On the Case

January 2008

News

Employment Bill introduced

The new proposed Employment Bill, which will replace the statutory dispute resolution procedures with a revised code of practice, is likely to receive Royal Assent by this summer.

Acas will be revising its statutory code on discipline and grievance procedures and the Bill provides that tribunals will be able to adjust awards where parties have unreasonably failed to follow the code.

The Bill also proposes to increase the maximum penalty for underpayment of the national minimum wage, and employment agency offences, to an unlimited fine. It will introduce a fairer method for dealing with national minimum wage arrears, so that workers do not lose out as a result of underpayment.

The Bill will also strengthen the investigative powers of the Employment Agency Standards Inspectorate.

Further, the Bill will make changes to ensure compliance with the European Court of Human Rights (ECHR) judgment in *Aslef v UK*, enabling enable trade unions to ban from membership people who belong to, or who have previously belonged to, a particular political party.

Employment Relations Minister Pat McFadden, said: "The National Minimum Wage was a key right this Government introduced to ensure workers were paid fairly... Our proposed changes to dispute resolution, responding to the Gibbons Review, would ease burdens for businesses and employees by abolishing rigid, statutory processes for dispute resolution, while also ensuring there is no discrimination in employees' rights".

Case reports featured

Lyddon v Englefield Brickwork Ltd (EAT) — rolled-up holiday pay was lawful.

Smith v Michelin Tyre plc (ET) — dismissal for smoking in the workplace was fair.

GAB Robins (UK) Ltd v Triggs (EAT) — calculation of liability to employer who caused employee's ill health.

Palacios De La Villa v Cortefiel Servicios SA (ECJ) — a mandatory retirement age was lawful.

A Happy New Year to all our readers! We are starting the year with a fresh, new look for your newsletter — and a new helpline number to call for advice on your employment, tax and payroll questions: see the business support information box at the bottom right of this page. ■

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News cont'd...

Retirement and agency cases put on hold

Under a Practice Direction for England and Wales, all current and future tribunal claims which allege that compulsory retirement at age 65 is unlawful have been stayed pending a European Court of Justice (ECJ) decision on this point in the case brought by Heyday (which is part of Age Concern).

The move follows an EAT decision (in *Johns v Solent SD Ltd*) that an employment tribunal had been wrong to throw out a claim that a default retirement age was unlawful under the Employment Equality (Age) Regulations 2006. The employment tribunal had ruled that the claim had no reasonable prospect of success, but it appears that decision was premature pending the Heyday judgment.

Similarly, all agency worker cases are stayed pending the awaited Court of Appeal judgment in *James v London Borough of Greenwich*.

Duty to consult on reason for closure

Following the decision in *UK Coal Mining Ltd v NUM*, if collective redundancies are proposed that are linked to the closure of an establishment, the employer must consult about the reason for that closure. It had previously been possible for an employer to argue that a workplace closure was "beyond discussion".

In the case, 158 redundancies were proposed by UK Coal Mining Ltd, and therefore the duty to carry out collective consultation arose. The EAT granted a 90-day protective award.

ECJ industrial action decision

The ECJ has decided that industrial action was a valid restriction on an employer's rights where it was for the purpose of protecting jobs and terms and conditions which were under threat.

However, the ECJ indicated that there is a licence for the courts to scrutinise the reasons for industrial action and to decide whether a trade union had another way of achieving its objectives — one that was less restrictive of the employer's right to freedom of establishment.

New rates of SSP, SMP, SPP and SAP

The Government has announced its proposed new rates of Statutory Sick Pay (SSP), Statutory Maternity Pay (SMP), Statutory Paternity Pay (SPP) and Statutory Adoption Pay (SAP) — subject to Parliamentary approval.

For SSP, the weekly rate for days of sickness absence on or after 6 April 2008 is £75.40 for employees earning £90.00 per week or more. From the first payment week starting on or after Sunday 6 April 2008, the standard weekly rate of SMP, SPP and SAP is £117.18. As ever, rules apply as to the rate payable being the lesser of the standard rate or 90% of the employee's earnings, and rules apply to the first six weeks of SMP.

Full details can be found at: *www.hmrc.gov.uk/employers/pay-rates-2008-2009.pdf*.

