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1: The scope of equal pay claims

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In *North and others v Dumfries and Galloway Council* the Supreme Court considered the scope of comparison in equal pay claims.

The claims were brought before the employment tribunal by 251 female classroom assistants, support for learning assistants and nursery nurses who were wishing to compare themselves for equal pay purposes to male manual workers employed by the same local authority as groundsmen, refuse collectors, refuse drivers and a leisure assistant. The school workers' terms were governed under the Blue Book collective agreement, whereas the manual workers' terms were set under the Green Book.

The question before the tribunal was whether they were "in the same employment" within the meaning of the Equal Pay Act 1970 (see now the Equality Act 2010.. To be in the same employment within the meaning of section 1(6) of the Act, the female workers had to be employed by the same or an associated employer as the male manual workers at either the same establishment or a different establishment where common terms and conditions are observed, whether generally or for the relevant classes of employee.

The employment judge defined the question in the following way:

"In the present case, the claimant and comparators are neither employed under the same terms and conditions nor in the same establishment. It is therefore necessary for the claimants to satisfy the Tribunal that if their comparators were employed at their establishment, they would be employed under broadly the same terms to those that they are employed under at present."

The employment tribunal determined the "same employment" issue in the claimants'

favour. It held that, if the comparator manual workers had been employed to do their job in the claimant's school, they would have been on the same Green Book terms and conditions as they currently enjoyed.

The local authority appealed to the Employment Appeal Tribunal (EAT) where Judge Lady Smith, sitting alone, held that a woman who seeks to compare her terms and conditions with those of a man who does not work at the same establishment as she does, must first show that there is a "real possibility" that he could be employed there to do the same or a broadly similar job to the one which he does at the other establishment. The EAT found that such a finding was not open to the tribunal on the evidence.

The Scottish Court of Session dismissed a further appeal by the local authority and the appellants appealed to the Supreme Court.

On appeal, the Supreme Court found that it was clear that the difference in treatment between the claimants and their comparators was attributable to the local authority which employed them and it was in a position to put right the discrepancy if required to do so. Different jobs that could not be carried out in the same workplace could be of equal value for equal pay purposes. The fact that those jobs must be done in different places was no barrier to equalising terms. Lady Hale, giving the only judgement, held that the "same employment test" should not be used as a proxy for other elements of an equal pay claim (such as the "like work" and "work rated as equivalent" tests) as a way of avoiding the difficult issues they raised. Its function was to simply weed out those cases in which geography played a significant part in determining what those terms and conditions were.

The Supreme Court restored the decision of the employment tribunal, finding that it was entitled to answer the question in the way that it did.

2: TUPE: A dynamic interpretation of collective bargaining clauses is not permissible

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In *Alemo-Herron v Parkwood Leisure Ltd* the European Court has delivered its long awaited judgment in the litigation concerning whether clauses in employment contracts which oblige an employer to follow determinations of a third party (such as a national negotiating body) in setting pay are binding on a transferee employer.

In British law, the answer was originally that such clauses are dynamic in nature, thus transferring to the new employer under TUPE even if the new employer has no say in the national bargaining arrangements. In the case of *Werhof* [2006] ECR1-2397 the European Court held, however, that such clauses are static in nature, thus obliging the new employer to follow only the current collective agreement affecting pay and conditions and not future determinations by a third party when the employer is not a party to the negotiations.

In this case, a public sector to private sector transfer (the contracting out of Lewisham Council's leisure services), it was argued that the dynamic interpretation was permissible under British law even if not permitted under European law, under the principle that a Member State may, it its domestic law, grant rights more favourable than contained in European law.

The European Court disagreed.

This was because a dynamic clause referring to collective agreements undermines the balance between the interests of the transferee in its capacity as employer, on the one hand, and those of the employees, on the other. Under Article 16 of the Charter of Fundamental Rights of the European Union, an employer must have the right to conduct a business and assert its interests effectively in a contractual process to which it is party. This allows it to negotiate the process of determining changes in the working conditions of its employees with a view to its future economic activity.

A dynamic interpretation was therefore inconsistent with the Charter. As such, Member States are not permitted to allow dynamic clauses referring to collective agreements negotiated and adopted after the date of transfer where the transferee does not have the opportunity of participating in the negotiating process by which such a collective agreement was concluded.

