THOMPSONS SOLICITORS

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AGE POSITIVE

Age Positive, the website run by the Department for Work and Pensions, has compiled 20 key facts that businesses need to know about age legislation.

They remind employers that the age regulations are due to come into force on 1 October 2006, covering employment and vocational training as well as trade unions and professional organisations. Under these regulations, the upper age limits for unfair dismissal and redundancy will be removed. And a national default retirement age of 65 will be introduced making compulsory retirement below that age unlawful (unless objectively justified).

To download the information, go to *www.agepositive.gov.uk*

APPRENTICE DEAL

A new guide from the TUC aims to help apprentices get a better deal at work. ***Your Rights As An Apprentice*** **provides information about terms and conditions, rights at work and pay.**

The TUC is concerned that young people seem to be moving into "gender-specific" sectors, as the survey also reveals that women apprentices are already earning £40 a week less than the men.

Many apprentices leave to find better-paid jobs before finishing their course. The TUC has evidence of some apprentices being paid well below the required £80 a week. The guide gives young people access to union support and the information they need to ensure that they are not exploited by a small minority of unscrupulous employers.

Go to *www.tuc.org.uk/tuc/apprentices.pdf* to download the new leaflet, or order it on 0870 600 4882.

SEXUAL ORIENTATION GUIDE

ACAS has produced a new guide about sexual orientation and the workplace.

The booklet provides an overview of the 2003 Employment Equality (Sexual Orientation) Regulations and provides guidance on good employment practice. It also takes account of the Civil Partnership Act (in force from 5 December 2005) and the necessary amendments to the 2003 regulations.

Go to *www.acas.org.uk/services/pdf/sexual.pdf* for a copy.

PAY CHEQUER

According to a recent survey, one in four women is unhappy with their pay compared to one in five men. Nearly 4,000 people responded to the survey run by PayWizard, an online salary checker.

But although women were more likely to be fed up with their pay, they were less likely than men to have raised the issue with their boss. Just under two-fifths of the female survey respondents had discussed pay with their manager in the past year, compared to just under half the men questioned.

PayWizard was launched by the TUC and Incomes Data Services at the beginning of the year. It only takes a minute to check your salary against that of people doing similar jobs in different parts of the UK. The site can be found at *www.paywizard.co.uk*

KEY STATISTICS

- 48% of employees were not satisfied with their pay
- 28% of female employees, compared to 20% of male workers, stated that they were highly dissatisfied with their pay
- 39% of women workers said that they had discussed their pay with their manager in the last year compared to 44% of men
- 35% of women asked for a pay rise compared to 40% of men.

EQUAL PAY, FOR FREE

With funding from the Department of Trade and Industry, the TUC has set up a panel of experts to give free expert advice to UK organisations on how to conduct equal pay reviews, in partnership with unions.

Evidence shows that when employers reward their employees fairly, they recruit and retain high calibre staff.

The TUC Equal Pay Panel of experts is made up of renowned and respected practitioners. The experts provide a free tailor-made three-hour session for unions and employers to explore issues such as assessing the readiness of the organisation to carry out an equal pay review.

To book your free expert session, contact Christine Armitage at The Partnership Institute on 020 7580 5665, e-mail her on *carmitage@tuc.org.uk*, or visit the website on *www.partnership-institute.org.uk*

Ainsworth goes to Lords

Under the Working Time Regulations 1998, workers are entitled to four weeks' paid annual leave. But what happens when someone has been off work on sick leave for any period of time – are they still entitled to holiday pay?

This is the question that Thompsons, acting on behalf of PCS, put to the Court of Appeal a few months ago in Commissioners of Inland Revenue -v- Ainsworth and ors (LELR 101). Unfortunately, it said that workers cannot claim holiday pay when their entitlement to sick leave has run out.

Thompsons has now won the right to appeal against this decision to the highest court in the land – the House of Lords. The case will be heard some time next year and will have significant implications for all workers and their trade unions (see pages 6 to 7).

More family friendly laws

In an effort to create more flexibility at work, the Government has announced new measures which it says will help all working families balance busy home and work lives.