New tribunal maximum limits

The proposed annual rises in the maximum compensation awardable by tribunal have been announced. A "week's pay" (for calculating basic awards and redundancy payments) rises from £310 to £330. The maximum compensatory award (where a maximum applies) rises from £60,600 to £63,000. The new limits apply to dismissals occurring on or after 1 February 2008.

In two unrelated developments, tribunal chairpersons are now to be known as "employment judges" and the Government has launched a consultation on reform of the tribunal service (available at *www.tribunals.gov.uk/Documents/Transforming%20Tribunals.pdf*). ■

Redundancy and mobility clauses

The Court of Appeal has addressed the interrelation of contractual mobility provisions with redundancy procedures. The decision demonstrates that redundancy entitlements and any applicable contractual redundancy procedures may well not be engaged if employees' contracts permit the employer to enforce relocation. Charles Wynn-Evans, Partner at Dechert LLP, explains.

In the case in question, *Home Office v (1) Peter Evans (2) Ian Laidlaw* [2007] EWCA Civ 1089, the relevant employees were immigration officers based at Waterloo International Rail Terminal in London. They had previously been employed at Heathrow Airport. Due to organisational changes, there was no longer a need for immigration service staff to be based at Waterloo. The employer commenced consultations and the employee on whom this article focuses was informed that his employment would be transferred to Heathrow.

Two of the affected employees resigned, arguing that they had been constructively and unfairly dismissed. One employee argued that he was not a mobile employee. The other — the one whose claim this article addresses — argued successfully not only that there was a redundancy situation but that the Home Office had acted in fundamental breach of contract by invoking the mobility provisions in the relevant contracts of employment in order to avoid following its own procedures.

The relevant redundancy policy required the Home Office to consult both the relevant local trade union representatives and departmental trade union representatives at the earliest opportunity where staff surpluses arose or where it was evident that they were likely to arise. This applied irrespective of the number of staff likely to be affected and irrespective of whether redundancies would be voluntary or compulsory. The Home Office's appeal was dismissed by the EAT and the matter proceeded to the Court of Appeal.

The employees' contracts provided that, if the employee was a mobile member of staff, he or she was liable to be transferred to any civil service post whether in the UK or abroad. Following its decision to close Waterloo International Terminal, the position which the Home Office adopted was that it wished to offer alternative employment that best matched individual preferences with available vacancies elsewhere in the immigration service. This would be carried out with regard to mobility arrangements for employees: mobile staff might be compulsorily transferred to meet business needs as permitted by their terms and conditions of employment, and non-mobile staff might be transferred to posts within reasonable daily travelling distance.

The employee on whom this article focuses argued that the Home Office was not entitled to invoke the mobility provisions to transfer him to Heathrow. As the situation was one of possible redundancy, he contended that the Home Office policy was engaged and that the Home Office had invoked the mobility obligations deliberately in order to avoid the requirement of formal consultation with the unions in accordance with the redundancy policy. In so doing, it was alleged that the Home Office had conducted itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee which is implied into all contracts of employment. Accordingly, the employee was constructively dismissed as he resigned promptly (or within a reasonable time) in response to the Home Office's breach of contract.

The employment tribunal found that the Home Office had initially concluded that all employees would be offered "suitable" alternative employment and that those employees who refused would be dismissed as redundant. However, the Home Office had subsequently decided (after taking legal advice) that it would not apply the redundancy policy and would, instead, invoke the

Redundancy and mobility clauses (cont'd)

contractual mobility provisions. The tribunal concluded that the Home Office was not entitled to change its mind in this way. The fact that the redundancy policy referred specifically to the fact that mobility clauses might be invoked "if necessary" only reinforced this point in the tribunal's view, in the sense that the Home Office had originally decided not to invoke mobility provisions even as part of the redundancy process.

The Court of Appeal decision

The key question was whether the tribunal had erred in law in holding that the Home Office was not entitled to invoke the mobility provisions. In *Curling v Securicor* [1992] IRLR 549 it had been held that, as between invoking mobility clauses to require employees to go to new locations or jobs on the one hand, and on the other hand relying on alternative suitable offers of employment as a defence to claims to redundancy, "what the employer cannot do is dodge between the two attitudes and hope to be able to adopt the most profitable at the end of the day".

