies not to dispose of their assets.

It went on to argue that, although there had been no actual awards of compensation as yet, the union had a "cause of action" which it had pursued – namely the pending claims at the employment tribunal.

The company, on the other hand, said that the court had no jurisdiction to grant a freezing order for something that did not exist at the time of applying for it.

Amazingly, it even argued that anyone bringing a tribunal claim could not be protected by the High Court if the respondents seemed to be about to dissipate their assets.

In any event, it said there was no evidence that the company had been about to do so, given that, once it had gone into administration, the administrators were in charge of what happened to the assets.

The union disagreed, pointing to the fact that Dynamex and Realty were clearly jointly running the undertaking that had previously belonged to Friction.

WHAT DID THE HIGH COURT DECIDE?

Fortunately, the High Court was not impressed by the company's arguments. It said that it had the power to make a freezing order, as long as the cause of action was already in existence when the claimant made the application.

In these circumstances, it was satisfied that the employment tribunal proceedings satisfied these requirements.

It said that: *"It would be highly unfortunate if this court did not have jurisdiction in circumstances where a person with a very strong case for compensation in the employment tribunal was frustrated by a respondent or defendant who is able to dissipate assets and thus bring to an end any realistic prospect of that individual recovering compensation."*

In this situation, the court concluded that the union had a good case, and there was a very real fear that the company would dissipate its assets. It therefore decided that, as there were assets to which a freezing order could attach, it would continue the interim order pending the conclusion of employment tribunal proceedings.

COMMENT

Although trade unions may want to use this approach against employers trying to evade their responsibilities, it is unlikely that the High Court will intervene unless (as here) there was a significant amount of money involved and a very strong case that compensation would be awarded.

a brief overview of

POLKEY

Until the introduction of new dispute resolution rules in October last year, there was a particular question that tribunals were not allowed to ask in unfair dismissal claims.

And that is, when deciding whether the dismissal was unfair, whether it would have made any difference to the outcome if the employer had followed the correct procedure.

In this article, ***Andrew James***, a solicitor from Thompsons' Employment Rights Unit in Leeds, takes a look at the effect that the new rules, which partially reversed that decision, are having on the rights of employees.

WHAT DID THE HOUSE OF LORDS DECIDE

The rule about following the correct procedure emerged from the famous House of Lords decision in *Polkey -v- A E Dayton Services (1987, IRLR 503)*.

Basically, the Lords said that, if an employer uses an unfair procedure when dismissing someone, the dismissal would be unfair. But they also said that, even if following the correct procedure would have resulted in dismissal, it would still be unfair.

There was one – very narrow – exception, however. And that was when an employer, in the light of everything that he or she knew at the time, decided that it would have been completely futile to follow procedure because it would not have made any difference to the outcome.

On top of that, tribunals had the power to reduce the level of compensation if the employer could show that the end result would have been the same, even if they had followed a fair procedure.

HOW DO THE NEW RULES AFFECT THAT APPROACH?

The Employment Act 2002 inserts a new section 98A into the Employment Rights Act (ERA) 1996. This change partly reverses the decision in Polkey.

The rule now is that, if an employer fails to complete all the requirements of the minimalist statutory procedure, the dismissal will be automatically unfair. However, if they do not follow their own, fuller, dismissal procedure (having complied with the statutory one), they can now argue that they would still have dismissed the employee, and tribunals have to find that it was fair. This is potentially disadvantageous to employees.

In such circumstances, a recent Court of Appeal case, *Lambe -v- 186K LTD, (2004 EWCA Civ 1045)*, may provide some protection for employees. Likewise, a previous decision of the Scottish Court of Appeal, *King -v- Eaton No 2 (1998, IRLR 68)* may be of help.

WHAT HAPPENED IN LAMBE -V- 186K LTD?

Following Mr Lambe's dismissal for redundancy, the tribunal decided that it had been unfair to dismiss him because his employer had not consulted him about other job opportunities.

