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Focus on vulnerable workers

Deducting from migrant workers

The unlawful deduction of wages is a common practice affecting migrant workers

Pg 2

Agents of change

The fraught history leading up to the adoption of the Temporary Agency Workers directive

Pg 6

Regulating part and fixed term workers

A number of recent decisions on comparators and objective justification under regulations governing part timers and fixed term employees

Pg 9

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Deducting from migrant workers

Kate Ewing, a solicitor in Thompsons' Employment Rights Unit, looks at one common practice that often affects migrant workers - the unlawful deduction of wages

THE EXPANSION of the European Union over the last few years has resulted in large numbers of migrant workers arriving in the UK from Eastern Europe and elsewhere.

Although EU citizens have every right to live and work here, they are much more likely to find themselves in temporary and transient jobs than other workers. Often recruited in their home countries by unlicensed employment agencies, they have much less protection than those in more permanent employment relationships.

For unregistered workers, the abuses are even greater.

Harsh realities of the UK

Once in the UK, the realities for migrant workers can be harsh. Wages are low and many employers ignore minimum wage, working time, paid holidays and other employment rights laws such as the right to a written statement of terms and conditions.

Making deductions from wages for accommodation, tools, transport and other work equipment is a common practice.

A Lithuanian builder was paid just £8.80 for a 39-hour week after deductions. His colleague, who had worked a 70 hour week, was paid £66 and another had £228 deducted in one week for tool hire.

Legal reality

It is illegal for employers to charge for finding work. Nor are they allowed to retain workers' passports and identity documents. It is also unlawful to charge workers for personal protective equipment, unless the contract states clearly that deductions will be made if the worker fails to return the equipment.

Deductions for accommodation must not exceed £4.30 per day for workers paid the national minimum wage (NMW). If a worker is paid more than the NMW then deductions for accommodation must not reduce their wages to less than £4.30 below the daily NMW rate.

Case study - Hungarian poultry workers

Thompsons acted for 20 Hungarian UNITE members who were supplied by a major employment agency in the East Midlands to work at Cranberry Foods, the UK's second largest poultry producer.

An unlicensed gangmaster recruited the workers in Hungary. They were forced to pay an arrangement fee of £350 to secure the work, which was deducted from their pay packets without their consent. Accommodation charges of up to £40 a week were also deducted. They were paid just £3 an hour.

They did not speak English and were originally not registered under the Worker Registration Scheme. This meant that their employment was illegal and that they were unable to rely on key rights. The collective and individual claims they had could only be pursued for the period that they had been registered.

The men and women were housed in former RAF camps surrounded by barbed wire, and were ticked in and out each day by their gangmasters. They worked long hours to the point of collapse and were often threatened with violence. They were told they would lose their jobs if they complained. Threats were also made against their families in Hungary.

Some were injured at work but were not given medical treatment. When a roof fell in and their clothing was saturated they were made to continue working. When a Thompsons lawyer met the workers none of them had more than £5 each.

Claims for abuse of employment rights were pursued on behalf of nine of the workers but these were withdrawn when a settlement was reached.

This ensures that workers are paid a basic minimum of the NMW less £4.30 per day and prevents employers appearing to pay workers above the minimum wage, but driving down their wages with excessive deductions for the provision of accommodation.

Case law has clarified that deductions for heating and lighting must be included within the daily maximum. Employers cannot deduct the permitted maximum for accommodation and make further deductions for other bills.

Nor can they make other deductions unless they are stipulated in the contract, the worker agrees to the deductions being made, or the deductions are required by law (national insurance and tax for example).

In each case the worker should understand why the deduction has been made and must not have been coerced into the agreement.

But, given the vulnerabilities of many migrant workers, it can be difficult to establish whether the worker willingly agreed to deductions, understood what they were agreeing to or whether they understood their rights.

Case study - Filipino nurses

Thompsons acted for 25 Filipino nurses recruited in the Philippines to work in a private care home. They were each charged around £4,000, which was said to be for their air fare and to put them through a course in order to register them for work. The cost of the course was around £100. The air fare was no more than £500.

Most of these nurses were highly qualified. Yet they were treated by the care home as cleaners, cooks, and carers. They were locked in their rooms at night, forced to work when ill and denied any privacy. And they were paid significantly less than their British colleagues.

