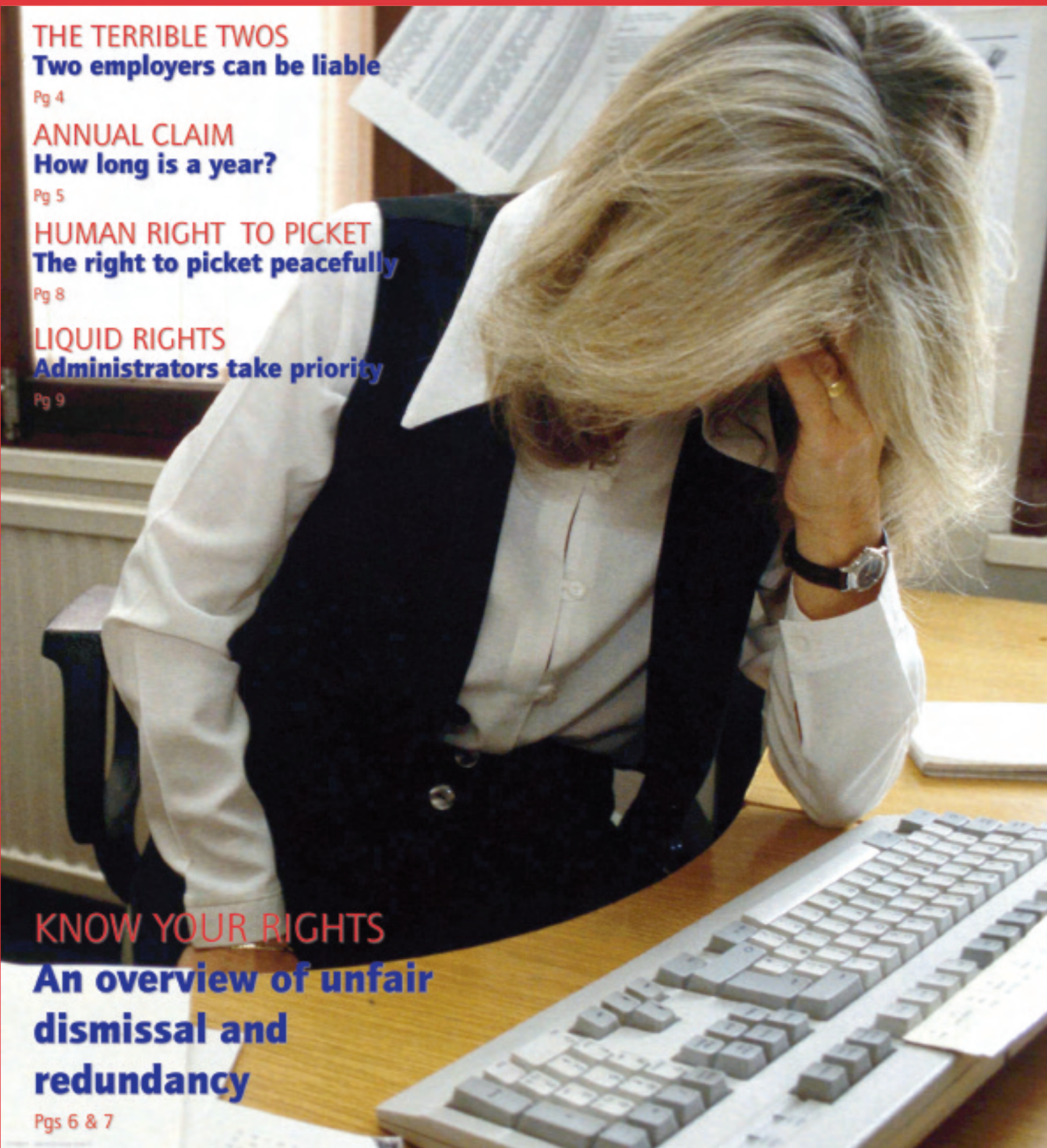
THOMPSONS SOLICITORS

Labour & European Law Review

ISSUE 107 JANUARY 2006



CUT IN PAY GAP

Recent figures from the Office for National Statistics show that the gender pay gap narrowed between 2004 and 2005 to its lowest value since records began. However, given that the Equal Pay Act was introduced thirty years ago, it is hardly cause for celebration.

Today women receive 83 pence for every £1 that a man earns. In 1975, the figure was 70 pence for every £1. That means that women now earn an average of £9.82 an hour with men earning £11.31 an hour.