Mr Lambe appealed unsuccessfully to both the EAT and the Court of Appeal, which held that the tribunal was entitled to reach the conclusions it did.

In rejecting his arguments, the Court of Appeal disapproved of attempts to characterise defects in dismissal procedures as "procedural or substantive". Subject to that, however, it helpfully approved the decision in *King -v- Eaton (No 2)*.

WHAT HAPPENED IN KING -V- EATON (NO 2)

Following a number of redundancies, a tribunal concluded that the dismissals had been unfair because the employer had failed to show that the method of selection was fair or applied reasonably because of a failure to consult with the trade union. The appeal tribunal disagreed, but the Scottish Court of Appeal

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said that the tribunal was right.

At a hearing to sort out compensation, the employer tried to argue that the employees would still have been dismissed even if a fair procedure had been followed, and that their compensation should, therefore, be reduced in accordance with the Polkey principle.

The tribunal acknowledged that, when a dismissal is unfair because of a serious flaw in procedure, compensation might be reduced if the outcome would not have been any different, even if a fair procedure had been followed.

But in a more serious case "riddled with unfairness throughout", usually a full award would be made. The EAT agreed with that view, as did the Scottish Court of Appeal. The crucial question was whether it was possible to "reconstruct the world that never was".

It said: *"To ask whether the same method and criteria would have been adopted, if there had been consultation beforehand, or to try to show what method and criteria would have been adopted, in the light of consultation, is in our opinion to embark upon a sea of speculation, where the opinions of witnesses could have no reliable factual starting point.*

"In such a situation, a tribunal is in our opinion well justified in refusing to allow evidence as to whether the unfair act or omission 'made a difference'."

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COMMENT

Although Mr Lambe was ultimately not successful, the principles set out in his case can be used to the advantage of employees to avoid Polkey reductions being applied, or, under section 98A(2) ERA, an unfair dismissal claim not being upheld at all.

The following points are, therefore, worth noting:

- Although it is entirely appropriate to talk of "procedural failings" in a dismissal process, it is unhelpful to describe the consequences of such failings as "merely procedural" or "substantive".
- The Court of Appeal in *Lambe* has helpfully endorsed the central thrust of the decision in *King -v- Eaton (No. 2)* that in certain circumstances a Polkey reduction is inappropriate.
- In light of the partial reversal of Polkey brought about by the insertion of Section 98A(2) into the ERA 1996, the extent to which it is possible to "reconstruct the world that never was" is likely to be just as important, in certain cases, in deciding whether there was an unfair dismissal at all.
- The "no difference"/percentage reduction principle in Polkey is still central to deciding the appropriate level of compensation in a case that is unfair contrary to sections 98A(1) (automatically unfair dismissals) , or 98(4) ERA 1996 (dismissals outside the range of reasonable responses). We should always try to persuade tribunals not to speculate too much, especially where it is not possible to "sensibly reconstruct the world as it might have been".
- There are going to be some cases in which tribunals will find, under section 98A(2) ERA 1996, that a failure to follow a fuller contractual procedure does not make the dismissal unfair, on the ground that the employee would have been dismissed in any event. Similarly, there will still be cases in which tribunals are going to continue to assess compensation on the basis that the employee had, say, only a 50 per cent chance of staying in their job.
- *Lambe and King -v- Eaton (No 2)* are likely to be particularly important in redundancy cases where there has been a failure to consult properly with the trade union over the selection criteria.

DISABLED BY DIABETES

Under section 4A of the Disability Discrimination Act 1995, employers have a duty to make reasonable adjustments to any provision, criteria or practice or any physical feature of the employer's premises which put a disabled person at a substantial disadvantage in comparison with people who are not disabled.

In Home Office -v- Collins (IDS 788), the Court of Appeal said that, as Ms Collins had not been fit to return to work at all, the Home Office had not failed in its duty to make reasonable adjustments by letting her return on a part time basis.

WHAT WERE THE BASIC FACTS?

Elaine Collins, an insulin dependent diabetic, started work for the Home Office in May 2000 on a 12-month probationary period. She was off work for 31 days up to August 2001, although none of the absences were said to be due to her diabetes.

