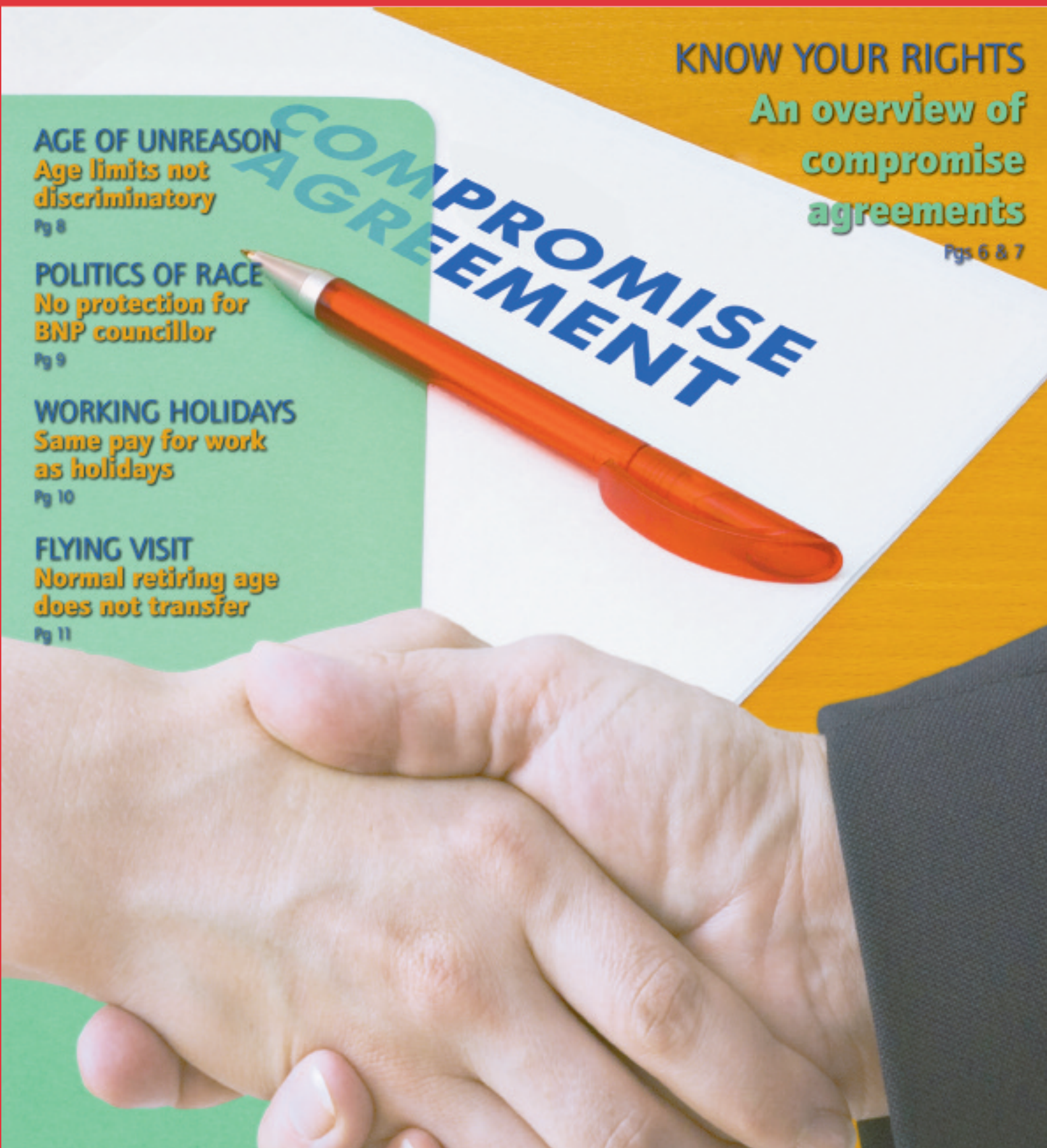
THOMPSONS SOLICITORS

Labour & European Law Review

ISSUE 113

JULY 2006



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AGEING LEAFLET

In anticipation of the introduction of age discrimination legislation in October, Thompsons has produced a guide for readers.

As well as explaining the basics of the regulations, it goes through the extensive exemptions and what employers have to do when someone asks to work beyond their retirement age.

To get a free copy of the briefing, send an e-mail to *info@thompsons.law.co.uk*

A TEMPORARY BLIP

Being a temporary worker in the UK too often means earning less than permanent colleagues, being denied access to a pension scheme, having less annual holiday entitlement and no sick pay, according to the results of a recent TUC survey.