The Court of Appeal concluded that the tribunal had been wrong in law. The question was not the Home Office's motive for its change of mind but whether it was legally entitled to invoke the mobility clause. It was clear that, contractually, the Home Office had the ability to invoke the mobility clause. Moreover, the tribunal was incorrect in considering the *Curling* case as being authority for the proposition that an employer is not legally entitled to invoke a mobility clause when a redundancy situation might arise or has arisen on the closure of part of a business. The *Curling* case addressed an entirely different situation.

The employee also sought to argue that the redundancy policy provisions applied contractually in any event. He sought to distinguish between a "redundancy situation" (being a state of affairs, for example, where an employer intends to cease to carry on business in a place of employment) and dismissals by reason of redundancy. The argument was that a contractual redundancy procedure is engaged, effectively automatically, on the occurrence of the redundancy situation, whereas a mobility clause is only applied where actively invoked by the employer. To refuse to operate the redundancy policy, which was engaged by virtue of a redundancy situation arising, was contended to be a fundamental breach of contract.

On a proper construction of the redundancy policy, the Court of Appeal held that the Home Office was bound to follow its redundancy procedure in the event of redundancies being proposed. However, where the mobility provisions were invoked in order to avoid redundancy dismissals, the redundancy procedure did not, at that stage, need to be applied to the relevant employees. The key question was whether the Home Office was dismissing, or proposing to dismiss, the claimants by reason of redundancy. Only at the stage of actual or proposed dismissal would the redundancy policy engage. Nothing prevented use of the contractual mobility provisions prior to that stage.

Conclusion

This decision reinforces the point that, where contracts contain appropriate mobility clauses, employers may be able to require employees to relocate rather than have to declare them redundant. Employers should therefore consider the inclusion of such provisions in their employees' contracts. Dismissal for refusal to relocate could then be defended on the basis of the employees' failure to comply with the contract of employment, rather than as a dismissal by reason of redundancy. That said, of course, given the implied duty to maintain trust and confidence, employers nevertheless need to be careful to ensure that they invoke mobility clauses properly and do not constructively dismiss employees in the way in which they operate relocation provisions, eg by failing to give adequate notice of a relocation. ■

Contact us: **020 8247 1175**

Lyddon v Englefield Brickwork Ltd

EAT/0301/07

Summary

Payments of rolled-up holiday pay could be set off against the entitlement to payment for a specific holiday period, even where there was no written provision in the contract of employment specifying the exact amount that represented holiday pay.

The facts

When the claimant started his job he was told that his pay would be £135 per day, but that this would include holiday pay. No detail was given at this time as to the rate of the holiday pay or the method of calculation. However, when the claimant received his weekly pay, the payslips did show the actual amount paid by way of holiday pay.

The claimant worked for a total of 17 weeks, during which he took two weeks' leave, for which no extra payment was made. He did not at any point query the method of calculation of his holiday pay. After his employment had come to an end he commenced proceedings for breach of the Working Time Regulations 1998, alleging that he had not been paid for the leave.

The employment tribunal

The tribunal found that the company was entitled to set off the amounts that it had paid by way of rolled-up holiday pay against the entitlement to holiday pay, as the payments were sufficiently transparent and comprehensible.

The EAT

In *Robinson-Steele v R D Retail Services Ltd* [2006] IRLR 386 ECJ, the ECJ had held that rolled-up holiday pay arrangements were contrary to EC law. However, it had also held that EC law did not preclude the practice if the relevant sums were transparently and comprehensibly holiday pay.

The EAT in *Smith v Morrisroes (AJ) and Sons Ltd* [2005] IRLR 72 EAT had given guidance. There must be mutual agreement for genuine payment for holidays representing a true addition to the contractual rate of pay for time worked. The best way to meet this requirement would be that: the provision for rolled-up holiday pay was clearly incorporated into the contract of employment; the percentage or amount allocated to holiday pay was identified in the contract and preferably also on any payslip; and records were kept of holidays taken and reasonably practicable steps were taken to ensure that workers took their holidays during the relevant holiday year.