After one nurse contacted UNISON they were all recruited to the union and found jobs in the NHS. Their claims against the home were settled. It seems, however, that the home simply turned to India to replace them.

If an employer exceeds the maximum deduction allowed, workers can make a claim in an employment tribunal for unlawful deduction of wages.

Workers can also contact the National Minimum Wage helpline if they think their employer is underpaying them. HM Revenue & Customs has the power to investigate complaints about non-compliance with the NMW and issue enforcement notices.

These legal actions and remedies are, however, not available to most migrant workers. Faced with a charge of £90 to register under the Worker

Registration Scheme, many choose to remain unregistered. Rogue employers prepared to give work to unregistered workers will inevitably exploit the fact that the law does not protect them.

Gangmasters Licensing Authority

Migrant workers may also not be aware that the Gangmasters Licensing Authority (GLA) requires certain labour providers to have a licence. These include anyone who provides labour for horticulture, fish processing, gathering shellfish, dairy farming, or the packaging or processing of these products (it does not however include construction, one of the biggest employers and abusers of migrant labour).

So if an employment agency, for example, supplies workers to any of these sectors, they need a GLA licence. It is illegal for a provider to operate without one. The GLA keeps a register of all licensed labour providers on its website (www.gla.gov.uk).

Importance of trade unions

Most migrant workers do not belong to a trade union and consequently may not be aware of their employment rights. They have no ready access to advice, often because of language barriers and, because many do shift work, it is difficult for them to find and attend language classes or union meetings and advice surgeries.

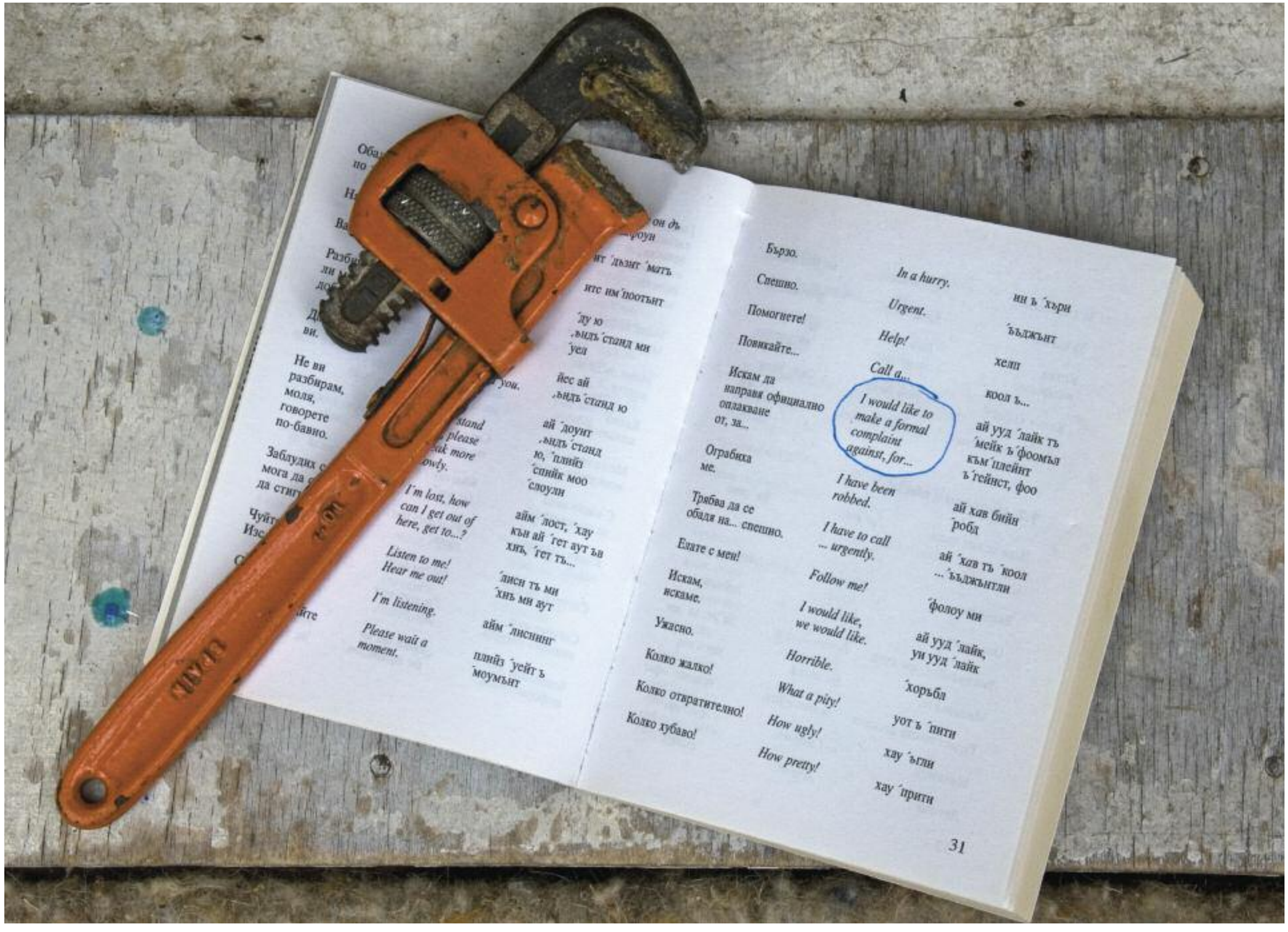
Nevertheless, trade union representatives play an important role in ensuring that migrant workers are aware of their rights by providing advice and guidance.