In *Working on the edge: A report on agency workers*, the TUC says that in almost nine out of ten of the 85 workplaces surveyed (employing over 15,000 temps and 100,000 staff), agency workers were earning less than directly employed staff.

The TUC is urging Trade and Industry Secretary Alistair Darling to support the draft Agency Workers' Directive, which the TUC says has been sitting on a shelf in Brussels for nearly a year. It also wants the Government to introduce domestic legislation in the meantime so that temps do not continue to lose out.

Go to *www.tuc.org.uk/extras/WOTE.doc* to get a copy

COST OF SUNDAY SHOPPING

The DTI has recently published an independent economic cost benefit analysis of Sunday shopping, which will form part of the Government's decision about whether there should be any change to the current Sunday trading laws.

If the Government decides to proceed further with the review, it will hold a formal consultation about any proposed changes.

Currently, the Sunday Trading Act 1994 limits the opening hours of large shops between 10am and 6pm. There are no restrictions on small shops.

Go to: *www.dti.gov.uk/ccp/topics1/sunday_trading.htm* to download the report.

WORKER SAFETY

Following the publication of a consultation document on worker safety by the Health and Safety Commission, the TUC has produced a briefing document to encourage health and safety reps to give their views.

It sets out:

- arguments for improving the rights of safety reps
- problems with the current regulations
- information on what the Health and Safety Executive has been doing to promote worker involvement
- details of the consultation exercise
- advice on how to respond.

The consultation closes on 8 September, and the TUC is asking reps to respond (even if it is only in the form of a letter), or to speak to their employer about doing a joint response.

It emphasises the need for as many workers as possible to respond in order to push through change. It says that, unless unions can show that there is overwhelming support for change from workers and safety reps, the situation will not move on.

Go to *www.tuc.org.uk/extras/HSC.pdf* to download a copy,

DISABILITY DUTY

From December 2006, public sector organisations will have a duty to end discrimination against disabled people.

To help them meet this new disability equality duty, the TUC has published a guide, *Disability and work: A trade union guide to the law and good practice*, which sets out how unions can work with employers to make it a reality.

The new duty will force the public sector to actively promote equality not only for its disabled employees but also for disabled people in receipt of its services. Public bodies, including government departments, local councils, NHS trusts and police authorities will therefore have to:

- promote equality of opportunity between disabled people and others
- eliminate unlawful discrimination
- promote positive attitudes towards disabled people
- encourage disabled people to participate in public life.

To download a copy of the guide, go to: *www.tuc.org.uk/extras/disabilityandwork.pdf* or there is further advice for unions at: *www.tuc.org.uk/equality/tuc-12006-f1.cfm#tuc-12006-1*

Long road to equal pay

Following the decision of the Court of Appeal to refer the equal pay case of Cadman -v- Health and Safety Executive **(LELR 95) to the European Court of Justice (ECJ), the Advocate General has now delivered his opinion.**

He has confirmed the position of trade unions: that service-related benefits may disadvantage women who tend to have shorter periods of service than men. In those circumstances, employers have to provide objective justification. If they cannot, they may be indirectly discriminating against women.

Mrs Cadman brought a claim for equal pay against her employer, relying on four male comparators who were all on the same grade as her, but paid substantially more. They had all worked for the HSE for longer than her.

As the proportion of men with longer service was greater than that of women, Mrs Cadman claimed that the use of length of service as a determinant of pay was indirectly discriminatory against her and that her employer should be required to justify it objectively.

The ECJ has not set a date for hearing the case, but it is more than likely to follow the opinion of the Attorney General when it does.

Injury to feelings

Tribunals are not allowed to include a punitive element in awards for injury to feelings, according to an employment appeal tribunal (EAT) in Corus Hotels -v- Woodward**.**

The tribunal awarded Ms Woodward £5,000 compensation for injury to feelings after she was told at an interview with Corus that employees with children only tended to last about six weeks with the company.

Reducing the award to £4,000, the EAT said that the tribunal had taken irrelevant factors into account, and had *"allowed their feelings of indignation at the [company's] conduct to inflate the award by way of punishment"*.

It held that tribunals must not take the size of the employer's organisation into account when assessing compensation, nor their failure to follow an equal opportunities policy. The EAT said this related to the employer's liability and not the amount of the award.

Defective hearings

In a case concerning the alleged misconduct of a deaf employee – Taylor -v- OCS Group Ltd **– the Court of Appeal has said that there was no rule of law that procedural defects in an initial disciplinary hearing had to be resolved on appeal by a complete "rehearing", rather than a "review".**

Instead, the Court of Appeal emphasized that the correct test was whether the employer had acted reasonably under section 98(4) of the Employment Rights Act 1996. Tribunals should decide this by looking at the disciplinary process as a whole.

