THOMPSONS SOLICITORS

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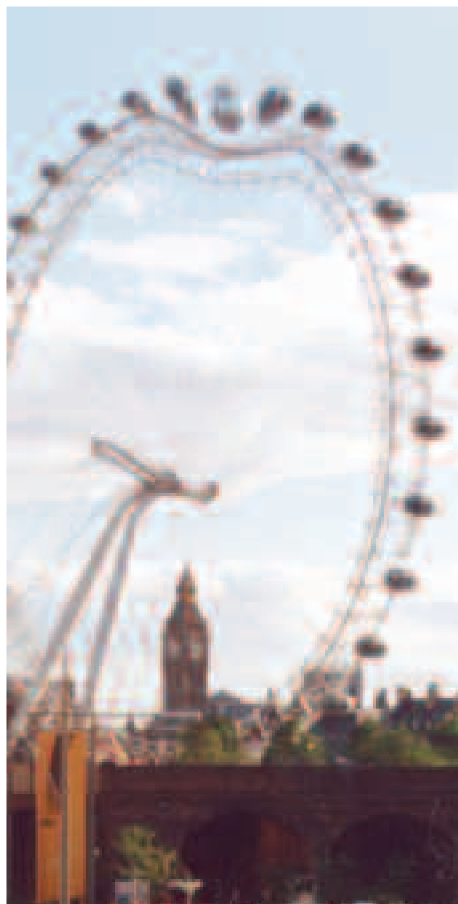

Stressed out

Stress is still the biggest problem facing UK workplaces, with excessive workloads, job cuts and rapid change the most common triggers for rising stress levels among employees, according to new research published by the TUC.

The figures show that six out of ten union safety reps (61 per cent), questioned by the TUC for its 2006 biennial safety reps survey, found that stress was their most pressing concern at work. Two years ago, the figure was 58 per cent of reps; in 2002, this figure was just 56 per cent.

London is the most stressed out part of the UK (67 per cent of safety reps in the capital placed it top of their workplace hazards list), closely followed by the north west where 65 per cent said it was their biggest problem.

When asked to cite the factors most likely to lead to problems with stress at work, over three-quarters of the reps (76 per cent) said that excessive workloads were to blame. Others mentioned cuts in staffing levels (57 per cent), rapid change (53 per cent), long working hours (34 per cent) and bullying (33 per cent).

Almost 3,400 union safety reps responded to the TUC questionnaire between the spring and summer of 2006.

To access the chapter on stress from the 2006 biennial safety reps survey, e-mail: media@tuc.org.uk

Equal but diverse

In just over seven years, only a fifth of the workforce will be white, able-bodied, male and under 45. This demographic time-bomb has inspired ACAS, the Government's advisory and conciliation service, to develop a set of equality and diversity online learning tools.

The e-learning tools are designed to help both employers and employees recognize and address situations in the workplace that result in people feeling undervalued and ineffective.

ACAS is also offering a free consultation on equality and diversity in the workplace as part of the Government's drive to promote good practice to underpin the sexual orientation and religion and belief regulations 2003.

For more information, go to: www.acas.org.uk/elearning

Busted flush

The TUC has published a report busting 14 false or exaggerated health and safety myths, saying that they undermine the important role that health and safety regulation plays in protecting people's health and well-being at work.

The report, *Health and safety myths* shows that employers often use health and safety as an excuse for not doing something that they didn't want to do anyway or to save money.

Myths busted in the report include:
Myth: health and safety regulations ban the use of ladders.
Truth: there is no ban on ladders but there are regulations aimed at ensuring that people use them safely to reduce the number of workers seriously injured or killed falling off them every year.
Myth: there are now more regulations and red tape than ever.
Truth: there were more than twice as many health and safety regulations and laws 35 years ago than there are today. The legislation that remains is now generally simpler and easier to understand.

To download the report, go to: www.tuc.org.uk/h_and_s/tuc-12556-f0.cfm

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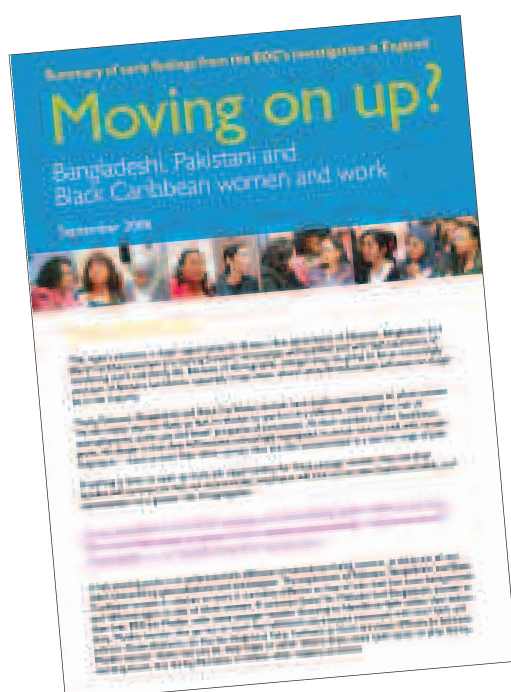
Moving on up



According to a recent, interim report by the Equal Opportunities Commission, ambitious young Pakistani, Bangladeshi and black Caribbean women face continued discrimination in the workplace.