Union recruitment and organisation campaigns are ensuring that rogue employers are increasingly being identified and challenged over illegal practices, including by supporting workers in bringing grievances for poor treatment and (when possible) claims for compensation in tribunals and courts.

Migrant Workers Unit

Thompsons' Migrant Workers Unit, headed by Rakesh Patel, provides legal advice and representation to trade unions and their members on the issues raised above and more. The Unit can provide training sessions for trade union representatives and has a number of fact sheets in various languages providing information on key employment rights.

The fact sheets can be obtained from the Publications Department at Thompsons' Head Office on 0207 290 0000.



Agents of change

Richard Arthur, a solicitor in Thompsons' Employment Rights Unit, looks at the fraught history leading up to the adoption of the Temporary Agency Workers directive

IT'S BEEN a long time coming, but the member states of the European Union have finally agreed the text of the Temporary Agency Workers Directive. If agreed by the European Parliament, it will give Europe's estimated eight million agency workers some rights to be treated equally to other workers hired directly by an employer.

Back history

The story goes back beyond March 2002 when the European Commission published proposals for a directive to "liberalise the agency sector" while at the same time giving agency workers the same basic working and employment conditions as other workers. During six years of talks, a number of member states, encouraged by the UK, blocked the directive's progress and it was effectively put on hold.

Agreement was finally reached largely as a result of a hard fought campaign by unions in the UK. Once a deal had been reached between the CBI, TUC and UK government, Britain stopped blocking the draft directive. Andrew Miller MP was also encouraged to withdraw his private members Bill seeking rights for temporary and agency workers.

A major bone of contention (particularly for the UK government) was the qualifying period before which "equal pay" rights could apply. At the behest of business, it insisted on more than six weeks, while trade unions and some member states argued there was no need for any qualifying period. In reality, it seemed like the UK didn't want an agreement at all.

The breakthrough came in May this year when the government finally agreed a deal with its social partners (unions and employers), giving agency workers in the UK a right to claim the same pay and holidays as those they work alongside after twelve weeks on the job. Elsewhere in the EU, the rights will kick in on day one.

Limited coverage

While the deal and the directive cover basic working and employment conditions such as pay, overtime and holidays, they do not cover rights such as occupational pensions and sick pay. Temporary staff will also have to work the same length of time as full-time workers to enjoy paid maternity leave.

This allowed the government to play ball on the stalled European proposals, and paved the way about a month later for an agreement among the EU member states themselves on both temporary workers and the working time regulations.

Among other things, EU member states have agreed that agency workers should be treated equally as of day one in terms of pay, maternity leave and holidays. The directive allows member states to "derogate" or modify their terms through collective agreements or agreements between social partners at national level, as has happened in the UK.

Without that agreement, the UK government would have continued to block the directive as it did last December. The pressure on the UK in Europe was such that the CBI was convinced that 12 weeks without rights was the best it could achieve for business.