The largest difference was in the East Midlands and South East, where women's pay was 15.8 per cent less than men's. The smallest gap was in Northern Ireland, at 4.2 per cent.

Go to: *www.statistics.gov.uk/cci/nugget.asp?id=167* for more details.

PROPER HOURS DAY

The TUC's "Work Your Proper Hours Day" takes place on Friday 24 February. This is when the TUC estimates that people who do unpaid overtime will stop working for free in 2006 and start to get paid.

The TUC is urging people who do unpaid overtime to take a proper lunch that day, and to arrive and leave work on time.

This should remind Britain's employers just how much they depend on the goodwill and voluntary extra work of their staff. Indeed the TUC is urging Britain's bosses to take their staff out for lunch, coffee or cocktails on "Work Your Proper Hours Day" to say thank you for their hard work and commitment.

The TUC has used the official Labour Force Survey, which measures unpaid overtime, to work out when "Work Your Proper Hours Day" will fall.

BE FLEXIBLE

Almost one in ten employees in the UK would like to work fewer hours, even if it meant taking home less money each month, according to a study published by the TUC.

The report, "Challenging times", revealed that over three-quarters of UK employees have no element of flexibility in their employment contracts. However, more than half a million workers who asked for a shorter working week had their requests turned down.

The report also says that union members are nearly twice as likely to work flexibly, compared to employees from non-unionised workplaces.

And although there are now 150,000 more people (many of whom are men) working flexitime, the total is still only a little over one in ten of all UK employees. For a copy of the report, go to: *www.tuc.org.uk/extras/CTreport.doc*

WHAT WOMEN REALLY WANT

Minister for Women Tessa Jowell has launched a nationwide debate to find out what matters most to women.

Over the next five months, at a series of events called Today's Woman – Your Say in the Future, women will be asked what they think about the challenges facing the country and what they want from Government policy.

The first event was held in Birmingham at the end of November. Future debates are being held in Liverpool, Bristol, Sheffield and Newcastle with a final event in London in April.

The Government has also set up a website for those unable to attend the events, but who want to feed in their views at: *secure.symphonyem.co.uk/todayswoman/survey*

PROTECTION FOR GAYS AND LESBIANS

Hotels, pubs and restaurants will soon be banned from discriminating against lesbian, gay and bisexual people, according to the Government.

Amendments to the Equality Bill will enable regulations to be made to prohibit discrimination on grounds of sexual orientation in the provision of goods, facilities and services.

This builds on the legislation introduced in December 2003, outlawing discrimination against lesbian, gay and bisexual people at work. The Government also introduced civil partnerships in December 2005.

The Equality Bill would also:

- establish the new Commission for Equality and Human Rights
- make it unlawful to discriminate on the grounds of religion or belief in the provision of goods and services
- create a duty on public authorities to promote equality of opportunity between men and women (the gender duty)

The Government has said that it will consult on the scope of the regulations.

Time extension

It is unusual for the employment appeal tribunal (EAT) to extend the time for lodging an appeal, but then so were the circumstances in Dodd -v- Bank of Tokyo-Mitsubishi.

In this case, a firm of solicitors moved offices around the time that the London (Central) tribunal moved from one part of London to another. Predictably, the tribunal's decision was lost and did not turn up until the very last day for lodging an appeal.

Things then took a further turn for the worse because the solicitor dealing with the case was on holiday, and by the time someone else took instructions, the notice of appeal was two weeks' late in getting to the tribunal.

The EAT, however, decided that it could exercise its discretion in these circumstances and allowed the appeal to be lodged.

The moral of the story is clear – if a tribunal decision does not turn up, chase it. The best approach is to put your query in writing so that the EAT has a written record of your efforts to track the decision down.

Compensating dismissal

When an employee is subjected to a "detriment" (or disadvantage) and claims constructive dismissal, the Court of Appeal has said that compensation should be assessed right up until the date of dismissal.

This decision – in Melia -v- Magna Kansei Ltd – overturns the decision of the appeal tribunal (LELR 100) which said that the cut off point should be the point at which the employer's conduct amounts to a breach of contract.

The court said that it could not have been the intention of Parliament to bring about a situation whereby an employee would lose entitlement to their compensation simply because they delayed resigning.

New CRE code

At the end of 2005, the Commission for Racial Equality published its new statutory code of practice on racial equality in employment.