The report, *Moving On Up?*, paints a picture of poor labour market prospects for young minority ethnic women, despite increasing attainment at school and ambitious aspirations.

Key findings include:

- Pakistani, Bangladeshi and black Caribbean girls age 16 have the same aspirations as white girls to combine work and family life and are even more ambitious about their education and future careers
- in GCSE 5A*-C performance, Pakistani and Bangladeshi girls have overtaken white boys, are are quickly catching up to white girls – and black Caribbean girls are not far behind. These girls have already overtaken boys in their ethnic groups
- Pakistani, Bangladeshi and black Caribbean women employees under 35 experience higher unemployment, a lower glass ceiling than white women, and – for Pakistani and Bangladeshi women – lower pay. Most work in a restricted range of sectors and jobs.

To download key findings from the report, go to: www.eoc.org.uk/Default.aspx?page=19421

Extension of time

Breach of contract claims dealing with a failure to pay notice after summary dismissal, fall within the "dismissal" provisions of the dispute resolution regulations, according to the Employment Appeals Tribunal (EAT) in London Borough of Lambeth -v- Corlett.

That gave Mr Corlett an extra three months to bring his claim of wrongful dismissal, which would otherwise have been time barred as he lodged the claim just under six months after the dismissal took effect.

The council argued that regulation 15(2) of the regulations (extending the time limit by three months where the dismissal and disciplinary procedure is ongoing) did not apply to a breach of contract claim.

The EAT held that the time limit could be extended because the ongoing dismissal and disciplinary hearing included the substance of his wrongful dismissal complaint to the tribunal.

The EAT also cast doubt on the recent decision of Martins -v- Castlehill and Bisset (In the news, LELR 115) when it decided that the statutory grievance procedure did not apply between employees. The EAT said that the decision in Bisset is "plainly arguable and of some importance. It must wait to be decided in a case in which it necessarily arises for determination".

Without prejudice

The law says that parties to disputes can have "without prejudice" discussions so that any proposals they make cannot ultimately be used against them if the dispute ends up in court.

However, that principle can be set aside in certain circumstances, such as in the case of **Brunel University & another -v- Vaseghi & Webster** – a race discrimination victimisation claim (in which Thompsons represented Ms Webster). The Employment Appeals Tribunal said that, as the University had already made the settlement discussions public by using them as evidence at a grievance hearing, it would be an abuse of privilege not to allow the claimants to refer to the original discussions as part of their victimisation claim.

It concluded that, in discrimination cases, the need to get at the truth of what happened may be more important than settling the claim.

Enhancing redundancy

According to the Court of Appeal in Keeley -v- Fosroc International Ltd, if employers put details of enhanced redundancy payments in staff handbooks rather than individual contracts of employment, the law will presume that they have contractual status. If the employer breaches them, employees can bring a breach of contract claim.

Holiday case heads for Europe

Following a brief hearing at the House of Lords, the case of Ainsworth -v- Commissioners of the Inland Revenue has been referred to the European Court of Justice (ECJ).

The Public and Commercial Services union instructed Thompsons to take the case to the House of Lords after the Court of Appeal ruled that a worker on long-term sick leave did not have a right to holiday entitlement.

The Court of Appeal agreed with the Inland Revenue that workers on long-term sick leave forfeit the right to compensation for holiday not taken if that worker's employment is terminated during the leave year.

The Law Lords referred the case to the ECJ after a German court decided to refer Schultz-Hoff -v- Deutsche Rentenversicherung Bund, asking whether article 7 of the Working Time Directive means that workers must receive minimum annual paid leave of four weeks during a long period of incapacity for work.

Although the German reference to the ECJ is concerned with German case law and the relevant collective agreement there, the Law Lords decided that there was value in joining Ainsworth with it.

The reference to the ECJ means that all other employment tribunal and Employment Appeal Tribunal cases currently stayed, waiting for the outcome of the appeal to the House of Lords, will have to wait until the ECJ has ruled.

Incomplete claim form

Common sense has prevailed in the case of Hamling -v- Coxlease School in which the claimant, Ms Hamling, omitted her address from the claim form but gave that of her solicitors.

The tribunal chair refused to hear her claim because the rules of procedure required her name and address be given.