The directive will also give temporary agency workers the right to be informed about permanent employment opportunities in the "user enterprise" and equal access to collective facilities. It requires member states to improve the access that temporary agency workers have to training and child care facilities in the periods between their assignments so as to increase their employability, and ensure penalties for non-compliance by temporary agencies and enterprises.

Criticism of the deal

Some bodies, however, have criticised the deal saying that the price – allowing the UK government to retain its 48-hour opt out from the Working Time Directive – is far too high.

The European Council justified the deal on the Working Time Directive by saying that both deals were reached as part of an overall social policy "flexicurity" package. A package that it claims has "created more security and better conditions for workers and temporary agency workers while maintaining the flexibility that industry needs and workers want when reconciling family life and working life."

The UK agreement has also been criticised on the ground that 12 weeks is too long before agency workers are treated equally, as about half of all assignments last less than 12 weeks. So was the horsetrading worth it and is the directive really needed? Yes and yes.

A much needed directive

A directive means that a Conservative government cannot reverse the situation if they take power, as they would have done if Andrew Miller's Bill became law.

A report by the TUC in 2005 ("The EU Temp Trade") cites various studies that show that, compared with other staff, temporary agency workers have less control over the type of work they do and how they do it; receive less training and have fewer career development opportunities; have a higher rate of workplace accidents and are less well-informed about safety; do more shift work and have less job security.

It also says that they lose out in terms of pay – typically agency workers receive lower wages for similar work and are excluded from bonuses and benefits awarded to other employees.

This finding is confirmed by a survey published in the July 2008 edition of the Chartered Institute of Personnel and Development's online magazine. It found that

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agency workers earn, on average, £7.80 per hour in the UK, compared with £11.47 for permanent workers, a difference of 32 per cent. Allowing for different variations in characteristics, this fell to 10 per cent, but the size of the gap varied across the wage distribution. For example, among the bottom tenth of wage earners, the "penalty" for agency working was 17 per cent.

The study also pointed to lower levels of job quality. Compared with both other temporary and permanent workers, agency staff were less satisfied in their jobs, had less variety and discretion over their work, were less likely to learn new things and more likely to be under-using their skills.

So there can be little doubt that agency workers covered by the deal stand to gain from it. In overall terms, a Government Regulatory Impact Assessment estimated that non-discrimination in pay would benefit agency workers by £366 million per year and increase holiday pay and annual leave by £118 million.

Not all over yet

But there is still a lot left to play for. There is the issue of the definition of an agency worker and the problem that some businesses will seek to remove workers before the 12 weeks is up.

And the trouble is, however welcome, the UK agreement does not deal with one of the most fraught issues for agency workers – their employment status. This is important because it dictates the employment rights available to them with the result that, for example, only employees have the right to claim unfair dismissal and statutory redundancy payments.

According to the TUC, most EU member states (but not the UK) make clear that agency workers are, in law, employees of the temporary work agency and enjoy the same or similar protections and rights as any other employee. The UK, by contrast, does not require agency workers to be employed either by the agency or by the client company.

And the courts have not helped much either. Indeed, they seemed to be in disarray with a recent crop of conflicting decisions. But earlier this year in **James -v -Greenwich Council** and **Consistent Group Ltd -v -Kalwak**, they seem to have finally decided that, generally, temps and agency workers are not employees of an employment agency or the end user.

Judges have recognised the gross injustices but Lord Justice Mummery recently said in **James** that workers and unions would be better off trying to change things through parliament than wasting their time in his court. There is nothing in the Employment Bill currently before Parliament to remedy this injustice, but the unions are looking for amendments to deal with that gap.

And, in relation to the limited equal treatment directive, there is a final hurdle that still has to be overcome – the European Parliament has to approve the proposals later this year. And that is by no means a foregone conclusion. When the members last voted in May 2005 on the issue of the UK opt out, they overwhelmingly agreed it should be phased out.

If, on the other hand, they decide to go along with the overall deal, the government anticipates that the regulations governing temporary agency workers will come into force in the UK either in April or October 2010.

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Regulating part and fixed term workers

Jo Seery, a solicitor in Thompsons' Employment Rights Unit, looks at a number of recent decisions on comparators and objective justification under regulations governing part timers and fixed term employees

THERE HAS been relatively little case law since the government introduced regulations protecting part time and fixed term workers in 2000 and 2002 respectively. This was mainly because the legislation required claimants to find actual (as opposed to hypothetical) comparators unlike other discrimination legislation, making it more difficult for them to succeed.