According to the Trade and Industry Secretary, Alan Johnson, the Work and Families Bill will create a modern framework of employment rights and responsibilities for employers and employees.

New measures include:

- extending statutory maternity pay to nine months from April 2007, and then to a year by the end of the Parliament
- a power to introduce new paternity leave for fathers, so that they can get leave and statutory pay if the mother returns to work after six months, but before the end of her maternity leave period
- extending the right to request flexible working to carers from April 2007
- introducing "keeping in touch" days so that women on maternity leave can go into work for a few days, without losing their right to maternity leave or statutory pay
- extending the period of notice for return from maternity leave to two months
- making clear in the regulations that employers can make reasonable contact with their employees on maternity leave

For more details, go to *www.dti.gov.uk/workandfamilies*

Rolled up holiday pay

Following the referral of three UK cases about rolled-up holiday pay to the European Court of Justice, the Advocate General has now given his opinion.

Although not binding on the court, it is nearly always accepted by the Judges.

His view is that these arrangements can be lawful, as long as there is some other system in place that ensures that workers take the minimum amount of annual leave to which they are entitled.

The claimants in the three cases – Caulfield and ors -v- Marshalls Clay Products Ltd; Clarke -v- Frank Staddon Ltd; Robinson Steele -v- Retail Services Ltd – argued that the legislation requires payment to be made during the time the worker is actually on holiday.

Otherwise it constitutes a payment in lieu, which is contrary to the directive. They also argued that the rolled up system discouraged workers from taking their leave.

Since workers earn more when they work every week, this is a real incentive for low paid workers in particular not to take any leave.

The employers said, however, that there was nothing in the directive to say that payment for annual leave should be made in a particular way or at a particular time.

DDA Orders

A number of changes to the Disability Discrimination Act came into force on 5 December, as a result of an order made by the Government in October.

One of the most significant changes has been the amendment of the definition of "disability" under the Act. This brings HIV, MS and certain forms of cancer within the scope of the Act.

In addition, the requirement that mental illnesses be "clinically well-recognised" has been removed, making it easier for people with mental impairments to bring claims.

And finally, the amendments introduced a positive duty on public authorities to have due regard to the need to eliminate harassment of, and unlawful discrimination against, the disabled.

WORKING TIME GENTLEMEN PLEASE

The Working Time Regulations (WTR) 1998 state that a worker's average working time should not exceed 48 hours, on average, per week. However, workers can agree individually to opt out from them.

In Hone -v- Six Continents Retail Ltd, the Court of Appeal has said that courts must take the regulations into account (and whether the employer has breached them) when deciding whether a stress at work claim was reasonably foreseeable, if the worker has not opted out.

WHAT WERE THE BASIC FACTS?

Mr Hone, a pub manager since 1995, collapsed at work in May 2000 with chest pain and giddiness. According to Mr Hone, this was caused by stress due to his long working hours (sometimes in excess of 90 hours a week).

According to his employer, however, there was no need for him to work such long hours, had he planned his work better. The county court judge agreed that until April 2000, it was not easy to see why he was working such long hours. However, that month, two of his four key employees left, putting extra pressure on him. And because he had no assistant manager, he could not arrange the time off that was owing to him.

Mr Hone then had a meeting with the new operations manager, Mr Reynolds, on 19 April, to discuss his long hours. Mr Reynolds was aware that Mr Hone had not signed a written opt out from the WTR and also agreed that he needed the support of an assistant manager.

WHAT DID THE COUNTY COURT DECIDE?

The judge made the following findings:

- that Mr Hone had a good employment record from 1995 until April 2000
- that he had been asking for an assistant manager since transferring to the new pub in August 1999
- that Mr Hone had been submitting regular returns showing that he was working 90 hours a week
- that he refused to sign the opt out under the Working Time Directive because of his concern at the hours he was working
- that Mr Hone specifically complained of working excessive hours and that he was very tired
- that his employer was aware of the WTR and the purpose behind them.

On the basis of these facts, the judge found that it was reasonably foreseeable that, from 19 April, Mr Hone's health would suffer from stress at work. Although his employer had provided some occasional relief, an assistant manager was not appointed until Mr Hone collapsed.