As a result, the Home Office extended her probationary period by another six months. She then went off sick, in August 2001, with stress and depression, and was referred to the occupational health service (OHS). Its report, in January 2002, stated that it would be another six to eight weeks before she could return to work.

However, she did not return and on 19 April 2002, she was sent a "Minded to Dismiss" letter "on the grounds of failed probation due to unsatisfactory attendance".

She then attended an interview at which it was agreed to obtain a further report from the OHS in August 2002. This said she was still suffering from anxiety, and recommended that she return on a part time basis in three to six months.

The Home Office sent the report to Ms Collins on 4 September, with a letter stating that her case would be reviewed and a decision made on her future employment. Her contract was subsequently terminated on 25 October.

She then lodged a claim that her employer had failed to make a reasonable adjustment by not providing a phased return to work or part-time employment.

WHAT DID THE TRIBUNALS DECIDE?

The employment tribunal decided that the Home Office had been justified in refusing to confirm her employment because of her unsatisfactory attendance, which was for reasons other than her disability.

It said that it was reasonable for the Home Office to rely on a policy that it would not offer a phased return or part-time work until the employee could indicate a definite date for her return to work.

The EAT disagreed and held that the tribunal had failed to give a reason for its conclusion that "the unfavourable treatment was justifiable". As for its failure to make a reasonable adjustment, the EAT said the tribunal could not rely on a policy which itself was unsustainable.

WHAT WAS THE VIEW OF THE COURT OF APPEAL?

The Court of Appeal overturned the decision of the EAT, stating that as Ms Collins had not been fit enough to return to work at all, the issue of pursuing a phased return did not arise.

Nor was it incumbent on the Home Office to provide further financial or operational reasons why it should have extended the period before which a decision to dismiss would be taken, as she had already been off for a long time.

It said that there had not been a breach of the duty to make a reasonable adjustment and that *"...the employment tribunal [was] entitled to find that the employer had taken such steps as were reasonable, in all the circumstances of the case."*

It concluded that, although the reasoning of the tribunal was flawed in places (for instance, its use of a like-for-like comparison), the dismissal was fair for the substantive reason of capability.

Home Office

MIDWIVES GET MATERNAL

It is well established in law that pregnant women employees or women on maternity leave are entitled to special protection.

But what about women who are not employees? In Fletcher and ors -v- Blackpool Fylde and Wyre Hospitals NHS Trust and anor (2005, IRLR 689), the employment appeal tribunal (EAT) has said that midwives on vocational training suffered discrimination when their bursaries were stopped during maternity leave

WHAT WERE THE FACTS?

The three claimants were trainee midwives on a vocational training course, made up of academic study at college with practical placements. They were not paid during their training as they were not employees, but they were eligible to receive bursaries.

The bursary scheme stated that if a student was absent during the course, the bursary could be reduced. However, there was no policy in relation to absence because of pregnancy or maternity leave.

The three trainees claimed sex discrimination when two of them ceased to be paid bursary instalments during their absence from training because of pregnancy and childbirth; and one was unable to take time off from training because the payments would have been stopped.

WHAT DID THE TRIBUNAL DECIDE?

At a preliminary hearing, the tribunal found that although the women were not "employees" or "workers", they were undergoing vocational training within the meaning of section 14 of the Sex Discrimination Act.

However, at the main hearing, the tribunal rejected the substance of the women's claims saying that they were effectively arguing for full pay during maternity leave and therefore could not rely on the Equal Treatment Directive.

It also said that they had been treated in the same way as anyone else on long term absence from the course, such as people on sick leave.

WHAT DID THE WOMEN ARGUE ON APPEAL?

On appeal, the women argued that their claim was not for maternity pay, but was about discrimination in the way their bursaries were paid. But for their pregnancies, they would not have needed to be absent from the course and their bursary payments would have continued.