3: The new unfair dismissal compensation cap in force soon

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The measure in the Enterprise and Regulatory Reform Act 2013 which caps the compensation element of unfair dismissal awards at 12 months' pay in addition to the existing overall cap of £74,200 (the lower of which would apply in an individual case) is expected to come into force at the end of the month. It applies where the effective date of termination is after the order is made.

4: Protected Pre-Termination Negotiations and Settlement Agreements come into force

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The following parts of the Enterprise and Regulatory Reform Act 2013 come into force on 29 July 2013.

- **Pre-termination negotiations**. These are negotiations which, without there necessarily having to be a pre-existing dispute, may not be referred to, in evidence, in most unfair dismissal cases.
- **Settlement agreements**. Compromise agreements and compromise contracts are to be renamed as "settlement agreements".

Finally, the Employment Code of Practice (Settlement Agreements) Order 2013 (SI1665/2013) was made on 04 July 2013. This provides that the statutory ACAS Code of Practice on settlement agreements will operate from 29 July 2013.

5: Government call for evidence on the whistleblowing framework

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The Government has announced a call for evidence on whistleblowing law. It believes that the overall framework works well, but changes in the way the labour market functions and ways of working since the introduction of the framework in 1998 mean that the time is

right to look at its effectiveness. The Government would like to establish whether:

- the *categories* of disclosure which qualify for a protection are still effective in capturing or incidences of wrong doing.
- the *methods* by which the disclosure is made are still relevant and effective.
- the list of *prescribed individuals/bodies* i.e. to whom the disclosure can be made, captures the individuals and bodies sufficiently to ensure that whilstblower benefits from the protection.
- the coverage of the *definition of worker* is sufficiently broad to capture all those that need to be protected by the framework.

The call for evidence may be accessed *here*.

6: Consultation on strengthening and simplifying the civil penalty scheme to prevent illegal working

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On 9 July 2013 the Government published a consultation on strengthening and simplifying the civil penalty scheme to prevent illegal working. The consultation seeks views on whether the current civil penalty scheme should be tougher on employers that continue to use illegal workers, and whether the processes should be simplified to make it easier for compliant employers to fulfil their obligations.

Any proposed changes would be via a new Immigration Bill which would not begin its passage through Parliament until Autumn 2013.

7: Joint and several liability for failure to inform and consult under TUPE

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Regulation 15(9) of the TUPE Regulations 2006 provides that the transferee shall be jointly liable with the transferor in respect of compensation payable under Regulation 15(8)(a) or Regulation 15(11) (transferor's failure to inform or consult under Regulation 13).

A common myth about this provision is that a tribunal has the ability to apportion liability between the transferor and transferee, according to blame. But this is not the case.

In *Todd v Strain* (UKEATS/0057/09/BI) the EAT (Underhill J) held quite specifically that a tribunal has no power to apportion liability between the transferor and transferee depending on responsibility or blame. That has to be determined in the ordinary courts.

In *Country Weddings Ltd v Crossman* the EAT has agreed, applying *Todd v Strain*. In this case, it was established that here had been a breach of TUPE in that the transferor had failed to inform an employee of the fact that there was to be a TUPE transfer, of both the date of the transfer and the reasons and it had also failed in its obligation to secure the election of an employee representative. The employment tribunal chose to apportion the compensation for a breach of the Regulations so as to make the whole sum payable by the transferor, Country Weddings.

But this was wrong. Where orders for compensation are made in claims in cases involving liability of more than one party, there is no power on the part of the employment tribunal to do anything other than to make an order for joint and several liability. If there is an issue between the parties as to the relative share that they should bear, this is a matter that has to be sorted out in the county court or the High Court under the provisions of the Civil Liability Contribution Act. His Honour Judge Serota QC noted that the *IDS Employment Law Handbook* March 2011 on *Transfer of Undertakings*, paragraph 3.1.20 suggested that an employment tribunal has jurisdiction to apportion liability. He considered this was simply incorrect.