The judge also held that his employer was under a duty to take all reasonable steps to ensure that Mr Hone did not work for more than 48 hours per week. Instead of providing an assistant to ensure he had two days off a week, the company "stood idly by" until Mrs Hone told them in May that Mr Hone was sick.

WHAT DID THE COURT OF APPEAL DECIDE?

Relying on the case of *Hatton -v- Sutherland (2002, EWCA Civ 76)*, the Court said that the crucial question is "whether this kind of harm to this particular employee was reasonably

Picture: Paul Box/Report Digital

foreseeable." The issue of foreseeability, in turn, depended upon what the employer knew (or ought reasonably to have known) about the individual employee.

However, because it can be difficult to know *"when and why a particular person will go over the edge from pressure to stress and from stress to injury to health, the indications must be plain enough for any reasonable employer to realise that he should do something about it."*

In this case, the Court said that the factors identified by the judge were sufficiently plain indications of "impending harm to health" for a reasonable employer to realise that he should do something about it. In this case, to hire an assistant manager.

WORKING HOLIDAY

Although the Working Time Regulations (WTR) were introduced in October 1998, they did not become effective in a number of sectors (such as air) until 1 August 2003. These stated, among other things, that workers were entitled to four weeks' paid annual leave.

In British Airways plc -v- Noble and Forde, the employment appeal tribunal (EAT) said that BA could not rely on a 30-year-old formula for calculating shift pay that had the effect of reducing a week's pay.

WHAT WERE THE BASIC FACTS?

Under the terms of their contracts, the holiday pay of BA employees was calculated using an agreement reached with the unions many years before the introduction of the regulations.

Clause 16 stated that total shift pay was calculated by multiplying the shift pay for each pattern by an agreed payment.

This was then divided by the number of weeks in that pattern, multiplied by 48 and divided by 52 to produce a weekly payment. This payment was then paid regularly throughout the year.

Mr Noble and Ms Forde argued that the formula did not comply with their entitlement to paid holiday under the WTR, which stated that they were entitled to be paid *"at the rate of a week's pay in respect of each week of leave."*

The tribunal agreed, saying that the purpose of the agreement (which was perfectly valid at the time) had been to prevent employees from getting shift pay when they were on holiday. As a result, it was in breach of the regulations.

WHAT DID THE PARTIES ARGUE ON APPEAL?

BA argued that the agreement complied with the regulations, in that it paid the same amount "for the weeks worked and the weeks on which the individual was on holiday." In effect, it said that clause 16 was just a way of calculating a week's pay.

Mr Noble and Ms Forde, pointed out, however, that in order to arrive at the calculation BA had made a deduction by reference to the multiplicand of 48 and the divisor of 52.

They said that in the "rolled-up holiday pay" cases – *Marshalls Clay -v- Caulfield (2004, ICR 1502)* and *Smith -v- Morrisroes (2005, ICR 596)* – employers had to show that there was enough holiday pay "rolled up" in the enhanced payments that they made to their workers during the weeks that they worked to cover the weeks on holiday. In this case, they said that although employees were paid the same for each week, BA had to show they had not reduced the amount of money they paid.

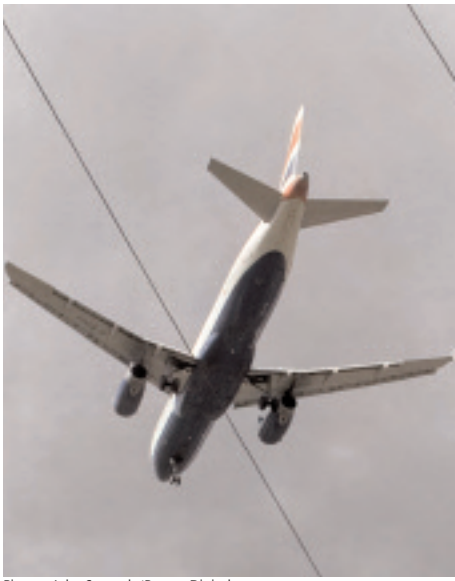
WHAT DID THE EAT DECIDE?