The code contains a set of recommendations and guidance on how to avoid unlawful racial discrimination and harassment in employment. It outlines employers' legal obligations under the Race Relations Act 1976, and contains general advice on the policies they should adopt.

It comes into force in April 2006 and replaces the existing statutory code which was issued in 1984. It does not have the force of law, but if an employer fails to follow the code, it may count against them.

To download a copy, go to *www.cre.gov.uk/employmentcode.pdf*

Fixed term discrimination

According to German law, fixed term contracts are unlawful unless they can be objectively justified. However, if the employee is over 52, that requirement does not apply.

The European Court of Justice has decided in Mangold -v- Rudiger Helm that this contravenes the EU Equal Treatment Directive, although it does not have to be implemented until the end of 2006.

It said that, in general terms, legislation that lets employers treat people differently because of their age offends the principle of eliminating discrimination on the basis of age.

It also said that although the Framework Directive was not due to be implemented until next year, the German Government should not have introduced age-specific legislation once the Directive was introduced in 2002.

In good faith

A man who applied for a job as a security officer said on the form that he suffered from depression. His application was rejected and he made a claim that he had been discriminated against because of his disability.

The tribunal in Greig -v- Initial Security Ltd agreed with him. It also decided, however, that it was not convinced that he had made the application "in good faith". They awarded him £500 for injury to feelings.

Mr Greig appealed saying that he should have been awarded a minimum of £750, and in this particular instance, a figure of £2,500 would have been nearer the mark.

The EAT disagreed, saying that tribunals were not bound by a minimum award, although a practice had developed of awarding at least £500.

THE TERRIBLE TWOS

It is well established in common (or Judge-made) law that an employer can be liable for the negligent acts of their employees. But there has always been an assumption that only one employer can be liable.

In Viasystems (Tyneside) Ltd -v- Thermal Transfer (Northern) Ltd and ors (2005, IRLR 983; IDS 792), the Court of Appeal has said that two employers can be equally liable.

WHAT WERE THE BASIC FACTS?

In July 1998, Viasystems engaged Thermal Transfer to install air conditioning in their factory. They, in turn, sub-contracted the ducting work to S&P Darwell, who contracted with CAT Metalwork Services to provide fitters and fitters' mates.

One of the fitters was Mr Megson, and his mate was Darren Strang. They worked under the supervision of Mr Horsley who was contracted to S&P Darwell. Both Mr Megson and Darren Strang were employed by CAT Metalwork Services.

Viasystems brought a claim for damages in the High Court after Mr Strang negligently caused a serious flood. But who was liable? The Judge decided that, as Mr Strang was under the control of Mr Megson, then his employer was vicariously liable for his negligence.

Appealing against that decision, CAT Metalwork Services argued that, as S&P Darwell were responsible for supervising Darren Strang, they were vicariously liable for his negligence.

WHAT WAS THE CORE QUESTION?

The Court of Appeal started by identifying the relevant negligent act – Darren Strang foolishly crawling through a duct and breaking a sprinkler system that caused a flood. But who was entitled, or even obliged, to stop him from doing that? That, said the court, was the core question.

And it said that "*the only sensible answer to that question in this case is that both Mr Megson and Mr Horsley were entitled, and in theory obliged, to stop Darren's foolishness.*" In other words, both employers were vicariously liable.

But that conclusion (of dual liability) meant challenging a centuries-old legal assumption that only one employer can be liable when an employee who has been "lent" to another employer has been negligent.

WAS THE CONTRACT TRANSFERRED?

Underpinning that assumption was the 19th century idea that, to find the temporary employer vicariously liable, there had to have been a transfer of employment. In other words, that the "servant" of the general employer had become the "servant" of the temporary employer.

But according to the Judge in *Denham -v- Midland Employers' Mutual Assurance Limited (1955, 2 QB 437)*, this concept was just a device to establish the liability of one employer or the other. However, it did "*not affect the contract of service itself. No contract of service could be transferred without the servant's consent.*"

The Court of Appeal therefore decided that, applying the principles in *Denham*, the employee did not have to be employed by the temporary employer to establish negligence.

Relying on the leading case of *Mersey Docks and Harbour Board -v- Coggins & Griffith (Liverpool) Ltd (1947, AC 1)*,the Judge said that the key issue was to concentrate on the relevant negligent act and then ask who should have prevented it.