The Employment Appeals Tribunal allowed her appeal, criticising the legalistic approach of the tribunal chair. It said that the error was neither "relevant" nor "material" and ordered her claim form to be accepted.

Service please

Article 141 of the EC Treaty says that member states must ensure the principle of equal pay for men and women doing equal work or work of equal value. The law also says that, if employers indirectly discriminate against one or more of their employees, they have to justify it

In **Cadman -v- Health and Safety Executive (IDS 815)**, the European Court of Justice (ECJ) said that employers do not as a general rule have to justify differences in pay based on "length of service" as a criterion in their pay system. But they do have to justify them if longer service does not necessarily result in improved performance.

What was the history to the case?

Mrs Cadman brought a claim for equal pay, 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, although some of them in more junior posts.

The HSE accepted that she was doing work rated as equivalent to that of the men but that she was paid substantially less. She argued that as the proportion of men with longer service was greater than that of women, 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.

What did the national courts decide?

The tribunal agreed with Mrs Cadman, but its decision was overturned by the Employment Appeal Tribunal. It said that the ECJ had decided in an earlier case – known as Danfoss – that using length of service as a criterion in a pay system did not need to be justified.

It also decided that Danfoss was still good law and had only been modified by subsequent decisions of the ECJ in relation to part timers. The Court of Appeal, decided to ask it for a definitive judgement on this point.

What did the ECJ decide?

The ECJ observed that, in Danfoss, the court decided that rewarding experience so that a worker performed their duties better was a legitimate pay policy objective.

It decided, therefore, that, as a general rule, using length of service to achieve that goal was perfectly acceptable. "Length of service goes hand in hand with experience, and experience generally enables the worker to perform his duties better. The employer is therefore free to reward length of service without having to establish the importance it has in the performance of specific tasks entrusted to the employee."

However, the court in Danfoss also accepted that there could be situations in which length of service would have to be justified by an employer. For instance, if a worker provided evidence that cast serious doubt on whether it was appropriate to award pay increases based on length of service. This was confirmed by the ECJ.

In those circumstances, employers would have to "prove that that which is true as a general rule, namely that length of service goes hand in hand with experience and that experience enables the worker to perform his duties better, is also true as regards the job in question."

It also said that, where a job classification system based on an evaluation of the work to be carried out was used in determining pay, employers did not have to show that the individual worker had acquired experience during the relevant period that had enabled them to perform their duties better.

Comment

This decision is a significant step forward in terms of challenging pay systems based on length of service. The ECJ has said that the general rule that employers do not have to justify pay increases based on length of service can be circumvented where the worker can show that additional service does not enable them to do the job better.

The Advocate General had proposed that the ruling should only apply to claims already started before the date of the judgement, but the ECJ has not adopted this restriction.

The decision will also be important in relation to the age regulations as employees with longer service are likely to be older than those with shorter service. Courts and tribunals are likely to want to achieve consistency in equal pay and age discrimination claims.

God given rights

Until recently, ministers of religion have been regarded by the courts as appointees to a holy office and not as employees of a church. That meant they could not claim unfair dismissal, among other rights

The Employment Appeal Tribunal (EAT) has now said in the case of **The New Testament Church of God -v- Reverend S Stewart** that ministers may be entitled to claim unfair dismissal.

What were the basic facts?

A lifelong member of the New Testament Church of God (NTCG), Reverend Stewart was involved at various levels, becoming an ordained minister in 1984. After an audit in 1999 showed that some funds had not been properly accounted for, he was reprimanded and put under supervision.

At around the same time, he became the pastor at the Harrow church and started to receive a salary (based on a local tithe paid by members) through the payroll office in Northampton and joined the church's pension scheme. If the local branch did not send in enough funds to cover the salary, the church stumped up the cash for one month only.

Although there was no written contract between the parties, Reverend Stewart had to perform certain work for the church (including administrative tasks and spiritual duties), and was required to provide certain information to the Northampton office, on a monthly basis.

In January 2005, another audit showed a number of financial irregularities. The Reverend Stewart was found guilty in June 2005 of unbecoming conduct and misappropriating funds. He was sent a P45 which, like his salary slips, indicated that the church was his employer.

What did the tribunal decide?

Relying on the House of Lords decision in the sex discrimination case of Percy -v- Church of Scotland Board of National Mission (LELR 108; 2006, IRLR 195), the tribunal decided, first of all, that there was a legal agreement between NTCG and the Reverend Stewart.

It reasoned that, although Reverend Stewart was free to arrange much of his work as he saw fit, he had to do so within the rules of the Church of God.

There was, therefore, it said, a connection between them that amounted to a legal agreement, although the "precise nature of those legal relations may not have been clear to all at the time of the agreement."

But was there a contract of employment between the parties? The tribunal said there was, partly because of the degree of control exercised over Reverend Stewart by the church (particularly in administrative matters), but also because he was treated like an employee for tax and national insurance purposes, as well as in relation to disciplinary matters.