And the EAT agreed with them. It said that employers have to show that they have not deducted any money in respect of holiday pay. The same principle applied as in the rolled-up holiday pay cases, in which the employers had to show that they had made a genuine payment in respect of holidays by increasing the amounts paid over the rest of the year.

It said that, in this case, the contractual rate of pay had been arrived at by calculating what was owed to the workers in respect of shift work, but then reducing it using the formula of 48/52.

The EAT said this was contrary to the regulations because *"there must be no reduction of payment during the working days in the rest of the year to pay for those 20 days holiday. That is what has occurred here."*

However, this only applied to the 20 days' statutory holiday to which the employees were entitled and not the 34 contractual days which most full timers enjoyed. As BA had been entitled to pay the reduced amount for 14 days, it was therefore only in breach of the regulations for six days (20 minus 14).



Picture: John Sturrock/Report Digital

a brief overview of

SICK OF

Under the Working Time Regulations (WTR) 1998, workers are entitled to four weeks' paid annual leave. But what happens when someone has been off work on sick leave for any period of time – are they still entitled to holiday pay?

Unfortunately, the Court of Appeal in Commissioners of Inland Revenue -v- Ainsworth (LELR 101; 2005, IRLR 465) decided they were not. Although the case is being appealed, it is not likely to be heard until late next year.

In this article, ***Andrew James***, a solicitor from Thompsons' Employment Rights Unit in Sheffield and Leeds looks at the implications of that decision, and advises trade unionists what to do to protect their members' interests until the case has been heard by the House of Lords.

WHAT WERE THE MAIN EFFECTS OF THE DECISION?

There were two main effects of this decision. First of all, workers cannot claim holiday pay under the WTR for periods during which they are on sick leave. This overturns the decision of the employment appeal tribunal (EAT) in Kigass Aero Components Ltd -v- Brown (2002, IRLR 312).

Secondly, workers who want to claim that their holiday pay rights under the WTR have been breached cannot take claims such as unauthorised deduction of wages claims. This over-turns the decision of the Scottish EAT in List Design Group Limited -v- Douglas (2003, IRLR 14). Instead, they can probably only claim for breaches of their WTR rights that have occurred during the current holiday year.

Having said that, it may be possible to argue that claims can also be taken in respect of breaches of entitlement to holiday for the previous holiday year, as long as the claim is submitted within three months of the end of that holiday year.

This is because the three month time limit for claims for breaches of regulation 13 (the right to take holiday) run from the end of each holiday year.

Our advice is always to err on the side of caution, however, and submit a claim within three months of a refusal of holiday. If, for some reason, the worker was not able to submit the claim in time, it might be worth running the other argument as a possible "get-out" clause.

DOES THIS DECISION AFFECT CONTRACTUAL RIGHTS?

The simple answer is no – the decision in *Ainsworth* only affects workers' rights under the WTR. Contractual rights are unaffected. So, for example, employees remain entitled to any contractual right to accrued holiday pay on termination.

Usually, that will be expressly dealt with in a contract of employment. But remember that it may also be implied by custom and practice, so if that's what has always happened in the past, then employees remain entitled to it in the future. Even if the right is not written down anywhere.

On top of that, employers have to provide employees with a statement of particulars under section one of the Employment Rights Act 1996. This must contain particulars of, amongst other things, any terms and conditions relating to "*entitlement to holidays (including public holidays) and holiday pay (the particulars being sufficient to enable the employee to precisely calculate his entitlement, including to accrued holiday pay on the termination of employment)*" (section 1(4)(d)(i)).

If this is not included in the statement of particulars, ask the employer to explain what the position is. Unfortunately, the employer may still be entitled to refuse to pay accrued holiday pay on termination even if there is no section 1(4) statement.

That is because, generally speaking, there is no implied right to be paid for accrued but untaken holiday when the employment terminates, in the absence of a specific provision to that effect – Morley -v- Heritage plc (1993, IRLR 400 CA).

WHAT ABOUT DEDUCTION OF WAGES CLAIMS?