Although this decision is not helpful to employees, it is worth bearing in mind that the events all took place before the statutory disputes resolution procedures came into force. They state that a significant breach of the statutory procedures will make a dismissal unfair.

The threat of costs

The case of Sims Limited -v- McKee **is a salutary tale for employers who routinely include costs threats against employees to put them off making further court applications.**

This case looked at whether the claimant could have brought their claim within three months. The tribunal decided to allow them to bring their case out of time, prompting the employer to appeal.

The employer subsequently lost the appeal and the appeal tribunal stated in its judgment that, since the employer had threatened to claim costs against the claimant in the first place, they *"can have little complaint at being ordered to pay the costs of this appeal"*.

Opting out

The saga of the UK opt out from the 48-hour working week continues. In recent talks, EU ministers could not reach agreement on changes to the Working Time Directive, with the result that the UK has hung on to its opt out.

The next issue

There is no August issue of LELR. The next issue will be in September.

AUTOMATICALLY UNFAIR... EXCEPT FOR POLKEY

The Polkey rule (that a dismissal is fair, whether or not the employer followed a fair procedure, because the employee would have been dismissed anyway) was partially reversed by section 98(A)2 of the Employment Rights Act (ERA) 1996.

In Alexander and anor -v- Bridgen Enterprises Ltd (2006, IRLR 422), the employment appeal tribunal has said that, where 20 employees or less are being made redundant, they must be given enough information at stage two of the statutory disputes procedure to respond to the redundancy and to know why they have been selected.

The RMT instructed Thompsons to act on their behalf.

WHAT HAPPENED?

Following a financial crisis, the company decided to make nine workers compulsorily redundant.

At the first of two meetings in January 2005, the two claimants were told of the selection criteria that the company intended to use, but not their personal scores. Just before their (unsuccessful) appeal, they were told how the criteria were to be applied and the marks given to everyone in the pool.

WHAT DID THEY ARGUE AT THE TRIBUNAL?

The employees claimed that their dismissals were automatically unfair under section 98A(1) of the ERA 1996, because their employer had not complied with the new statutory dismissal procedure. And they were also unfair under section 98(4) because they had failed to consult properly with them.

Relying on section 98A(2) – the "Polkey-reversal" section – the employers argued that, although they did not follow the correct procedure, the dismissals were fair because they would have dismissed the employees anyway.

The tribunal said that the employer had followed the three stages of the statutory dismissal and disciplinary procedure, and that there was a 100 per cent chance that Mr Alexander and Mr Hatherley would have been dismissed no matter what procedure was followed.

WHAT DID THEY ARGUE ON APPEAL?

Mr Alexander and Mr Hatherley argued that, to comply with section 98A(1), they should have seen the scores of everyone selected for redundancy and how they applied to the criteria in advance of the "step one" meeting in January. The employers argued that they just had to tell them that they might be made redundant.

The employees also argued that there had been no proper consultation. The employers said that was irrelevant, because the tribunal found they would have been dismissed anyway.

WHAT DID THE EAT DECIDE?

The EAT made the following findings:

- Step one of the standard procedure just requires employers to tell employees that they might be dismissed and why. In a conduct case, they must identify the nature of the misconduct.
- At step two, employers must tell the employee why they are contemplating dismissal.
- In redundancy dismissals, employers have to tell employees the reason for the redundancy, the selection criteria they are using and give them their assessment before the step two meeting, but not the assessments of other employees.

As the employers in this case had not given the employees enough information before the step two meeting in January 2005, their dismissals were automatically unfair.

The EAT said that section 98A(2) should not be narrowly construed. Employers could rely on it in respect of any breaches of a "fair" procedure, as long as they could show that the employee would have been dismissed in any event.

COMMENT

Two important principles have emerged from this case regarding the statutory dispute resolution procedures.

At the second stage of the dismissal procedure involving 20 redundancies or less, employees must be given enough detail to enable them to respond, to know why there is a redundancy situation, and to understand why they have been selected. This includes the individual's score in the selection process.

But section 98(A)(2) of the ERA 1996 has to be given a wide interpretation, making it easier for employers to justify dismissals as fair, provided that they follow the statutory dismissal procedure.