As for the requirement for "mutuality of obligation", the tribunal said "there was clearly sufficient work for the claimant to carry out and the expected level of services as reflected in the forms he was required to complete and return to the national office, supports the view that there was such an obligation on both parties".

What did the EAT decide?

> If the relationship has many of the characteristics of a contract of employment, these cannot be ignored simply because the duties are of a religious or pastoral nature

The EAT agreed with the tribunal, saying that there was enough mutuality of obligation between the parties to support a contract of employment, despite its finding that the church did not have to pay Reverend Stewart if they did not receive sufficient funds.

It accepted the argument put forward by Reverend Stewart that the church had an obligation to pay him out of the funds that they received from members. Even if there was not enough money, the church still had to pick up the tab for a month.

It agreed that the situation was similar to that of bonus payments – where an employer can be contractually obliged to pay a bonus, but only if the predetermined turnover or profit target is achieved.

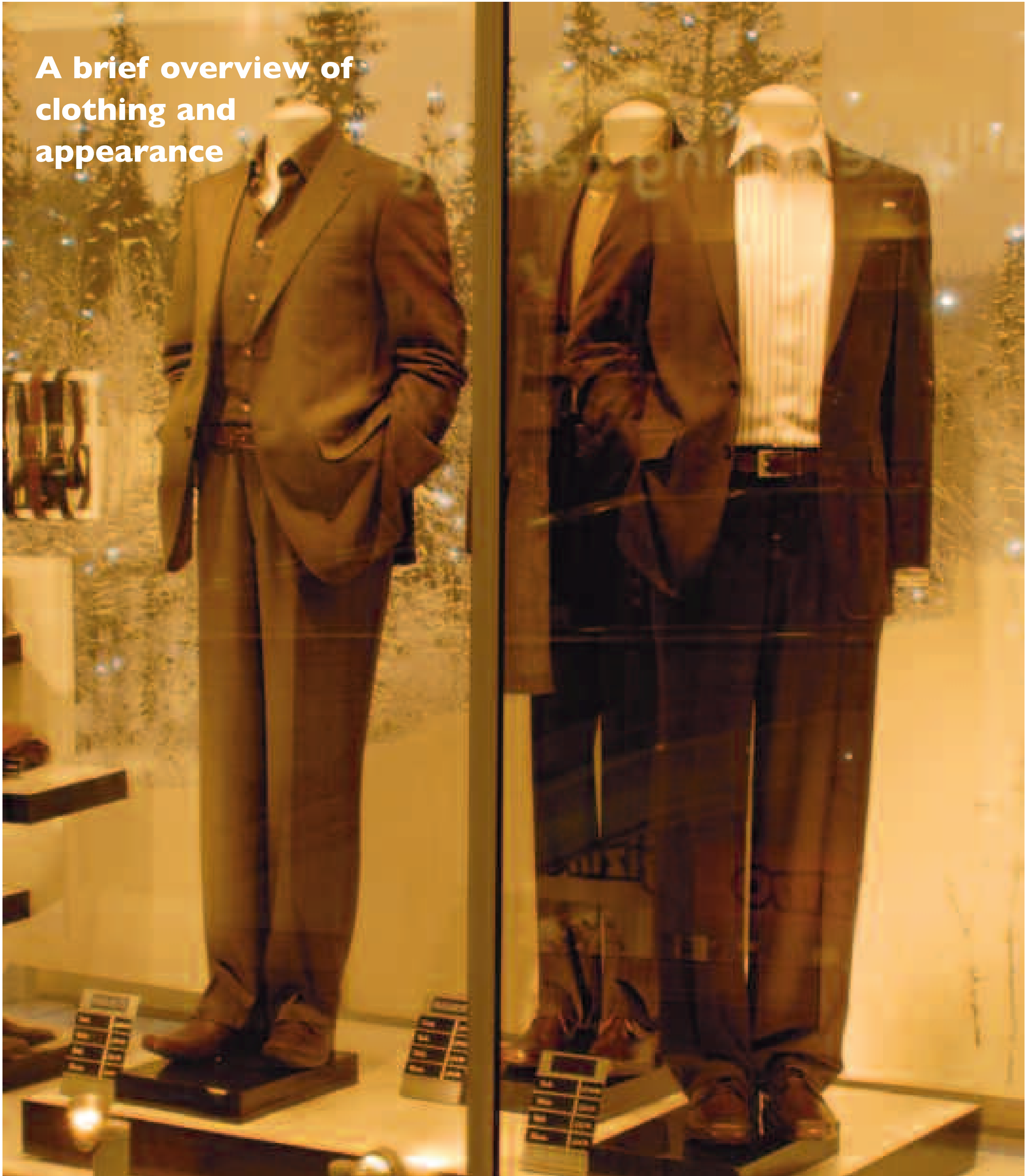
It concluded that "it seems to us that the House of Lords have clearly stated that if the relationship between church and minister has many of the characteristics of a contract of employment in terms of rights and obligations, these cannot be ignored simply because the duties are of a religious or pastoral nature."