What do the regulations state?

The part time workers regulations state that employers cannot treat part time workers (as opposed to just employees) less favourably than comparable full timers and must not be subjected to any disadvantage (or detriment) by their employer because of their part time status, unless they can justify it.

Likewise, the fixed term employees regulations state that employers cannot treat employees on fixed term contracts less favourably than comparable permanent employees, unless they can objectively justify the treatment.

Who is the comparator?

Fixed term employees who think they have been treated less favourably have to compare themselves with someone doing the same or broadly similar work, who is employed by the same employer. They cannot, however, compare themselves with a permanent employee who used to work for the employer but has now left their job.

Similarly, part time workers have to compare themselves with someone doing the same or broadly similar work. However, that worker must also be someone who is employed full time under the same type of contract whether on a permanent or fixed term basis.

The issue of comparators was considered in the leading 2004 case of **Matthews v- Kent & Medway Towns Fire Authority** in which part time fire fighters claimed they were treated less favourably because they were denied access to the pension scheme.

The House of Lords held that, when considering whether the comparators were engaged in the same or broadly similar work, tribunals should focus on the similarities of the work being done as well as the importance of the work to the employer as a whole rather than the differences between the two groups.

Pro rata principle

Less favourable treatment is subject to two tests – the pro rata principle and objective justification.

The pro rata principle allows employers to claim that, although the part time worker or fixed term employee was treated less favourably, it was in proportion to the terms on which they offered pay and/or benefits to other workers.

For instance, holidays – these should be pro rated for a part timer in line with the number of holidays for a full timer, based on the number of part time hours they work. The same principle does not, however, apply to overtime, with the result that part time workers cannot claim less favourable treatment when they are not paid overtime until they have worked the same hours as a full timer.

The fixed term regulations, on the other hand, allow employers to adopt a "package" approach. This is contrary to equal pay legislation, which allows a term-by-term comparison. In practice, the package approach means that employers can pay their fixed term employees a higher rate of pay instead of providing them with the same benefits as other employees.

Take pensions as a good example. According to guidance issued by the government, employers may be able to justify preventing someone on a very short fixed term contract from joining the pension scheme if they pay into a stakeholder pension. However, there is no onus on the employer to ensure that the fixed term employee does not lose out if the stakeholder pension pays out a lower benefit than the company pension scheme.

Objective justification

Employers can also justify less favourable treatment of a part time worker or fixed term employee if they can show that the treatment was necessary and appropriate to achieve a legitimate aim, such as a genuine business objective.

However, a number of recent decisions have set some limits on the test of objective justification. The European Court of Justice ruled in 2006 in **Adeneler -v- Ellinikos Oranismos Galaklos** and the 2007 case of **Del Cerro Alonso -v- Osakidetza-Servicio Vasco de Salud** that reliance on a general law or collective agreement will not amount to objective justification.