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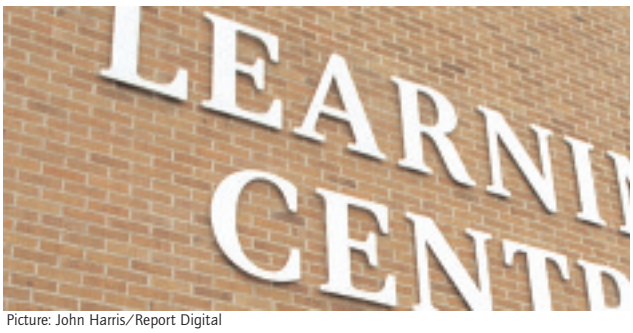
BREACH OF PROCEDURE

At virtually the same time that the employment appeal tribunal (EAT) was coming to its decision in *Alexander and anor -v- Bridgen Enterprises Ltd*, another EAT had come to a different conclusion.

It said in Mason -v- Ward End Primary School (2006, IRLR 432) that section 98A(2) of the Employment Rights Act 1995 could only rescue employers where there had been a breach of a formal procedure.



Picture: John Harris/Report Digital

WHAT WERE THE BASIC FACTS?

Ms Mason had a three-year contract as a learning centre support manager, which came to an end when she was made redundant. Her employer did not meet or consult with her.

The tribunal decided that, although her employer had not followed a fair procedure, there were no suitable alternative jobs to offer her. She would have been dismissed, whether or not they had consulted.

It said that the dismissal was therefore fair because section 98A(2) applied. Even if it had found the dismissal procedurally unfair, it would have reduced her compensation by 100 per cent.

WHAT DID THE PARTIES ARGUE ON APPEAL?

Ms Mason argued that the tribunal should not have considered section 98A(2) because it did not come into force until after her dismissal. She also argued that even if it was applicable, employers could only rely on it if they had followed the statutory dismissal and disciplinary procedures.

The employers argued that section 98A(2) applied because the normal rule (that statutory provisions are not retrospective) was only relevant when there was a substantive change in a person's rights. That was not the case here.

WHAT DID THE EAT DECIDE?

The EAT said that section 98A(2) could only rescue employers where there was a breach of a formal procedure. Something that was *"written or unwritten, contractual or non-contractual, contained in an agreement or a policy which relates to dismissal of employees and which has not been followed"*.

That also included disciplinary procedures which were not contractually binding and procedures established by custom and practice, such as "last in first out" in a redundancy situation.

It did not, therefore, apply to breaches of the statutory dismissal procedure, and the tribunal was wrong to find that it applied to Ms Mason's dismissal.

Nor did the 2004 ACAS Code of Practice on Disciplinary and Grievance Procedures fall within section 98A(2), as this was not in itself "a procedure".

In any event, it said that section 98A(2) only applied to dismissals taking effect on or after 1 October 2004, and since the dismissal in this case occurred before that, the tribunal should not have taken it into account. The appeal would therefore be allowed and a finding of unfair dismissal substituted.

The employment tribunal was, however, entitled to conclude that her compensatory award could be reduced by 100 per cent. There was a genuine redundancy situation and she would still have been dismissed, whether she had been consulted or not. The case was remitted to the tribunal to decide the date on which she would have been dismissed fairly, had she been consulted.

98A ERA 1996

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subsection (1), failure by an employer to follow a elation to the dismissal of an employee shall not r the purposes of s.98(4)(a) as by itself making action unreasonable if he shows that he would o dismiss the employee if he had followed the

a brief overview of

COMING TO

By law, workers cannot agree to contract out of the rights that they have for bringing tribunal claims in the event of a dispute with their employer.

This rule does not apply, however, if they want to resolve matters by signing a compromise agreement as long as it satisfies certain statutory requirements.

In this article, ***Emma del Torto***, a solicitor from Thompsons Employment Rights Unit in Cardiff, sets out the legalities of compromise agreements and offers some general background information.

WHAT ARE THEY?

Compromise agreements are legally binding contracts between an employee and their employer. They are nearly always used when the employee's contract is about to come to an end.

They can, however, also be used in other circumstances such as resolving a dispute (for instance, a negotiated equal pay claim) and the parties want to record the terms of the agreement to allow the employment relationship to continue.

In general, though, they are most commonly used for redundancies, terminations by mutual agreement, dismissals or to settle an employment tribunal claim prior to a hearing.

They are also known as severance agreements, redundancy agreements or termination agreements.

WHY DO EMPLOYEES SIGN THEM?

Compromise agreements provide certainty for both sides in that the terms of the agreement are written down in black and white.

Generally, compromise agreements are used by employers to ensure that employees who sign them cannot take any claims against them in the future, or to ensure that any existing claims are settled. And in return for giving up their rights, the employee gets a compensation payment.