By stopping the payments, they had been treated less favourably on grounds of pregnancy or maternity, and had therefore been discriminated against unlawfully on grounds of sex under the Sex Discrimination Act.

WHAT DID THE EAT DECIDE?

And the EAT agreed with them. It decided that the tribunal had been wrong to characterise the women's claim as one of pay. The issue was whether there was discrimination in the operation of the bursary scheme, as a facility for training.

In *Gillespie -v- Northern Health and Social Services Board, C-342/93 (1996, IRLR 214)*, the European Court of Justice made clear that *"discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations."*

That being so, treating these pregnant trainee midwives in the same way as other trainee midwives who were absent for other reasons (such as sickness) could not be used as a defence to less favourable treatment.

The established test for determining direct discrimination is the "but for" test. In the present case, but for their pregnancies, the claimants would not have been absent. Their absence resulted in the termination of their bursary payments which caused the discrimination.

The employment tribunal was also wrong to say that the trainee midwives could not compare their treatment to the more favourable treatment available to a man on sick leave.

Although it is not necessary for women to make a comparison with a man to succeed in their claim, the decision in *Webb -v- EMO Air Cargo (UK) Ltd (1995, IRLR 645)* does not prevent them from comparing their treatment with more favourable treatment afforded to sick men. Otherwise, they would not be able to show that a different rule had been applied in comparable circumstances resulting in discrimination against them.

Building up to dismissal

For a claim of constructive dismissal to succeed, the employee has to show that the employer breached a fundamental clause of their contract; that they resigned in response to that breach; and that they resigned fairly soon after the breach.

In Kerry Foods Ltd -v- Lynch (2005, IRLR 680), the employment appeal tribunal (EAT) said that there could not be a constructive dismissal in circumstances where the employee resigned before the notice period had expired.

WHAT WERE THE BASIC FACTS?

Mr Lynch had worked for Kerry Foods (or its predecessors) from 1972 until his dismissal in March 2004. He worked a five-day week, excluding weekends, although managers in other depots worked six days, including Saturdays.

In 2003 his employer decided to introduce a six day working week for all managers, on the basis that, when they worked the same rota as their team, the Saturday trading results improved. It also decided to reduce his holiday entitlement by six days.

Mr Lynch refused to agree to the changes, but was told in January 2004 that his contract would be terminated and that he would be re-engaged on the new terms with effect from 29 March 2004.

He resigned on 22 March and claimed constructive dismissal, arguing that his employer had breached the implied term of trust and confidence between them.

WHAT DID THE TRIBUNAL DECIDE?

And the tribunal agreed with Mr Lynch. It rejected the argument put forward by Kerry Foods that the dismissal was for "some other substantial reason" within the meaning of section 98(1)(b) of the Employment Rights Acts (ERA)1996.

It said that there was no evidence to show that the business would have suffered, had the changes not been introduced. As a result, Kerry Foods had not discharged the burden of showing some other substantial reason for dismissal.

The tribunal did not, therefore, need to go on to consider the question of reasonableness under section 98(4) of the ERA. It awarded Mr Lynch nearly £40,000.

WHAT WAS DECIDED ON APPEAL?

Unfortunately for Mr Lynch, the EAT disagreed and said that there was plenty of evidence that the company would benefit from introducing the rota changes.

It pointed out that the tribunal itself had identified the advantages to the employers of the proposed changes. These were enough, it said, to pass the low hurdle of showing some other substantial reason for dismissal. It was not necessary, as the tribunal had required, for employers to show the "quantum of improvement achieved".

The tribunal was, therefore, bound as a matter of law to find that Kerry Foods had shown some other substantial reason for dismissal, and should then have gone on to consider section 98(4) reasonableness.

In addition the EAT said the tribunal was wrong in law to find that the company was in repudiatory breach of the contract (a pre-requisite for constructive dismissal).