In the present case, the fundamental question was whether there was a consensual agreement identifying a specific sum properly attributable to periods of holiday. The EAT were satisfied that this requirement was met, even if previous EAT guidance had not been followed directly.

Comment

On the basis of *Robinson-Steele v R D Retail Services Ltd* [2006] IRLR 386 ECJ, the Department for Business, Enterprise and Regulatory Reform (BERR) website refers to rolled-up holiday pay being considered unlawful, but suggests that such payments may be offset against any future liability to make payments in respect of annual leave, but for a transitional period only. It is noteworthy that this decision of the EAT makes no reference to any transitional period.

The expectation of the ECJ seems to have been that member states would take measures to prohibit rolled-up holiday pay. However, until such measures are taken, it seems clear that tribunals will allow rolled-up holiday pay to be set off against any entitlement to payment for a specific holiday period, provided the payments are genuine, transparent and comprehensible. ■

Smith v Michelin Tyre plc

[2007] IDS 839 ET

Summary

The summary dismissal of an employee for a one-off breach of the employer's smoking policy fell within the band of reasonable responses and was therefore fair.

The facts

Mr Smith worked for Michelin for 12 years at its Dundee factory. The factory operated a very strict smoking policy because of the use of highly flammable products. Smoking was prohibited in unauthorised areas. Contravention of the smoking policy was specifically referred to in the disciplinary procedure as gross misconduct.

In March 2006, when the smoking ban came into force in Scotland, Michelin reviewed and extended its smoking policy. All smoking in the factory was prohibited but some facilities were made available for smokers outside. Staff were informed of these changes in a presentation and on notice boards.

In September 2006, cigarette butts were found in the factory and Michelin reminded staff of the policy by the publication of a further notice.

On 21 November 2006 Mr Smith went to the staff locker room, opened the fire door and sat smoking. His supervisor saw and reported him. At a company disciplinary hearing, Mr Smith did not deny misconduct but said that he had been under pressure, was suffering from depression, and expressed regret about the incident.

The company's disciplinary panel considered that company policy was clear and that there was insufficient mitigation. Mr Smith was summarily dismissed for gross misconduct.

Mr Smith appealed within the company. At that internal appeal, he admitted the offence but put forward various factors in mitigation. The chair took into account his length of service, the circumstances of the incident, and Mr Smith's depression. The chair also looked at an occupational health report, which referred to a problem with Mr Smith's shoulder but did not refer to any psychological problems.

The chair considered that, as Mr Smith had been well enough to work, the issue of his depression was not relevant. He rejected the appeal. Mr Smith brought a claim of unfair dismissal

The employment tribunal

The tribunal found that Mr Smith had been dismissed for a fair reason and that Michelin's decision to dismiss was not outside the band of reasonable responses.

Michelin had had a no-smoking policy in place for many years and it was clear that smoking in non-authorised areas was considered gross misconduct. This had been reviewed and reinforced following the introduction of smoking legislation. Mr Smith had been fit for work and had therefore been able to comply with the smoking rules.

The tribunal acknowledged that the decision to dismiss was harsh, but accepted that Michelin had to weigh Mr Smith's personal circumstances against the importance of the policy in preserving its business, its property and more importantly the lives of its other staff. The decision to dismiss was not considered unreasonable given the safety issues involved and the long-standing existence of a smoking policy.

Comment

The case serves as a reminder of the importance of having and enforcing a smoking policy, ensuring that employees understand it and that they are aware of the consequences of any breach. This is particularly important since the coming into force of the smoking legislation throughout the UK. ■

GAB Robins (UK) Ltd v Triggs

[2007] ICR 1424 EAT

Summary

Where an employer's conduct has caused an employee's ill health, the employee can recover loss of earnings following the dismissal as part of the award for unfair dismissal, even though the illness pre-dated the dismissal. Where the employer's conduct of a grievance procedure was the "final straw" for the employee, the final straw, viewed alone, need not be unreasonable or blameworthy for the employer nonetheless to be liable.

The facts

Ms Gillian Triggs worked as a secretary at a firm of chartered loss adjusters. Issues regarding her excessive workload had been raised from about April 2001. This resulted in a period of absence due to stress in August 2003. However, no steps were taken to reduce her workload. Also, Ms Triggs considered that she was being bullied by a manager.