Our advice is that if members have potential claims for holiday pay going back more than one holiday year, trade union officials should continue to submit ET1 claim forms on both counts.

In other words, submit claims under the WTR and as unauthorised deduction of wages claims. The tribunal should be asked to hear the WTR claim in relation to the most recent breaches; but stay

HOLIDAYS?

the rest of the case pending the decision of the House of Lords on the *Ainsworth* appeal.

The other alternative is to ask the tribunal to stay the claim in relation to the previous year's holiday pay, but get a ruling on the current year's holiday pay due under the WTR.

CAN PAID LEAVE BE REDUCED?

Some employers may try to argue that workers' rights to paid leave should be proportionately reduced by the amount of sick leave taken during any leave year. This is one of the potential (and arguably illogical) consequences of *Ainsworth*.

Union officials should tell employers that they will challenge any such interpretation, not least because the comments from the Court of Appeal on that issue were "obiter" (and therefore do not need to be followed).

In any event, as stated above, *Ainsworth* does not affect workers' contractual rights, only rights under the WTR. Arguably therefore, unless the contract specifically allows for it, an employer must allow an employee returning from a period of sick leave their full contractual right to leave for that holiday year.

If a period of sick leave straddles two holiday years, however, and the contract does not allow an employee to carry over leave into the next leave year, there is no right to do so. But there is nothing to stop members (with support from their trade union rep) from trying to persuade the employer to allow some of the sick leave to be classed retrospectively as holiday leave.

DO HOLIDAYS STILL HAVE TO BE NOTIFIED?

The requirement set out in the *Kigass* decision to notify the employer of a period of leave in order to qualify for it still remains. So continue to advise members to apply for their holidays, twice as many days in advance of the holiday as the number of days leave they want to take (regulation 15).

WHAT ELSE SHOULD TRADE UNIONS DO?

We suggest that officials tell employers that *Ainsworth* is being appealed and that pending the decision of the House of Lords, the status quo should apply. In other words, workers should continue to be entitled to take a period of paid holiday leave, during sick leave.

Don't forget that the statutory grievance procedure applies to both working time and unauthorised deduction cases. Workers therefore need to lodge a grievance with their employer within three months of the breach, and then wait at least 28 days before submitting a tribunal application.

If in any doubt about what to do, seek legal advice from the union's legal department.

COMMENT

Whatever way you look at it, the decision in *Ainsworth* is not good for workers. It will, in effect, allow unscrupulous employers, who have not paid holiday pay due to its workers for years, to evade their workers' rights for all but the most recent breaches.

Picture: Paul Herrmann Report Digital/RexClusive

PERSONALITY PLUS

Under section 98 of the Employment Rights Act 1996, employers can rely on a number of potentially fair reasons to challenge a claim of unfair dismissal.

In Perkin -v- St Georges Healthcare NHS Trust, the Court of Appeal has said that employers can dismiss a difficult employee by relying on "some other substantial reason".

WHAT WERE THE FACTS?

Mr Perkin was the finance director at the trust from September 1986 until he was asked to resign at the end of July 2002 because of his abrasive management style and poor interpersonal skills. He refused and was suspended.

The disciplinary hearings were chaired by Ms McLoughlin (who was also the chair of the trust), although she had previously been involved in discussions about preparing an "exit strategy" for him.

At the hearings, a series of senior colleagues reported their concerns about Mr Perkin, saying that he was aloof, stubborn and intimidating.

For his part, Mr Perkin accused the chief executive of being a bully and lying about his qualifications.

He was finally dismissed with effect from 4 December 2002. In the letter Ms McLoughlin said that the principal reason for his dismissal was his poor relationships with other senior colleagues. However, she added that his conduct at the disciplinary hearing would in any event have led to his dismissal.

WHAT HAPPENED AT THE TRIBUNAL?

Mr Perkin claimed that his dismissal was automatically unfair because he had made a number of protected disclosures. The trust said he had been dismissed for a reason related to his conduct, and/or for some other substantial reason (SOSR), namely the "irretrievable breakdown in relationships to which his behaviour had given rise.