It said therefore that there were no grounds to interfere with the tribunal's decision and dismissed the appeal.

Comment

This case confirms that holding office in a church is not inconsistent with employee status, though much will depend on whether the parties intended to create a legal relationship and if so whether that relationship gave them status as an employee.

Dressed to suit



A brief overview of clothing and appearance

It is perfectly legitimate for employers to tell their employees to dress in a certain way at work. However, if they dismiss someone for not complying with the code, the employee may be able to bring a claim against them.

Whatever code they introduce, employers need to be consistent in their approach and have a good reason for imposing it – perhaps because their employee has contact with the public. Or for health and safety reasons.

In this article, **Deborah Henning**, a solicitor from Thompsons Employment Rights Unit in Newcastle, provides an overview of the law governing dress codes at work.

Is it a contractual requirement?

There is nothing to stop an employer from including an express clause in the contract spelling out the dress code that employees have to observe. Some may do so for health and safety reasons.

However, even if there is no explicit reference to clothing in the contract, employees are still under an implied duty to obey their employer's reasonable and lawful instructions regarding expected standards. And that includes their clothing and appearance.

Employers should make sure that employees are aware of the contractual clause and that they know that a failure to comply with any written policy will be treated as a disciplinary matter.

How should employers deal with someone they think is inappropriately dressed?

Employers should discuss their concerns privately with the employee, and allow them to give their side of the story. If the employer is not convinced by the explanation, they should give the employee time to comply with the code before considering disciplinary action.

Is dismissal an option?

Yes, an employer can dismiss someone fairly for refusing to comply with their reasonable instructions, if they have no good reason for not doing so, and they have been given prior warnings and adequate time to comply.

She had not been discriminated against because the company had also imposed equivalent restrictions on male members of staff

For instance, a reporter was sacked by his employer, having been warned on three occasions about his offensive BO and scruffy appearance. The employer won the case on the basis that the reporter came into contact with the public and acted as an ambassador for the company.

On the other hand, an electrician who was dismissed for refusing to have his hair cut was held to have been unfairly dismissed because the tribunal said his appearance was not detrimental to the employer's business, nor to the way he did his work.

Is imposing a code sex discrimination?

The answer is that It depends. In the case of **Schmidt -v- Austicks Bookshops Ltd**, the company imposed a rule that female members of staff who came into contact with the public were not allowed to wear trousers. Miss Schmidt refused to comply and was dismissed.

The EAT said she had not been discriminated against because the company had also imposed different but equivalent restrictions on male members of staff.

Employers can, therefore, treat men and women differently, as long as they don't treat one or other of the sexes less favourably.

Take the case of **Smith -v- Safeway**. Mr Smith claimed he had been discriminated against on the ground of sex when he was dismissed for refusing to cut his hair.

The Safeway dress code required both men and women to wear hats, but women were allowed to keep their hair long if they tied it back. Men were not allowed to have it below shoulder length.

A dress code requiring all women to wear dresses or skirts might impact unfavourably on Muslim women who wanted to wear trousers

The Court of Appeal said that Mr Smith had not been treated less favourably, simply because Safeway had applied the same conventional standards to both sexes. That was not, in itself, discriminatory.

This point came to a head again in **Department for Work and Pensions -v- Thompson**, in which the EAT said that requiring men to wear a collar and tie to work did not necessarily amount to sex discrimination. It said that Mr Thompson (who was represented by Thompsons) had to show that he had been treated less favourably, not just that he had been treated differently.

In this case, Mr Thompson's employer decided to introduce a new dress code that required men to wear a collar and tie; and women to wear something to a similar standard.

The Employment Appeals Tribunal said that the deciding factor was whether "an equivalent level of smartness to that required of the female members of staff could only be achieved in the case of men, by requiring them to wear a collar and tie". If it could be achieved in some other way, then imposing such a rigid code might suggest less favourable treatment towards male staff.

Is it religious discrimination?

Employees can also rely on the Religion and Belief Regulations 2003, although they do not stipulate anything specifically about dress codes. It stands to reason, however, that a code that impacts less favourably on a particular religious group is likely to amount to indirect discrimination, requiring the employer to justify it.

So for example a dress code requiring all women to wear dresses or skirts might impact unfavourably on Muslim women who wanted to wear trousers (and might, depending on whether it amounted to less favourable treatment, also constitute sex discrimination).