WHY MUST EMPLOYEES HAVE INDEPENDENT LEGAL ADVICE?

However, it is not enough just for the terms to be written down. It is also very important for employees to understand what they are signing, as most agreements are drafted by employers' solicitors and often contain complicated "legalese" which needs to be deciphered.

In any event, Section 203 of the Employment Rights Act 1996 says that employees must receive independent legal advice from someone who is professionally qualified so that the agreement is legally binding – usually a solicitor or qualified trade union advisor.

This ensures that the employee cannot later claim that they did not understand what they were signing.

In most cases, employers pay or contribute to any legal expenses that the employee incurs in receiving the legal advice.

WHAT ARE THE LEGAL IMPLICATIONS?

Before the employee signs the agreement accepting the terms,

Picture: Linda & Colin McKie/RexClusive

A COMPROMISE

it is crucial that they understand the implications of what they are doing. In other words, that they are specifically excluding their right to make a claim against the employer in a court or employment tribunal.

CAN EMPLOYEES STILL MAKE CLAIMS?

Having said that, employees can sometimes still bring a few very limited claims in the following circumstances, even if they have signed a compromise agreement:

- if the employer breaches the agreement, for instance they do not pay the money agreed
- claims in respect of personal injury, unless the agreement excludes personal injury claims for something that the employee knew about when it was signed (for instance, where the termination is for sickness absence or a personal injury claim for stress or depression)
- accrued pension rights.

The Court of Appeal said in *Hinton -v -University of East London* (LELR 102) that, to compromise a potential claim, the agreement has to specifically identify the claim, either by describing it or by referring to the relevant section of the statute.

Some agreements set out fairly exhaustive lists of potential claims, while others only list the ones that the employer thinks are potentially relevant.

DO EMPLOYEES PAY TAX?

That depends on how the payment is made up.

Employees usually have to pay tax and national insurance on any wages and holiday pay.

Generally, the first £30,000 of a payment given as compensation for loss of employment is tax free, as are redundancy payments up to £30,000 (both contractual and statutory).

Payments in lieu of notice are also tax free, provided that the employer does not have a contractual right to pay in lieu and, in redundancy situations, provided that the employer does not usually make a payment in lieu of notice as a matter of course.

Benefits such as continued use of a mobile phone or company car are usually tax free. Even if the payment is being made to the employee tax free, the agreement normally makes clear that, if Her Majesty's Revenue and Customs state that tax or national insurance is payable, the employee is responsible for paying it, not the employer.

CAN THE EMPLOYEE TALK ABOUT IT?

Confidentiality clauses are fairly standard in compromise agreements, although sometimes they only cover the terms of the agreement. So an employee can still tell people that they have come to an agreement with their employer about the termination of employment or tribunal claim, but cannot say what the terms of the agreement are

Sometimes, however, employers insist that the employee does not even tell people that they have reached an agreement.

AND AFTER THE AGREEMENT IS SIGNED?

Sometimes agreements contain a "non-derogatory statements" clause to stop the employee from bad-mouthing the employer or people who work for them.

Employees should therefore be careful what they say about the employer, particularly in public if there is a chance that someone may report back.

It is possible to make the clause mutual so that neither side can make derogatory or disparaging statements about the other.

CAN EMPLOYEES GO TO THE PRESS?

That depends on the type of confidentiality clause in the agreement and whether there is a "non-derogatory statements" clause. Employees should take advice from their trade union and/or legal advisor before going to the press.

WHAT ABOUT REFERENCES?

There is generally no legal obligation on an employer to provide a reference, but if they do, it should be true, accurate and fair. If not, the employer may be guilty of misrepresentation.

It is possible to incorporate a reference into the compromise agreement, in which case the reference becomes part of the agreement. This should be done early on in negotiations.

AGE OF UNREASON

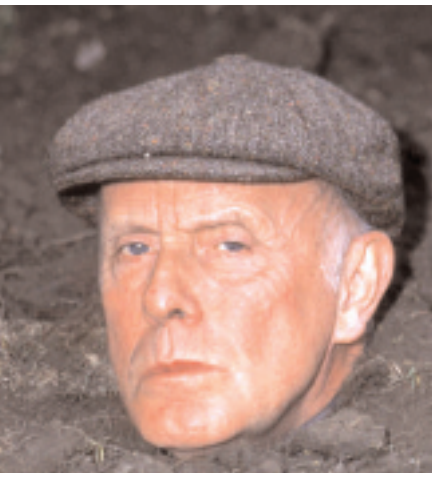
The law currently states that employees over the age of 65 do not have the right to claim unfair dismissal or redundancy pay.