He concluded that *"there will be some cases in which the sensible answer would be each of two 'employers'. The present is such a case. In my judgment, dual vicarious liability should be a legal possibility, and I would hold that it is."*

But in which other circumstances will dual liability apply? According to another Judge, it will be when an employee is so much a part of the business or organisation of both employers that it would be fair to make both employers answer for his or her negligence.

In this case, the court decided that each defendant should contribute 50 per cent of the total liability as they were each equally responsible – a likely outcome in any judgement of dual liability.

ANNUAL CLAIM

As every trade union official should know, employees generally cannot bring a claim of unfair dismissal unless they have been continuously employed for a year.

In Pacitti Jones -v- O'Brien (IRLR 2005, 888), the Court of Session in Scotland has clarified the length of a year. It said that someone who starts work on 8 April and whose effective date of termination is 7 April, can bring a claim of unfair dismissal.

WHAT WERE THE FACTS?

Ms Jones started work for her employer on 8 April 2002. Almost a year later – on 27 March 2003 – she was dismissed and given one week's notice. She, however, was away from home at the time the letter was delivered, and did not receive it until 31 March.

She claimed unfair dismissal, but her employer said she had not been employed for long enough. And the tribunal agreed with the employer, saying that her period of notice expired on 3 April. The employment appeal tribunal (EAT) said that as the period of notice did not expire until 7 April (having started on 1 April), her claim was admissible.

By the time the parties reached the appeal court, they had agreed that the period of notice expired on 7 April 2003.

WHAT DOES THE LAW SAY?

Section 94 of the 1996 Employment Rights Act (ERA) states that employees have the right not to be unfairly dismissed. However, that is qualified by section 108(1) which says they have to have been continuously employed for a year ending with the effective date of termination to bring a claim of unfair dismissal.

The question then is how to calculate the period of continuous employment. Section 211(1) says that the period of continuous employment "*begins with the day on which the employee starts work*". Section 210(2) says that a month means a calendar month, and a year means a year of 12 calendar months.

WHAT DID THE PARTIES ARGUE ON APPEAL?

The employer argued that a calendar month generally runs from a date in one month to the corresponding date in the succeeding month – for example, from 8 April to 8 May. The position was different only if the months were of different lengths. So, for example, the calendar month starting on 31 January ended on 28 February.

They relied on the House of Lords case of *Dodds -v- Walker*, which said that "*the general rule is that the period ends upon the corresponding date in the appropriate subsequent month, i.e. the day of that month that bears the same number as the day of the earlier month on which the notice was given.*"

Ms Jones, on the other hand, argued that section 211(1)(a) included the first day of employment in the calculation. In other words, the period from 8 April 2002 to 8 April 2003 added up to a year and a day. The year that started on 8 April 2002 ended on 7 April 2003.

WHAT DID THE COURT OF SESSION DECIDE?

The Court of Session (the Scottish equivalent of the Court of Appeal) agreed with her. It said that Ms Jones could claim unfair dismissal, as she had been employed for exactly one year on the effective date of termination.

To work out whether she had one year's continuous employment to claim unfair dismissal, the court emphasised that section 211(1)(a) makes clear that the first day of work has to be included in the calculation.

And that was fatal to the employer's argument. The court made clear that the "corresponding date rule", identified in *Dodds -v- Walker,* does not apply if the statute says that the date on which the relevant event occurred has to be included as part of their calculation.

a brief overview of

IT'S ALL

Being made redundant can be a traumatic event. It can be even more traumatic if the person has not worked for their employer for at least two years, because they cannot then claim redundancy pay.

In this article, ***John O'Neill,*** a solicitor from Thompsons Employment Rights Unit in Belfast, summarises the law on unfair dismissal and redundancy and answers some basic questions that members are likely to ask.

CAN YOU CLAIM UNFAIR DISMISSAL?

As redundancy may be a fair reason for dismissal, an employee who has been made redundant (including someone on a fixed-term contract) can only win an unfair dismissal claim if they can establish that:

- there was no genuine redundancy situation
- the employee has been selected for an unlawful reason
- the selection procedure was itself unfair
- the selection procedure, while fair, was applied unfairly
- the employer failed to comply with the disputes resolution procedure
- the employer did not properly consult with the union and/or the employee
- the employer failed to consider suitable alternative work or did not allow the employee enough information to enable them to decide whether to take an alternative job offered
- the employer acted unreasonably in some other way.