The issue of wearing a full face veil has, however, turned out to be rather different as the recent (so far unsuccessful) case of Aishah Azmi, has demonstrated. The teaching assistant claimed that she had been discriminated against when asked to remove her veil in front of men, but failed to prove her case.

Yet to be decided is the case of a Christian woman (Nadia Eweida) who recently lodged a claim against BA for refusing to allow her to wear a crucifix.

The airline said that it breached uniform rules stating that staff must not wear visible jewellery or other "adornments" while on duty. The company allows religious items such as turbans, hijabs and bangles to be worn as staff cannot physically conceal them beneath their uniforms. Ms Eweida says that amounts to religious discrimination.

Can employees rely on the Human Rights Act 1998?

Employees may also try to bring claims under the Human Rights Act. Article 10 – which gives the right to freedom of expression – may include the right of an individual to express themselves by means of the way they dress.

Employers may be able to argue that they have to protect their reputation, including that of the business itself, but they would have to be able to justify any restrictions they impose.

Can employers rely on health and safety reasons?

When it comes to health and safety requirements, employers can usually provide a reasonable justification for imposing certain dress requirements, such as hard hats on a building site or at a factory.

But note that the Race Relations Act 1976 and the Religion and Belief Regulations 2003 exempt turban-wearing Sikhs on a construction site from having to wear a safety helmet.

What about trans gender employees?

If an employee has embarked on a course of action that will lead to gender reassignment surgery, it would be unlawful to prevent them dressing according to their new gender.

Do different rules apply at the Christmas party?

Although most rules are relaxed at the Christmas party, employees should not assume this automatically applies to their employer's dress code. This is particularly the case if the event is being held in a public place. The employer is still likely to want to project a positive image of their organization in public, and is unlikely to appreciate seeing their employees in a state of undress, whatever the time of year.

So caution is the by word. If in doubt, employees should stick to the dress code that is normally acceptable at social events connected with their workplace.

Public or private?

The law says that public bodies can act as private landowners and exclude individuals from their premises

However, in **R (on the application of Montgomery) -v- Hertfordshire County Council (2006, IRLR 787)**, the High Court has said that they must act fairly and follow the proper procedures.

Ms Montgomery's union, UNISON, instructed Thompsons to act on her behalf.

What were the basic facts?

Ms Montgomery was employed as a social worker by the local authority from May 1983 to 2004. In April 2001, she was seconded to the local NHS trust, but was suspended in October 2003, following a number of complaints.

In May 2004, she became an employee of the trust as part of a TUPE transfer. It therefore took over the investigation into the allegations against her, and reached a compromise agreement with her in October 2004.

Without admitting any liability on its part, the trust agreed to pay her £15,000 in full and final settlement of all claims she might have against them as well as the county council.

The trust also agreed to provide her with a reference that said, among other things, that: "In more than 21 years in Hertfordshire, Claire has enjoyed an excellent attendance record and unblemished work record."

What happened next?

On 17 January 2005, Ms Montgomery secured a job as a temporary senior lecturer at the University of Hertfordshire, following a reference supplied by the trust in which it said she was capable of doing the job, but admitted it would not re-employ her.

The job included organising placements of trainee social workers with the trust and the local authority, among others. She therefore needed to make contact with members of staff of both her previous employers.

Unfortunately, the trust refused her access to their premises, which meant she could not organise the placements. The local authority subsequently also refused her access to their premises in March. The trust withdrew its embargo in April, but the county council persisted.

The university then told Ms Montgomery in May that she would lose her job unless the ban was withdrawn. She brought judicial review proceedings against the local authority, arguing that it was making it impossible for her to do her job. It argued that it was acting in the interests of staff who had complained about her in the past.

What did the High Court decide?

The High Court decided that the council "failed manifestly and flagrantly to comply with the fundamental principles of fairness. They had given no notice of their action, they did not explain the grounds of their action, they have not explained the basis of future fears based upon the past complaints and they have not given the claimant any opportunity before the decision to ban her…. to respond."

It said that, although local authorities can sometimes be regarded as private landowners who can exclude whoever they want from their land, those rights have to be balanced with their public law responsibilities.

In this case, the judge said that the council should have thought very carefully before taking action because it was based on an historic grievance. That grievance had been resolved with the compromise agreement, and Ms Montgomery had had no reason to believe that future contact would be prevented because of past events.

The trust had not seen fit to ban her, after getting legal advice, despite the fact that it employed many of those cited in the council's evidence. Although some members of staff had felt intimidated by her as a manager, the court said they were not complaints that required them to have protection from her.

However, it said that, if the council decided (for reasons best known to them) that they did need to protect their staff from Ms Montgomery, they could still do so but only if they followed the proper procedure.

It concluded that the scope of the ban and the lack of evidence requiring a ban "of this severity" must result in the council's decision being quashed.