The House of Lords has decided in Secretary of State for Trade & Industry -v- Rutherford and anor (IDS 805) that this provision does not constitute indirect discrimination against men.

WHAT WERE THE BASIC FACTS?

Mr Rutherford was dismissed in October 1998 when he was 67; Mr Bentley in 2001 when he was 73.

Both men wanted to bring claims for redundancy pay and Mr Rutherford wanted to claim unfair dismissal, but they were prevented by the statutory upper age limit in section 109 of the Employment Rights Act 1996.



They then argued that, as the age bar affected more men than women, it was indirectly discriminatory against them and contrary to Article 141 of the EC Treaty.

Although their employers subsequently went bust, the Secretary of State for Trade and Industry took over responsibility for their claims because any compensation awarded to them would have had to come out of the National Insurance Fund.

WHAT DID THE LOWER COURTS DECIDE?

The first question to consider was the alleged "disparate" impact of the age limit on men as opposed to women. But who should be compared to whom?

The employment tribunal decided to compare employees between the ages of 55 and 74, because they were the section of the workforce most likely to be disadvantaged by the upper age limit. This showed that substantially more men than women were affected by the provisions.

The employment appeal tribunal (EAT), on the other hand, said that the correct group (or "pool") should be the whole workforce – people employed between the ages of 16 and 79 – as the upper age limit applied to all of them. This showed that there was no real difference. The Court of Appeal agreed with the EAT (see LELR 94).

WHAT DID THE HOUSE OF LORDS DECIDE?

In five different speeches, the House of Lords unanimously agreed that the upper age limit was not indirectly discriminatory against men. The problem was, however, as one of the judges acknowledged, that the five opinions do not make it *"easy to extract from their opinions a single easily-stated principle"*.

The most detailed judgement, however, identified two main issues that needed to be decided.

The first, said the judge, was straightforward in that *"the relevant legislation applies generally to all employed persons on whom rights are conferred by the Employment Rights Act 1996. As a matter of general principle, therefore, the pool should be all those persons."*

The second identified the comparisons that should be made. This should be *"a comparison of the proportions of men and women able to satisfy the requirement ('the qualifiers'), and a comparison of the proportions of men and women unable to satisfy the requirement ('the non-qualifiers')"*.

In other words, the courts should concentrate on the proportions of men and women who can satisfy the requirement laid down by the employer (or in this case, by statute). The judge termed this the "advantage-led" approach.

Three of the other law lords, however, argued that statistics were not relevant at all to the claim, and that the equal pay legislation just required a man over 65 to be treated in the same way as a woman in the same age group. As no one over 65 could claim unfair dismissal or redundancy pay, there could be no discrimination.

COMMENT

This case does not state any new principle of law, but simply confirms that employees (both men and women) have to be under 65 to get redundancy pay.

The issue of an upper age limit will be partly resolved by the age discrimination regulations coming into force on 1 October 2006.

POLITICS OF RACE

The Race Relations Act 1976 (RRA) 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 Serco Ltd -v- Redfearn, however, the Court of Appeal has said that a BNP councillor's complaint did not fall within it.

WHAT WERE THE BASIC FACTS?

Mr Redfearn was employed on 5 December 2003 by West Yorkshire Trading Services (WYTS) as a driver and escort for disabled children and adults in the Bradford area, a majority of whom were Asian.

In May 2004, he was identified in the local paper as a BNP candidate for the forthcoming local elections and was subsequently elected in early June.

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 them.

On 30 June 2004, WYTS had 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 (a third of whom were Asian) and the passengers, with the result that they might not want to travel with WYTS. That would potentially jeopardise its whole reputation.

Mr Redfearn claimed direct and indirect race discrimination. He could not claim unfair dismissal as he had been employed for less than a year.

WHAT DID THE TRIBUNALS DECIDE?

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 then 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."*

The employment appeal tribunal (EAT) overturned the tribunal's decision, saying that it had defined the term "on racial grounds" far too narrowly.

WHAT DID THE COURT OF APPEAL DECIDE?

The Court said that although the circumstances leading up to Mr Redfearn's dismissal included a relevant racial consideration, such as the race of fellow employees and customers and the policies of the BNP on racial matters, it did not follow that he was dismissed "on racial grounds".

He had been treated less favourably not because he was white, but because of a particular non-racial characteristic shared by him with a tiny proportion of the white population. In other words, membership of and standing for election for a political party like the BNP.