WHAT CONSTITUTES A REDUNDANCY?

There will be a genuine redundancy situation if the person is dismissed because the business as a whole, or the particular workplace where the employee worked, has closed down. Likewise, if there has been a reduction in the size of the workforce needed to do work of a particular kind.

It can be difficult, however, for employees to challenge their employer when they say there is a redundancy situation. This is because, when a business closes or the number of employees is reduced, employers only have to show that their decision was genuinely based on commercial considerations.

WHEN IS IT AUTOMATICALLY UNFAIR?

Any dismissal will be automatically unfair if the employee can show they were selected for redundancy for a number of specified reasons which include:

- trade union membership
- acting as an employee representative
- taking part in industrial action
- reasons related to health and safety rights; working time rights; minimum wage rights
- whistleblowing
- assertion of a statutory right.

Similarly, selection may also be unlawful if is directly or indirectly discriminatory. So, for example, a redundancy dismissal may constitute unlawful disability discrimination if a criterion in relation to sickness or attendance is not subject to "reasonable adjustments" in relation to a disabled employee.

And selecting someone because they work part time is likely to be unlawful, either because it constitutes indirect sex discrimination, or because it is contrary to the Part Time Workers (Prevention of Less Favourable Treatment) Regulations.

Any policy of selecting fixed term workers for redundancy may also be unlawful under regulations protecting fixed term workers. However, if they have been brought in to complete a specific task that ends, or to cover a peak in demand, an employer may be able to objectively justify selecting them.

HOW CAN THE SELECTION PROCEDURE BE CHALLENGED?

Even though redundancy is a fair reason for dismissal, an employee may still be able to bring a claim for unfair dismissal if the employer acts unreasonably in terms of the selection procedure they adopt. The selection criteria used must be non-discriminatory and objective.

For instance, a scheme that relied entirely on the opinion of a manager without reference to any objective measurements of performance would be likely to be unfair. Likewise, if the employer does not stick to a contractual selection scheme.

WAS IT APPLIED UNFAIRLY?

Even if the procedure is considered to be fair, a

SO UNFAIR

redundancy may still be unfair if the selection procedure is applied unfairly. For instance, if an employee with a record of positive appraisals is given a low score for performance.

However, other than such clear cut situations, the law is very unfavourable to employees pursuing these claims. It is also very difficult to win them because tribunals are reluctant to interfere with the way employers exercise their discretion.

DID THEY FOLLOW THE DISPUTES RESOLUTION PROCEDURE?

Under the disputes resolution procedure, any dismissal because of redundancy will be automatically unfair if the employer does not comply with the requirements of the statutory dismissal and disciplinary procedures (DDP). The only exception is when the employer has to collectively consult with the relevant union/s.

Even if the employer complies with the basic DDP requirements, they still have to make sure there were no substantial defects in the dismissal procedure. So a redundancy dismissal may be found to be unfair if, for example, the employee was not given an opportunity to put their case as to why their selection was unfair.

DO THEY HAVE TO CONSULT COLLECTIVELY?

When 20 or more people are made redundant within a 90 day period, the employer has a statutory duty to consult with the relevant unions.

Although a failure to consult would not, of itself, make a dismissal unfair, the tribunal would take that fact into account in considering whether the employer acted reasonably.

DO THEY HAVE TO CONSULT INDIVIDUALLY?

Just because an employer has consulted collectively does not relieve them of the obligation to consult on an individual basis.

If the employer does not consult with the individual (for instance, about their assessment under the selection criteria and possible redeployment), that does not guarantee a finding of unfair dismissal. However, the tribunal will take that into account in deciding whether the employer acted reasonably overall.

DO THEY HAVE TO FIND ALTERNATIVE WORK FOR YOU?

The simple answer is no, but the employer does have to take reasonable steps to find alternative work for an employee threatened with redundancy. This includes providing specific information about alternative posts, rather than just notifying them of suitable vacancies.

But if an employee does not accept an offer of "suitable alternative employment", they may lose their right to a redundancy payment. They are, however, allowed a four-week trial period in the new post if the terms of employment, including function or location, are significantly different from the old one.

WHAT COMPENSATION IS AVAILABLE?

Compensation for redundancy is assessed in the same way as any unfair dismissal case. In other words, an individual receives a basic award based on age (soon to be changed due to age discrimination provisions) and length of service; and a compensatory award based on actual financial loss.