And the tribunal agreed that Mr Perkin had been unfairly dismissed. It was critical of the trust for allowing Ms McLoughlin to chair the meeting. However, the tribunal was certain that he would have been dismissed, whoever had conducted the hearings. It also said that he contributed 100 per cent to his dismissal by his conduct during the disciplinary process.

And the EAT essentially agreed, although the reason for dismissal, in its view, was SOSR rather than conduct.

WHAT DID THE PARTIES ARGUE AT THE COURT OF APPEAL?

Mr Perkin said he had been dismissed because of his personality, which could not be categorised as "conduct" under section 98(2)(b) of the Employment Rights Act (ERA)1996. If, however, the dismissal was for SOSR, he said that the tribunal had not provided any factual basis for its decision.

For its part, the trust argued that an employer must have the right to take action to address problems of personality, particularly where they impinge on the issues of trust and confidence and are adversely affecting the trust.

In this case, it said that the reason given by the trust for Mr Perkin's dismissal could be characterised as a reason related to his conduct (the way he conducted himself in his dealings with colleagues), or as SOSR (the serious and disabling breakdown of trust and confidence between him and his colleagues).

WHAT DID THE COURT OF APPEAL DECIDE?

The Court agreed with Mr Perkin that personality, of itself, cannot be a ground for dismissal within section 98. *"For there to be a potentially fair reason for dismissal, an employee's personality must, it seems to me, manifest itself in such a way as to bring the actions of the employee, one way or another, within the section."* Provided the employer can justify the facts, however, then section 98(4) kicks in.

The Court of Appeal also thought this was a case that fell within SOSR, rather than conduct (requiring a different fairness test), but that the tribunal was entitled to come to the conclusion that the trust had a potentially fair reason to dismiss Mr. Perkin.

Finally, although the dismissal was procedurally unfair, the tribunal was entitled to decide not to award any compensation and to find that Mr Perkin contributed 100 per cent to his dismissal.

A SHODDY COMPROMISE

In order to protect workers from unscrupulous employers, the law says that they cannot contract out of their statutory rights unless they sign a compromise agreement, which has to satisfy certain specific requirements.

A Scottish employment appeal tribunal (EAT) has said in Hilton UK Hotels Ltd -v- McNaughton that the language in the agreement has to be completely unambiguous for a future, unknown claim to be successfully compromised.

WHAT WERE THE FACTS IN THIS CASE?

Ms McNaughton worked for the hotel from April 1974 to May 2003. Between April 1974 and April 1981 she was excluded from her employer's pension scheme because of her part-time status.

When her employment was terminated in May 2003, she signed a compromise agreement, waiving her rights to bring any further claims against the hotel. The agreement referred to "claims that you believe you have against the company for breaches of...", followed by a list of statutes including the Equal Pay Act 1970 (EqPA) and the Sex Discrimination Act 1975 (SDA).

Although she took extensive advice from a solicitor prior to signing the agreement, she was unaware that she had a potential claim because she had been excluded from the pension fund. She then read a newspaper article in August 2003 (after the agreement had been signed), about part-time workers' pension rights.

She brought a fresh claim under the EqPA and SDA, arguing that she had been discriminated against because she had been excluded from the pension scheme as a part timer. And the tribunal said that, despite the compromise agreement, she could pursue her claim.

WHAT DID THE PARTIES ARGUE ON APPEAL?

The hotel argued it was for Ms McNaughton's solicitor to find out any relevant facts about her employment. In this case, it would not have been difficult to discover she had worked part time and, therefore, had a claim under the Equal Pay Act.

Relying on the case of *Hinton -v- University of East London (LELR 102)*, the hotel argued that although the agreement did not specify the relevant section of the statute (in order to compromise her claim), there was no need in this case since there was only one section under which a claim could be made.

Ms McNaughton, on the other hand, argued that *"a party could not, as a matter of law, compromise a claim that they were not aware of."* In any event, the language in the agreement could not exclude the present claim because it did not do so in clear enough language.

WHAT DID THE EAT DECIDE?