It concluded therefore that Mr Redfearn was no more dismissed "on racial grounds" than an employee who is dismissed for racially abusing his employer, a fellow employee or a valued customer.

The Court said that *"any other result would be incompatible with the purpose of the 1976 Act to promote equal treatment of persons irrespective of race by making it unlawful to discriminate against a person on the grounds of race."*

As for his claim of indirect discrimination, the Court said that the tribunal should not have even considered this because Mr Redfearn had not identified "the policy, criterion or practice" that had supposedly been applied to him, the relevant pool nor the relevant disparity.

COMMENT

This judgment is a common sense application of the law. Had the decision of the EAT been allowed to stand then the whole purpose of the Race Relations Act would have been undermined, and the policies negotiated by unions - that BNP membership is incompatible with certain jobs like prison officers - would have unravelled.

Working hours

Although the Working Time Regulations (WTR) came into force in October 1998, they did not take effect in the air transportation sector 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 Court of Appeal has said that employers just have to ensure that they pay the same for a working week as for a holiday week so that workers are not put off from taking their holiday.

WHAT WERE THE BASIC FACTS?

Mr Noble and Ms Forde (both shift workers) were entitled to 34 days annual paid leave. Up until the introduction of the WTR, their holiday pay had been calculated using an agreement reached with the unions many years before.

Clause 16 stated that total shift pay was calculated by multiplying the shift pay for each pattern by an agreed average payment. This was then divided by the number of weeks in that pattern, multiplied by 48 and divided by 52 to produce a weekly sum that was then paid regularly throughout the year.

That meant that staff got 48 weeks' pay over a 52 week period, and did not get shift pay when they were on holiday.

WHAT WAS THE PROBLEM?

Mr Noble and Ms Forde argued that BA's method of calculation did not comply with their entitlement to be paid under the WTR *"at the rate of a week's pay in respect of each week of leave."*

They said that by using the multiplier 48/52, BA was able to reduce the amount of the shift element in the holiday pay. They wanted it for 52 weeks a year, not just 48.

BA argued that it had complied with its statutory obligations by paying the same amount of weekly salary all year round in accordance with the regulations and using the multiplier 48/52 as stated in the collective agreements.

WHAT DID THE TRIBUNALS DECIDE?

The employment tribunal upheld the claim, saying that because they did not get paid for shifts that were not worked, BA could not argue that the shift pay element of holiday pay was made "in respect of" the annual leave week in which it was received.

The employment appeal tribunal (EAT) also found in favour of the claimants by applying the approach laid down in the rolled up holiday pay cases. It said that BA had underpaid holiday pay because it did not pay for shifts during four weeks out of 52.

WHAT DID THE COURT OF APPEAL DECIDE?

The Court of Appeal found in favour of BA. It said that the "reduction" or discount in shift pay was not the result of BA misapplying the regulations or the collective agreements. All it had done was to apply the formula for calculating the consolidated rate.

It highlighted the differences between the issues in this case and those in the "rolled up holiday pay" cases of *Robinson Steele -v- RD Retails Services Ltd* (LELR 111), in which the European Court of Justice was just looking at whether there had been a "true addition" to the contractual rate of pay that related to holidays.

The "rolled up holiday pay" arrangements were not, therefore, relevant to this case. BA had simply paid the same amount of shift pay for identified holiday periods as well as for work. That complied with the requirements of the regulations.

It said that Mr Noble and Ms Forde were asking for enhanced shift pay for the holiday period, compared to the shift pay they got when at work, which was not required by the regulations. The employer just had to make sure that they were no worse off when they were on holiday, as opposed to being at work, which is what BA had done.

Picture: Jonathan Davies

'The employer just had to make sure that they were no worse off when they were on holiday as opposed to being at work, which is what BA had done'

Flying visit

The 1981 (Transfer of Undertakings (Protection of Employment) regulations (better known as TUPE) give protection to employees in the event of a transfer of an undertaking from one employer to another.

In Cross and Gibson -v- BA, the Court of Appeal has said that an employee's normal retirement age does not transfer under the regulations.

WHAT WERE THE BASIC FACTS?

Before April 1988 Mr Cross and Mrs Gibson were employed by BCal, which allowed its flying crew to work until 60. After its takeover by BA in 1988, both accepted contracts on BA terms. This stipulated 0flying crew had to retire on full pension at 55.

A year after the merger, Mr Cross moved from Gatwick to Heathrow and would have had to sign a new contract with standard BA terms had he not already done so. Mrs Gibson also changed her contractual status, moving from full to part time work on more than one occasion.