In calculating the compensatory award, the amount by which the redundancy payment exceeds the statutory redundancy payment is treated as an "ex-gratia payment" and is deducted from any financial loss.

If the dismissal is automatically unfair, because the employer has not complied with the requirements of the statutory dismissal and disciplinary procedures, the basic award will usually be subject to a minimum of four weeks' pay and the compensatory award will usually be increased by between 10 and 50 per cent.

Picture: Janina Struk Report Digital

HUMAN RIGHT TO PICKET

Under section 20 of the Trade Union and Labour Relations (Consolidation) Act 1992, a union is liable for the unlawful acts of its members if it can be said to have authorised or endorsed them.

In Gate Gourmet London Ltd -v- Transport and General Workers Union and ors (IRLR 2005, 881), the High Court decided that the union had authorised unlawful picketing.

However, the judge also said that picketing law had to take account of the rights to peaceful assembly and of freedom of expression under the Human Rights Act.

The T&G instructed Thompsons to act on behalf of their members.

WHAT WERE THE BASIC FACTS?

Gate Gourmet, which supplies in-flight meals for airlines, had been in consultation with the T&G for some time about changes that it wanted to make in the hope of resolving its financial problems.

Although the union reached agreement with the company, 98 per cent of the membership rejected the proposals in a ballot held in July 2005.

The two sides were due to start mediation talks on 12 August, but on 10 August the employees on the early shift held an unofficial sit in, as a result of which the company ended up sacking 622 of them.

The dismissed employees set up pickets on a number of sites, only one of which was designated.

The company complained that some of their employees were being intimidated by the pickets to the point where they were going off sick or even resigning, and applied to the High Court for an emergency injunction.

It asked the court to limit the number of pickets to 10 and to order them to engage in peaceful protests only. It also asked for the union to be included in the injunction, along with 37 named defendants and an unknown number of unnamed defendants.

WHAT DID THE UNION ARGUE?

The union argued that it should not be included in the proceedings. It said that there was not enough evidence to establish a case against it, the 37 named employees, or the "persons unknown" in the injunction. It pointed out that any order against unnamed defendants would be hard to enforce and that the Human Rights Act 1998 created a right to picket (Article 11 guarantees the right to peaceful assembly).

WHAT DID THE HIGH COURT DECIDE?

The Judge said there was evidence that, because union officials had frequently been present at the pickets, they knew and *"understood the types of unlawful activity which were being routinely perpetrated"*.

That being so, officials could be said to have authorised those unlawful acts and as the union had not "repudiated" them, the injunction should include the T&G.

The Judge ordered that the number of pickets should be limited to six at one site because of the alleged level of intimidation there. And he ordered the strikers at another site to restrict their picketing to that area and not to make contact with employees going to and from work.

He also granted an injunction against some of the named defendants who had allegedly made threats or stopped employees from moving on. Although this would curtail the right of the strikers to *"reason with others and to attempt to dissuade them from working"* (a perfectly lawful activity), the Judge said it was necessary to curtail the unlawful activities that had been going on.

However he refused to include in the injunction employees who were not making any threats against the workers, saying he had to take account of the Human Rights Act and the right of peaceful assembly.

COMMENT

This case is important for a number of reasons. Firstly, the T&G successfully relied on the Human Rights Act to protect peaceful assembly in relation to a trade dispute.

Secondly, the public support for the dismissed workers has highlighted the artificial nature of the law of secondary action.

Lastly, by winning support at both the TUC and Labour Party conferences, the T&G has restored the issue of industrial law to the political agenda.

LIQUID RIGHTS

The Insolvency Act 1986 says, among other things, that administrators' claims for pay and expenses should generally have priority over any other debts a company might have.

In Krasner -v- McMath and two other cases (2005, IRLR 995; IDS 792), the Court of Appeal has said that protective awards and payments in lieu of notice do not take priority over money and expenses owing to the administrators.

WHAT WAS THE BACKGROUND?

In July 2005, Krasner, the administrators of Huddersfield Fine Worsteds Ltd and Globe Worsted Co Ltd asked the High Court to clarify the priorities in which they had to make certain payments under the Insolvency Act.

The Judge held that, as administrators, they had to pay protective awards and payments in lieu of notice to employees (whose contracts had been "adopted"), before paying their own administration expenses.