The EAT did not agree with either of them, but a majority of them said she could pursue her claim, and that employers cannot rely on blanket agreements that simply sign away an employee's rights. That does not mean, however, that future claims (even ones that a claimant does not know about) cannot be excluded.

But to be effective, they have to specifically identify the claim either by describing it or by referring to the relevant section of the statute. And the language

used *"must be absolutely plain and unequivocal."*

In this particular agreement, the EAT agreed that the reference to the Equal Pay Act was *"sufficient to identify the type of claim referred to and no further detail of the nature of the claim would require to be given."*

However, the agreement then went on to say that her claim could only be excluded if, on 16 May 2003, (the date when she signed it) she "believed" she had such a claim and had raised it with the hotel. That qualification was fatal to the employer's case because it meant that *"the contract between the parties was, plainly, that if the Claimant did not have such a belief, then the claim was not waived."*

The EAT dismissed the appeal and remitted the case to the tribunal to consider the merits of her equal pay claim.

Tip toe through the TUPE

There are a number of tests that have been applied by the European Court of Justice to establish whether, and in what circumstances, the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) apply.

In Scottish Coal Co Ltd -v- McCormick and ors, the Court of Session has said that tribunals have to determine whether the essential elements of an operation were taken over by the transferee to know whether an undertaking has retained its identity, after a transfer.

WHAT WERE THE BASIC FACTS?

Scottish Coal had been sub-contracting with Crouch Ltd to extract coal at an opencast mine in Ayrshire since 1988. The value of the plant used by Crouch was in excess of £2 million. It had also erected buildings on the site with a value of about £150,000.

In April 2001, Scottish Coal took over the work at the site, but did not buy any of the plant or equipment from Crouch. However, most of their site workers were retained (with the exception of the foreman, Mr McCormick), doing more or less the same job as they had before.

Some of the workforce, including Mr McCormick, brought a claim arguing that there had been a TUPE transfer between the two companies.

WHAT DID THE TRIBUNAL DECIDE?

Relying on the principles set out in *Cheeseman -v- Brewer Contracts Ltd (2001, IRLR 144)*, the tribunal said that the activities of Crouch Ltd constituted a stable economic entity, prior to the transfer. The workforce was more or less permanently assigned to mining; the entity was autonomous; and it had significant tangible assets, such as the plant and equipment.

The tribunal then said that as operations continued at the site (following a short break), and as most of the workforce transferred over to Scottish Coal, the entity had retained its identity and there had, therefore, been a TUPE transfer.

WHAT DID THE EAT DECIDE?

The EAT agreed that the activities of Crouch constituted a stable economic entity, and that there had been a TUPE transfer, given that the main activity (the extraction of coal) had continued after the transfer. The only difference was that the equipment that was being used belonged to Scottish Coal, rather than Crouch.

The EAT said it was important to apply a "purposive approach" in order to give effect to the purpose behind the regulations – the protection of workers' rights. The tribunal was, therefore, right to decide there had been a TUPE transfer.

WHAT DID THE COURT OF SESSION DECIDE?

Scottish Coal appealed again, saying that both tribunals had failed to follow the guidance of the European Court of Justice in *Oy Liijkenne Ab -v- Liskojarvi (2001, IRLR 171)*.

This said that courts have to characterise undertakings as either "asset reliant" or "labour intensive" to decide if there has been a transfer. Given that Crouch Ltd had been an "asset reliant" undertaking, there could not be a TUPE transfer as none of the assets had transferred.

The Court of Session (the Court of Appeal in Scotland) disagreed, however, saying that the decisive test is whether the entity has retained its identity, after the transfer. To do that, the ECJ made clear that it is for *"the national court [to] ... determine which are the essential and indispensable elements required in order for the economic entity to carry on operating and establish whether these elements have been taken over by the transferee."*

The Court warned, however, that when examining the "essential and indispensable elements", tribunals must examine the whole of the transaction to find out whether one particular factor is decisive.

In this instance, it decided that the tribunal had not sufficiently analysed the relative importance of plant and labour in Crouch's activities. Nor had it made any findings of fact about whether Crouch's technical and managerial staff had transferred. It therefore allowed the appeal and remitted the case to the tribunal to be heard again.