Comment

Although Ms Montgomery succeeded in her claim, the facts of this case were so unusual that other claimants cannot assume that they can rely on judicial review proceedings except in equally exceptional circumstances.

Consult in time

Section 188 of the Trade Union and Labour Relations (Consolidation) Act 1992 states that employers have to consult "in good time" with their workforce before making redundancies

In **Leicestershire County Council -v- UNISON (LELR105; 2006, IRLR 810)**, the Court of Appeal said that the employers could not introduce a new argument about the meaning of "in good time" at the appeal hearing when it had not done so at the original tribunal, despite the high value of the claims.

What were the facts in the case?

Following a national agreement in 1997 to introduce a single structure for manual and administrative staff, Leicestershire County Council started an evaluation of 9,000 jobs in 1999. After a number of meetings with the trade unions between July 1999 and May 2002, negotiations broke down.

Once the job evaluation was complete, the council decided to downgrade some employees and enhance the terms and conditions of others. It took the formal political decision on 12 December to dismiss both groups and offer them jobs on new terms and conditions.

However, this formal decision was preceded by a meeting of the council's employment committee a month earlier, which had considered a report to give notice and offer re-engagement to all staff affected by the job evaluation.

On 13 December, the council wrote to the union side telling them of the formal decision, and on 20 December, sent a "consultation notice", to the UNISON local branch secretary. UNISON claimed that the council had failed to consult with them about the redundancies "in good time" and applied for a protective award for both the "downgraded" group and the "enhancement" group.

What did the tribunals decide?

The tribunal decided that the obligation to consult arose by mid-November at the latest. As the formal announcement was not sent to the union until 20 December, the council was in clear breach of its duty to consult "in good time".

It made a protective award of 90 days for the downgraded group, and 20 days for the enhancement group (because the trade union side had failed to respond to the council's invitation to consult about them).

The Employment Appeals Tribunal (EAT) agreed that the decision to dismiss had been taken in mid November. Relying on the ECJ decision in Junk -v- Kühnel (LELR 98), it said that the obligation to consult must arise before an employer decides to terminate someone's contract.

The EAT upheld the award of 90 days' pay for the downgraded group, but reduced the protection award to 10 days for the enhancement group, saying that the council had tried to negotiate with the unions.

However, it refused to allow the employers to argue a new point – namely, that the expression "in good time" in the legislation meant not "speedily" but in good time before the proposed dismissals took effect. It had not argued this point at the tribunal and there were no exceptional circumstances to allow it to do so now.

What did the Court of Appeal decide?

The Court of Appeal agreed with the EAT that the employers should not be allowed to introduce a new argument about the construction of the expression "in good time".

It was not convinced by the employers' argument that it was in the public interest to rule on what it meant, not least because a decision in their favour would mean remitting the case back again to the tribunal

It said that "it is well established that the EAT should only allow a new point of law to be taken before it in exceptional circumstances… Nothing had been shown to demonstrate that the present case was of an exceptional nature. The high value of the claim could not make it so."

It also said that the tribunal was right to make a protective award for the maximum period of 90 days, given that the employers had totally failed to comply with the requirement to consult.

The EAT was wrong, however, to reduce the protective award for the enhancement group and it upheld the union's cross appeal.

Getting organised

Regulation 8 of the Transfer of Undertakings Regulations (TUPE) 1981 states that if an employee is dismissed for a reason connected with the transfer, the dismissal will be unfair

The only exception is for an economic, technical or organisational (ETO) reason entailing changes in the workforce

In **London Metropolitan University -v- Sackur and others** (a case brought by NATFHE, now UCU), the Employment Appeal Tribunal (EAT) has confirmed that an ETO defence is only available to employers who have reduced the numbers of their workforce, or made changes to the functions of relevant employees.

What were the basic facts?

The London Guildhall University (LGU) and the University of North London (UNL) merged on 1 August 2002 to form the London Metropolitan University, following a TUPE transfer.

In negotiations leading up to the transfer, unions and staff were led to believe that the former LGU contracts would be adopted for all academic staff as the "default position". Within a few months of the transfer, the university turned that default position on its head and said that academic staff should revert to, or be placed on, UNL contracts.

Discussions between the parties eventually broke down in August 2004, after which the human resources department sent out a letter, indicating that, if staff continued to work after 1 September 2004, they would be deemed to have accepted the preferred UNL type contract. This followed an earlier letter in April in which the university gave notice of its intention to move staff onto the new contracts.

A number of staff lodged claims of unfair dismissal. The university said the dismissals were for an ETO reason entailing changes in the workforce of LGU, or alternatively, that they were for some other substantial reason and were not unfair.

What did the tribunal decide?

The tribunal found in favour of the claimants, concluding that their dismissal was for a reason relating to the transfer of UNL to LGU.