BA then told Mrs Gibson in 2001 (13 years after the transfer) and Mr Cross in 2002 (14 years post transfer) that they would have to retire at 55 in accordance with the retirement and pension scheme rules.

Mr Cross and Mrs Gibson then tried to claim unfair dismissal, arguing that they were entitled to continue working until aged 60, despite the fact that they had agreed to the lower retiring age. They said the TUPE regulations had "negated" their acceptance of the new term.

WHAT DOES THE LAW STATE?

Regulation five of TUPE says that any contract that has been transferred under the regulations has to be adopted wholesale by the transferee.

Employers can make changes to contracts, but the transfer cannot be the reason for the change. And according to the rule in *Daddy's Dance Hall (Foreningen af Arbejdsledere i Danmark -v- Daddy's Dance Hall A/S)*, employees cannot waive the rights conferred on them by TUPE.

However, the Court also had to consider section 109 of the Employment Rights Act, which says that employees cannot claim unfair dismissal after they have attained the "normal retiring age" for someone in their "position".

WHAT DID THE PARTIES ARGUE?

Mr Cross and Mrs Gibson argued that their contractual retirement age with BCal was also their normal retiring age under the statute. And that, because of regulation five, their original contractual retirement age of 60 and their corresponding normal retiring age had transferred over with them to BA.

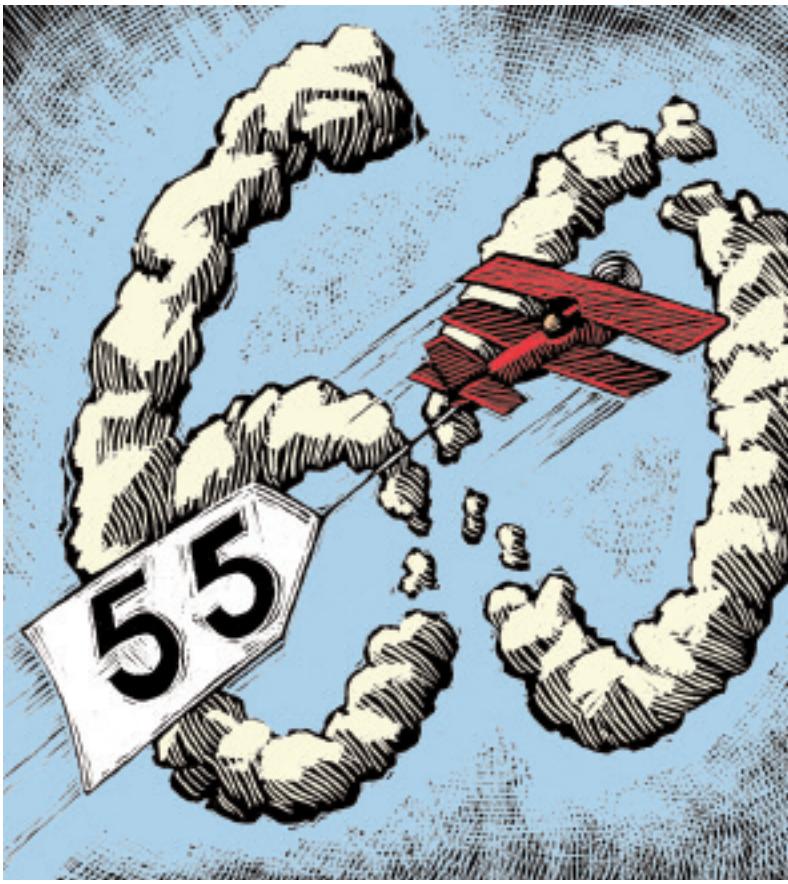
BA said, however, that the statutory normal retirement age (which was different from a contractual one) did not transfer over because it was not an individual "right". In any event, Mr Cross and Mrs Gibson had made a number of post transfer changes to their contracts, which invalidated the rule in *Daddy's Dance Hall*.

DID THE STATUTORY RETIREMENT AGE TRANSFER?

And the Court agreed with BA. It reasoned that, although the focus of the TUPE regulations was on protecting the rights of individual employees, the section 109 "normal retiring age" was conceptually different from a contractual retirement date and was not one of the "rights, powers, duties and liabilities" that transferred under regulation five.

All that had transferred was a general law right not to be unfairly dismissed before reaching normal retirement age, whatever that might be at the time of dismissal (not at the time of the transfer)

The normal retiring age, it said, could not be "frozen in perpetuity as at the moment of transfer". As they had reached the normal retiring age of 55, they could not 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 **LINDA & COLIN MCKIE/REXCLUSIVE**

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19926/0706/1097