> *'it is for the national court to determine which are the essential and indispensable elements for the economic entity to carry on operating and establish whether these elements have been taken over by the transferee'*

Trade secrets

Employers sometimes insert restrictive covenants in employees' contracts so that they do not give away any trade secrets when they leave. But what happens if an employee is sacked for refusing to agree to them?

In Willow Oak Developments Ltd t/a Windsor Recruitment -v- Silverwood, the EAT has said that tribunals have to ascertain the reason for the dismissal, before going on to consider whether the covenant was reasonable.

WHAT WERE THE BASIC FACTS?

The claimants, all employees of a staff recruitment company, were dismissed when they refused to sign new contracts containing extensive restrictive covenants. They brought claims of unfair dismissal.

And the tribunal agreed, saying that the covenants were too wide. It decided that the company could not therefore rely on the defence of "some other substantial reason", within section 98(1)(b) of the Employment Rights Act (ERA) 1996.

Although the tribunal said that it did not have to consider the issue of fairness under section 98(4) of the ERA, it went on to decide that the procedure followed by the company was also unfair as the claimants were only given 30 minutes to read (and sign) what amounted to complex legal documents.

Nor were they warned that they would be dismissed if they failed to agree to them. Had the procedure been fair, the tribunal said the claimants would most probably have signed.

WHAT DID THE PARTIES ARGUE ON APPEAL?

The employer argued that the tribunal had adopted the wrong approach. They said that *"all that is necessary is for the employer to establish that the reason for dismissal could be for a substantial other reason"*.

The question about whether the new contract was an unreasonable restraint of trade was not an issue for the tribunal to decide as such. Instead, this should just have formed part of its deliberations about whether the employer had been reasonable or not.

The employees, on the other hand, said that the tribunal had been right to rely on the case of *Forshaw -v- Archcraft Ltd*, in which the EAT decided that refusing to sign up to a covenant that was unreasonably wide could amount to a potentially fair reason for dismissal. And they argued that it was perfectly appropriate for a tribunal to consider whether the covenant was fair or not, at the same time as considering whether the employer could show a fair reason for the dismissal.

WHAT DID THE EAT DECIDE?

The EAT said that it was not *"appropriate for the employment tribunal to decide the validity of a proposed covenant"* (as it had not yet been imposed). Instead, the issue was whether it was reasonable to dismiss the employees for refusing to sign the new contract.

The tribunal should have followed three stages. First of all, it should have ascertained whether the reason for dismissal would pass the section 98(1)(b) test. Then it should have considered *"whether the employer had a genuine belief that the dismissal for that reason was justified."*

Finally, it should have considered the reasonableness of the covenants. If unreasonable, then the dismissal would probably be unfair. If they were arguably unenforceable, then tribunals needed to look at the employer's approach to the whole matter. But if they were plainly reasonable, then the dismissal was likely to be fair.

The tribunal had, therefore, taken the wrong approach at the section 98(1)(b) stage, as had the EAT in the earlier case of *Forshaw*.

However, the EAT upheld the overall decision of the tribunal that the dismissals were unfair, relying on its "alternative" not its "principal" reason that the procedure adopted by the employers had been unfair.

SECTION 98(1)(B), ERA 1996

98. – (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

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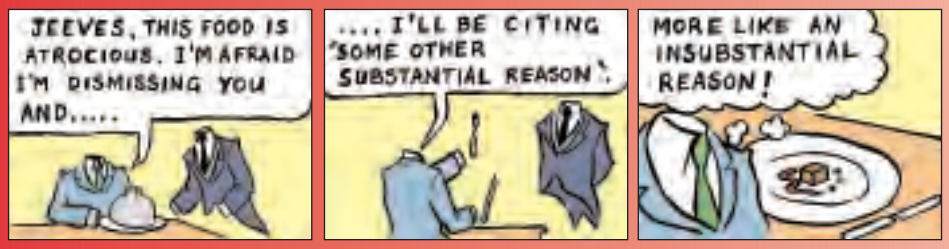

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