This was not, the EAT said, *"a case in which the respondent employer unilaterally varied the claimant's terms and conditions of employment. They gave lawful notice of termination to expire on 29 March 2004, coupled with an offer of continuous employment on the new terms proposed. During the notice period the old terms remained in force."*

The final nail in the coffin for Mr Lynch was the fact that he resigned during the notice period, and his resignation was accepted. Accordingly the effective date of termination took place before the expiry of the company's notice.

The EAT concluded that these facts could not give rise to a breach of the implied trust and confidence term. It therefore declared that there was no dismissal, and set aside the tribunal's decision and consequent award.

'this was not a case in which the respondent employer unilaterally varied the claimant's terms and conditions of employment ... During the notice period, the old terms remained in force'

Photo: james jenkins/report digital

Politics of race

The Race Relations Act applies to anyone discriminated against on the basis of their race, ethnic or national origins, colour or nationality (defined as "racial grounds").

The Act therefore applies equally to white people as well as to ethnic minorities.

In Redfearn -v- Serco Ltd t/a West Yorkshire Transport Service, the employment appeal tribunal (EAT) has overturned a decision that the claimant's dismissal could be justified on health and safety grounds.

WHAT WERE THE FACTS OF THE CASE?

Mr Redfearn had been employed by West Yorkshire Trading Services (WYTS) as a driver and escort for disabled children and adults in the Bradford area. He was summarily dismissed at the end of June 2004, shortly after his election as a BNP councillor.

A number of unions and individual employees expressed concern to the council that a BNP candidate was employed by an organisation that was contracted to carry out services for the council.

His employer also shared those concerns, and on 30 June, WYTS held a meeting with Mr Redfearn at which he was summarily dismissed. It said that his very public membership of the BNP:

- would present a serious risk to the health and safety of other employees (35 per cent of whom were Asian); and the passengers (70 to 80 per cent of whom were of Asian origin)
- would cause such anxiety that they would no longer want to travel with WYTS
- would potentially jeopardize the reputation of WYTS and the group as a whole.

WHAT CLAIMS DID HE MAKE?

Mr Redfearn brought two claims – one of direct race discrimination on the basis that he had been treated less favourably on racial grounds than others would be treated; and a second of indirect race discrimination (that a provision, criterion or practice had been applied to him that was to his disadvantage).

The tribunal dismissed the claim of direct discrimination saying that if he had been treated unfavourably, it was on health and safety grounds.

It accepted, however, that the company had applied a provision to Mr Redfearn – that as a member of the BNP he could not be employed on health and safety grounds.

However, it said the employer was justified in this indirect discrimination on the basis "*that the application of the provision was a proportionate means of achieving a legitimate aim.*"

WHAT DID THE EAT DECIDE?

The EAT overturned the tribunal's decision and criticised its reasoning on a number of grounds.

Relying on the case of *Showboat Entertainment Centre -v- Owens (1984, IRLR 7)*, the EAT said that the phrase "on racial grounds" must be interpreted widely. By ignoring this line of authorities, the tribunal had defined the term far too narrowly.

It had then failed to go on and ask, contrary to the test in *Nagarajan -v- London Regional Transport (1999, IRLR 172)* whether racial grounds had "had a significant influence on the outcome" ie dismissal. Instead, it had only considered the reason for his dismissal – health and safety.

The EAT was equally scathing of the tribunal's decision on indirect discrimination, accusing it of a lack of critical evaluation of its reasoning. As a result, it said there was no way of knowing how it came to the conclusion that Mr Redfearn's dismissal was a proportionate means of achieving the aim of health and safety.

The decision was therefore remitted to a new tribunal.

COMMENT

This decision is of great concern to those unions and employers who have negotiated policies that membership of the BNP is incompatible with the duties they are employed to do.

If the case is not overturned on appeal, unions will be lobbying the Government to ensure that the BNP cannot use the Race Relations Act (the purpose of which is to prevent discrimination on the ground of race) to be used by the BNP by the back door to protect their political beliefs.

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LELR AIMS TO GIVE NEWS AND VIEWS ON EMPLOYMENT LAW DEVELOPMENTS AS THEY AFFECT TRADE UNIONS AND THEIR MEMBERS

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