By 30 September 2004 Ms Triggs had had enough. She left the office that morning, never to return. She was signed off work as sick, with stress and depression. She submitted a grievance. Some months later, the company sought to resolve the grievance by arranging an informal meeting between Ms Triggs and the manager concerned. She resigned and claimed constructive dismissal.

The employment tribunal

The tribunal found that all trust and confidence finally broke down when the employer failed to carry out an adequate investigation into the claimant's grievances about her workload and the pressure she was under because of it, and because of the manager's manner towards her. She was constructively dismissed and her dismissal was unfair.

The EAT

The employer argued that the claimant had resigned on the basis of the employer's failure to uphold her grievance, and that this required the tribunal to consider whether the employer's conduct of the grievance procedure was within the range of reasonable responses.

The EAT rejected this argument. In a true "final straw" case, the range of reasonable responses test had no application to the employer's conduct of a grievance procedure where that conduct is the final straw. The employee was entitled to rely on the employer's conduct of the grievance procedure as contributing materially to the earlier acts relied on.

The employer also argued that the loss flowing from psychiatric illness caused by an employer's conduct can only be compensated as part of an award for unfair dismissal if it occurs as a consequence of the dismissal. It must therefore post-date the effective date of termination. Where the illness pre-dates the dismissal, the employee's cause of action lies, instead, in an action for damages for personal injury in the civil courts.

The EAT did not agree with this. A constructive dismissal consists of repudiatory conduct by the employer and acceptance of that breach by the employee. Here, the employer's conduct consisted of a breach of the implied term of trust and confidence from an accumulation of events dating back to 2001. The breach caused Ms Triggs' illness in September 2004. The conduct by the employer, amounting to a breach of the implied term, formed part of the constructive dismissal. The claimant's ill health caused by that breach was to be treated as a consequence of the dismissal, leading to loss of earnings.

Comment

The employer would have been in a better position had it actually dismissed the employee unfairly on the grounds of ill-health capability. It could not then have been said that her illness was caused by such a dismissal, and it might be argued that any loss of earnings was caused by the illness and was not a consequence of the dismissal. ■

Palacios De La Villa v Cortefiel Servicios SA

[2007] IRLR 989, ECJ

Summary

In a case that originated in Spain, a compulsory retirement age was found to be lawful under EU law. Although compulsory retirement at a pre-set age was found to be age discrimination, it was justified — and therefore lawful — as a reasonable measure to promote the legitimate aim of promoting overall employment.

The facts

Félix Palacios De La Villa worked for Cortefiel Servicios SA, in Spain, as a manager. Under a collective agreement, the company operated a compulsory retirement age of 65. In July 2005, Mr Palacios De La Villa (who was born in 1940) was notified by the company of compulsory retirement.

Mr Palacios De La Villa claimed that his compulsory retirement was unlawful as it was based entirely on his age and was therefore discriminatory on the grounds of age.

The Spanish court

The Spanish domestic court (Juzgado de lo Social No. 33) referred the following two questions to the ECJ.

1. Does the European prohibition on age discrimination preclude a national law under which compulsory retirement clauses are lawful?
2. If so, should the Spanish court not apply its national law (which permitted compulsory retirement)?

The European Court of Justice

Disagreeing with an earlier opinion of the Advocate General, the ECJ held that the compulsory retirement age, in this case, was lawful.

Automatic termination of employment on reaching a retirement age was direct age discrimination. However, Article 6 of Directive 2000/78 permits this if, within the context of national law, the discrimination is objectively and reasonably justified by a legitimate aim. The means of achieving that aim must be proportionate and necessary. Legitimate aims include a legitimate employment policy.

In this case, the retirement clause was part of a national policy seeking to promote better overall access to employment. This was a legitimate aim and the means of achieving it was proportionate.

Mr Palacios De La Villa's claim therefore failed.

Comment

Following this decision, it is likely that the UK default retirement age of 65 will also be deemed to be lawful.

There is no established ECJ precedent for the UK on this point as yet. All UK age cases that seek to argue that the UK's national retirement age of 65 is unlawful were put on hold pending an ECJ decision in the case brought by Heyday, which is part of Age Concern. ■

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