Two weeks later, however, a Judge considering an application by Duggins, the administrators of Ferrotech Ltd and Granville Technology Group, came to the opposite conclusion.

WHAT IS THE RELEVANT LAW?

Under paragraph 99(3) of Schedule B1 to the Insolvency Act, administrators can generally claim priority for their expenses over other company debts.

However, paragraphs 99(4) to (6) state that any wages or salary due to be paid under a contract of employment that has been "adopted" by the administrators have to be paid before their expenses. This gives them what is known as "super priority" status.

The Judge in *Krasner* decided that protective awards and payments in lieu of notice fell within para. 99(6)(d), saying they should be treated as wages or salary under social security legislation and therefore qualified for priority.

The Judge in *Duggins*, on the other hand, decided that the reference to "a period" in para. 99(6)(d) was to a period of holiday or a period of illness, and did not, therefore, cover protective awards or payments in lieu of notice.

The issue to be decided in the Court of Appeal, therefore, was whether protective awards and payments in lieu of notice are "wages and salary".

WHAT DID THE COURT OF APPEAL DECIDE?

Protective awards: the Court of Appeal said protective awards could not take priority over administration expenses because they did not satisfy two vital conditions. Firstly, they did not constitute the term "wages or salary" in the legislation, because reference to "a period" in para 99(6)(d) was to a period of holiday or a period of illness. Secondly, the right had to come out of a contract of employment, whereas these came from a statute.

Payments in lieu of notice: Relying on the case of *Delaney -v- Staples (1992, IRLR 191)*, the Court of Appeal said that wages can only attract "super priority" status if certain conditions are satisfied. Namely, if the employer has given proper notice of termination to the employee, told them that they do not need to work until the termination date and given them the wages for the notice period in a lump sum. This was the only type of payment that could be characterised as "wages" under paras 99(5) and (6).

INSOLVENCY ACT 1986, SCHEDULE B1

Paragraph 99(5)

"Sub-paragraph (4) shall apply to a liability arising under a contract of employment which was adopted by the former administrator or a predecessor before cessation, and for that purpose –

(b) no account shall be taken of any liability which arises, or in so far as it arises, by reference to anything which is done or which occurs before the adoption of the contract of employment, and

(c) no account shall be taken of a liability to make a payment other than wages or salary."

Paragraph 99(6): 'wages or salary' includes

(a) a sum payable in respect of a period of holiday (for which purpose the sum shall be treated as relating to the period by reference to which the entitlement to holiday accrued)

(b) a sum payable in respect of a period of absence through illness or other good cause

(c) a sum payable in lieu of holiday

(d) in respect of a period a sum which would be treated as earnings for that period for the purposes of an enactment about social security.

Equally valued

There are two main stages to an equal pay claim. The first is to establish whether the woman is doing like work, work rated as equivalent or work of equal value to a man; and secondly whether the employer can show that there is a material explanation or factor for the difference in pay that has nothing to do with sex.

In Sharp -v- Caledonia Group Services Ltd, the employment appeal tribunal (EAT) has said that it is not only in cases where there is sex discrimination that the employer has to show objective justification of the pay difference.

WHAT WERE THE FACTS IN THIS CASE?

Ms Sharp started working for Caledonia in March 1996 and submitted an equal pay claim in August 2002. The tribunal's independent expert concluded that, as at 1 March 2002, her work was of equal value to one of her comparators, Mr Barnes.

However, the tribunal accepted the employer's defence that, although Mr Barnes now worked as an office manager, his salary reflected his long service and his previous duties as private secretary and confidante to the chairman, who had died in 1999. As a result, the difference in pay between Ms Sharpe and Mr Barnes was an historical matter that had nothing to do with her sex.

WHAT DID THEY ARGUE AT APPEAL?

Ms Sharp argued, on appeal, that an historical inequality in pay cannot be used as a material factor defence; and that the reasons put forward for the inequality have to be objectively justified by the employer without any proof of direct or indirect discrimination claims by the employee.

Caledonia, on the other hand, said that Ms Sharp had to show indirect discrimination before they were under a duty to show that it was objectively justified.

WHAT DID THE EAT DECIDE?

The EAT decided that the tribunal was right to consider the historical difference in duties between the two and the employer's reasons for not equalizing pay after the chairman's death.

But the real question, it said,

was whether the employer could rely on a material factor defence that did not objectively justify the difference in pay between the employee and her comparator.