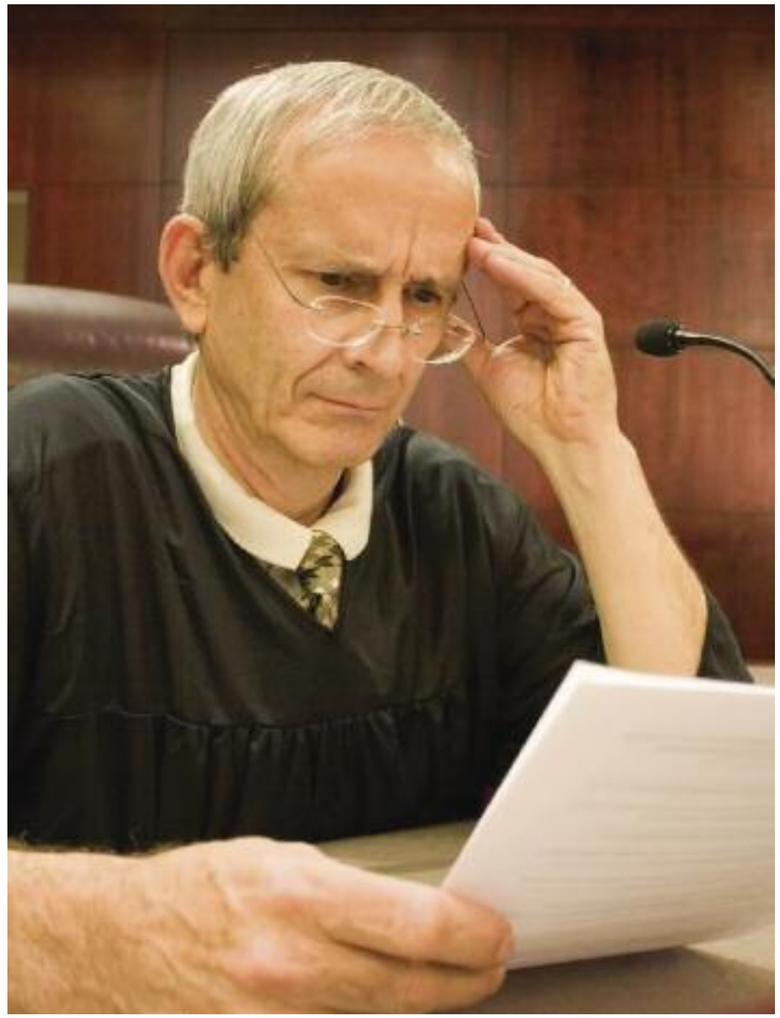
Instead, it said that, to establish objective justification, courts have to look at the "precise and concrete factors characterising the employment condition to which it relates, in the specific context in which it occurs and on the basis of objective and transparent criteria in order to ensure that the unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose".

The test of objective justification applies not just to less favourable treatment but also to the use of successive fixed term contracts. Employers often cite lack of funding as an objective justification for not making a fixed term employee permanent.

It is worth noting that cost, in and of itself, is generally not a good enough reason under other discrimination legislation to amount to objective justification and a justification defence on the grounds of limited funding is arguably cost by another name.

The issue of limited funding as justification for retaining a contract researcher on a fixed term contract was considered by a Scottish tribunal recently in the case of **Dr Ball -v- the University of Aberdeen**. It accepted that the tests in **Adeneler** and **Del Cerro** were similar to the tests applied in other discrimination legislation and as such the correct approach was to consider whether there was a genuine business need to be addressed and whether the use of a fixed tem contract amounted to "means" that were necessary and appropriate to meet that need.

> Employers cannot treat employees on fixed term contracts less favourably than comparable permanent employees



> It looks as though the courts are now prepared to put employers under more scrutiny

In applying this test, the tribunal decided that the business need for the university was how to cope with the fact that the research funding from grant-giving institutions was short term.

It therefore had to consider the disadvantages to the employee (uncertainty of future employment, disadvantage in terms of career prospects and potential difficulties in obtaining credit) against the advantages to the employer.

It rejected the employer's argument that it would be too expensive to retain Dr Ball beyond the end of the fixed term contract as a red herring, and said that, in attempting to match up future labour needs with future revenue, the University was really in no different a position to many other employers.

The choice for the employer was to employ Dr Ball on a fixed term contract or an indefinite contract with the possibility of his being made redundant.

Challenging objective justification

- **Is the employer's stated business need a legitimate aim? A blanket policy or collective agreement that has not taken a fixed term employee's particular circumstances into account will not of itself amount to a legitimate aim.**
- **Is it necessary to achieve that aim? A blanket policy of putting all employees who have short term funding (as in academia) on fixed term contracts may not be the only way of achieving that aim, particularly if there is a possibility of further funding.**
- **Is it appropriate? This will be a question of fact balancing the disadvantages to the employee such as uncertainty of future employment, adverse impact on career progression/professional development and credit worthiness versus advantages to the employer.**

Conclusion

Although both sets of regulations have very definite limits (and employers have made maximum use of them), it looks as though the courts are now prepared to put employers under more scrutiny, at least as far as objective justification is concerned.

If tribunals continue to turn down employers' arguments when they try to justify business practices that are clearly beyond the pale, then the regulations may, finally, turn out to be worth the paper they were written on. Watch the weekly LELR online newletter for further developments.

LELR aims to give news and views on employment law developments as they affect trade unions and their members.

This publication is not intended as legal advice on particular cases.

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