Referring to the case of Berriman -v- Delabole Slate Limited (1986, ICR 546), the tribunal said that the sole reason for the dismissals was to harmonise contracts, not to reduce numbers of staff, and was not therefore an ETO reason.

The tribunal had to infer from the evidence (because it was not clear from the minutes of meetings) that the decision to dismiss was taken shortly after the transfer, although the intention to do so was not communicated to staff until at least 18 months later, in April 2004.

What did the EAT decide?

The EAT agreed with the tribunal. It said that although the further away a transfer is from a dismissal, the less likely it is that it will be found to be connected to it or related to it, this was always a matter of fact for a tribunal to decide.

In this case, the tribunal "knew exactly what it was to determine: whether there was a connection; and if the connection was the principal reason between the dismissal and the transfer. The tribunal held that the reason was harmonisation."

The tribunal did not find that the numbers of employees in the workforce had changed, nor that their functions had changed in a way envisaged by Berriman, which meant that the tribunal had correctly applied the law.

The EAT confirmed that an ETO defence is available only where employers have made changes in the workforce as a result of a reduction in the numbers (Berriman), or changes to the functions of relevant employees (Crawford -v- Swinton Insurance Brokers Ltd, 1990, IRLR 42).

It confirmed that Berriman remained good law and had not been adjusted or made significantly more flexible by Crawford. Although there was an organisational reason on the part of the university behind its demand for a change in the terms and conditions so that they could be harmonized, these were still changes in terms and conditions.

Comment

It is difficult to see how the University can challenge the argument that Berriman is good law as Parliament could have effected this change in the 2006 TUPE regulations, but did not do so.

Fixing the term of contract

The expiry of a fixed term contract constitutes a dismissal. But what happens if the person is dismissed before that date, and then reinstated after it?

The Employment Appeal Tribunal (EAT) in **Prakash -v- Wolverhampton City Council** has said that it just reinstates the original contract.

Mr Prakash's union, the GMB, instructed Thompsons to act on his behalf.

What were the basic facts?

Mr Prakash started work on 1 November 2001 for Wolverhampton City Council on a three year fixed term contract, but was dismissed on 23 October 2003 following allegations of bullying and sexual harassment. He lodged a claim for unfair dismissal on 15 January 2004.

Mr Prakash also appealed internally against the dismissal, which was finally heard on 3 February 2005. His appeal was allowed and he was told that he would be reinstated.

He then received a letter on 9 February telling him that he would be re-engaged in a suitable post and his details placed on the redeployment register for six months. He did not apply for any jobs on the register and his name was removed from it on 10 October.

In June 2005, the council lodged an amended response to his unfair dismissal claim arguing that, as his appeal had been successful, his dismissal took effect on 31 October 2004. Mr Prakash applied to amend his claim that his contract ended later than 23 October 2003.

What did the tribunal decide?

Relying on the decision in West Midlands Co-operative Society -v- Tipton (1986, 1 All ER 513), the tribunal decided that "a successful domestic appeal reinstates a person to employment under the terms of the contract of employment under which they were originally employed, … This … effectively puts an employee in a position where there was no dismissal."

Having removed the sanction of dismissal, the tribunal said that "what must be reinstated is the initial contract between the parties." In this case, a fixed term contract. There was nothing in the behaviour of the parties to conclude that the contract of employment had been "extended backward in time" by the decision to reinstate him. The effective date of determination of the revived contract was, therefore, 31 October 2004.

Mr Prakash's complaint of unfair dismissal was therefore nine months premature. It could not hear his complaint nor allow him to amend his application to submit a later date for his claim of unfair dismissal.

What did the parties argue on appeal?

Mr Prakash argued that, as his appeal had been successful, his contract had been extended, at least to the date of the appeal hearing. It provided a "bridge" between the original date of termination (October 2003) and the appeal date hearing. The effective date of determination was six months later – 9 August 2005; or, alternatively 10 October 2005 when his name was removed from the register.

The council, on the other hand, said that the successful appeal did no more than put Mr Prakash in the position he would have been in but for the overturned dismissal. In other words, it just restored him to his original fixed term contract.

What did the EAT decide?

And the EAT agreed with the council. It said that the logic of Mr Prakash's argument meant that his fixed term contract would be extended beyond its due date. That would put him in a better position than someone who had received a lesser penalty, or someone on a fixed term contract whose appeal was heard during their contract.

It would also mean that claimants would be entitled, as a result of their successful appeal, to arrears of salary, pension benefits, and the right to claim unfair dismissal. Instead, reinstatement should just mean "putting the claimant back into the position he was in at the time of dismissal, not extending his contractual rights beyond that."

However, the really interesting part of the case is that the EAT said that the tribunal was wrong not to allow Mr Prakash to amend his original claim form. It said there was no reason why a cause of action that had accrued after presentation of the original claim form could not be added as an amendment later.

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