It turned out that this was not an easy question to answer because of a difference in approach between courts in this country and the European Court of Justice (ECJ).

For her part, Ms Sharp argued that the EAT was bound by the ECJ decision in *Brunnhofer -v- Bank Der Osterrichischen Postparkasse AG (2001, 1RLR 271)* which held that objective justification was required for all material factor defences.

The employer said the court should follow the line taken by the courts here. That is, that employers just have to identify a material factor which accounts for the difference in pay. They do not have to objectively justify this difference unless the factor is indirectly discriminatory against women.

The EAT, however, decided to follow the European approach, going against the decision of another EAT in *Parliamentary Commissioner for Administration -v- Fernandez (2004, IRLR 22)*.

It said that the tribunal had *"approached the genuine material factor defence on a subjective rather than objective view"*. As a result the EAT said the case would have to be re-heard by a different tribunal to allow for a different approach to be taken.

Because of the importance of the decision, it gave both sides leave to appeal.

> *'the tribunal had approached the genuine material factor defence on a subjective rather than objective view'*

COMMENT

The basic question in this case is whether the law requires an employer to justify every difference in pay, when a man and woman are doing work of equal value but one is paid more than the other.

Traditionally, the courts in this country have assumed that the pay system was not to blame, and required evidence of sex discrimination. But given the shameful persistence of the pay gap (see news), it seems that the EAT is now acknowledging that any pay difference between men and women has to be viewed with suspicion.

Implied terms

Although certain terms can be implied into a contract, the employment appeal tribunal (EAT) has made clear in Royal and Sun Alliance Insurance Group -v- Payne (2005, IRLR 848) **that contractual retirement ages are not necessarily governed by a pension scheme deed.**

WHAT WERE THE BASIC FACTS?

When Mr Payne started work for Royal Insurance in 1974, its pension scheme allowed men to retire at 65. In October 1978, when the Royal said that men could retire between 62 and 65, Mr Payne opted for 65. In 1980, the trust deed reduced the retirement age, but only for men joining the company after 1 April 1978 to 62.

Then in 1995, following the decision of the European Court of Justice in *Barber -v- Guardian Royal Exchange (1990, IRLR 240)*, the Royal equalised its pension scheme retirement age to 62 for men and women. It did not consult any of its staff.

When Mr Payne complained about the change, he was told that it was because of a "European Directive". The company did say, however, that individuals could retire later than that, but they had to give six months' written notice and they had to provide a strong business case.

In 1996, the Royal merged with the Sun Alliance. Their pension scheme allowed employees to retire between 60 and 65, although new employees had to retire at 62.

In March 2003, Mr Payne gave his manager a year's notice of his wish to carry on working after 62. He did not receive a decision until March 2004 (although the manager was supposed to respond within a month), when his request was denied.

His employment was terminated on 7 April 2004, the day before his 62nd birthday. Mr Payne brought claims for wrongful and unfair dismissal, arguing that his contractual retirement age was 65 and not 62. The tribunal agreed with him.

WAS HE WRONGFULLY DISMISSED?

To prove wrongful dismissal, Mr Payne had to show the EAT that there was no implied term in his contract that his contractual retirement age would be governed by the terms of the pension scheme.

Following the law of contract, the EAT said that a "*court will only imply a term if it is one which must necessarily have been intended by them [the parties].*"

In this case, it pointed out that Mr Payne had objected to the variation to his retirement age, and that his pension deed had stated that the retirement age for someone in his situation would be the date agreed with their employer.

The EAT agreed with Mr Payne, and concluded that there was no such implied term in his contract. His employers could not, therefore, reduce his contractual retirement age to 62 by changing the provisions of the pension scheme, and were in breach of contract by terminating it when they did. Mr Payne had been wrongfully dismissed.

WAS HE UNFAIRLY DISMISSED?

To claim unfair dismissal, Mr Payne had to show, under section 109(1) of the Employment Rights Act that he had not reached the company's "normal retiring age".

Relying on *Waite -v- Government Communications Headquarters (1983, IRLR 341)*, the EAT said this can be worked out by asking the employees in the "relevant group" what they understood to be the age at which they could be made to retire.

As people are not usually made to retire before reaching the contractual retirement age (in this case 65), Mr Payne could reasonably expect to continue working until he reached 65. That, therefore, was his normal retiring age, which meant that he could claim unfair dismissal.

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

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(No.19)

19926/0106/1097