8: Information and consultation, European Law and the Woolworths and BonMarché insolvencies

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In our June Bulletin we reported the decision in *USDAW v WW Realisation 1 Ltd* in which the EAT applied a purposive approach to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 concerning the duty to inform and consult on multiple redundancies. The EAT, it will be remembered, considered the wording of TULRe(C)A Section 188 under which the duty to inform and consult is triggered when there is a proposal to dismiss as redundant 20 or more employees at *one establishment* within a period of 90 days or less. The EAT decided that the words “at one establishment” were to be disregarded as being in breach of European law. The effect of its decision is that once it is proposed that more than 20 employees *in a single business* are to be made redundant, their location is irrelevant. This means, as we advised last month, employers should collectively consult whenever 20 proposed redundancy dismissals are being considered, regardless of where those dismissals are to take place. It is not yet known whether the case will go to appeal although we understand this is being considered. The full case report for the decision in the combined appeals of *USDAW v Ethel Austin Ltd (In Administration)* and *USDAW v (1) Unite the Union (2) WW Realisation 1 Ltd (3) Secretary of State for Business, Innovation and Skills* is now available *here*.

In the meantime, the Northern Ireland Industrial Tribunal, in the case of *Lyttle v Bluebird UK Bidco 2 Limited*, has decided to refer the construction of the equivalent legislation in Northern Ireland and of the Collective Redundancies Directive to the European Court. Bluebird is the current owner of the BonMarché business. In January 2012 BonMarché had 394 stores throughout the United Kingdom and Isle of Man and there were 4000 employees employed in those stores. For administrative purposes, BonMarché regarded its single Isle of Man store and all its Northern Ireland stores as constituting one region within its overall UK business. In the Northern Ireland region there were 20 stores employing 180 people. Redundancies occurred in the spring of 2012. The store on the Isle of Man was closed and the number of stores in Northern Ireland reduced to 8. It was conceded that insufficient information and consultation under Part VIII of the Employment Rights (Northern Ireland) Order 1996 (the equivalent of s.188 of TULRe(C)A) took place. The claimants worked in shops where fewer than 20 employees were employed and when those stores closed the question was whether they were entitled to a protective award because of their employer’s failure to inform and consult.

The Chairman of the Industrial Tribunal (Mr Paul Buggy) decided to refer the construction of the Collective Redundancies Directive (and hence its effect on Northern Ireland legislation) to the European Court for an opinion (pursuant to Article 267 of the Treaty on

the Functioning of the European Union).

The case, which had been given the number C-182/13 refers a number of questions to the European Court. Item 3 deals with the point taken in the *USDAW* case:

"3. In Article 1(1)(a)(ii) of the Directive does the phrase "at least 20" refer to the number of dismissals across all of the employers establishments, or does it, instead, refer to the number of dismissals *per establishment* (in other words, is the reference to "20" a reference to 20 in any particular establishment or to 20 overall?)."

It could take 18 months for the European Court to make a ruling on this matter.

9: High Court upholds a twelve month restrictive covenant preventing soliciting of customers

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In *Romero Insurance Brokers Ltd v Templeton and another*, the High Court considered a senior insurance broker's claim that he had been constructively dismissed, and examined the enforceability of a non-solicitation restrictive covenant.

Any contractual term in an employee's contract restricting his activities after termination is void for being in restraint of trade and contrary to public policy unless the employer can show it has a legitimate interest to protect and the protection sought is no more than is reasonable. However, if an employer terminates an individual's employment contract in breach of its terms (for example by constructively dismissing him or dismissing without contractual notice) the individual can argue he should be freed from the terms of the agreement that are intended to apply after termination, including post termination restrictions. So this tactic is often used by employees claiming constructive dismissal, who argue they are thereby no longer bound by post termination restrictions because of the employer's fundamental breach of contract.

In *Romero*, however, the High Court upheld a twelve month non-solicitation restrictive covenant in a senior insurance broker's contract and awarded damages and an injunction to his former employer for the remaining period of the covenant. It dismissed the broker's argument in this particular case that he had been constructively dismissed as a result of a sham redundancy. The court found that the employer had made a genuine attempt at consultation but this had been frustrated when the broker refused to engage in the process. Overall then, the employer's conduct was not consistent with a repudiation of the contract.

The covenant would therefore apply, unless it was unreasonable. But here, the court found that the twelve month period of restraint was reasonable in the context of selling insurance, where policies are traditionally renewed annually. The broker had been specifically recruited in order to build up the employer's business, and it was legitimate for the employer to seek to protect its client relationships. However a longer restriction would not have been enforceable.

10: Employee constructively dismissed following reinstatement when required to undergo a retraining programme

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In *Thomson v Barnet Primary Care Trust* the EAT held that a district nurse, who was summarily dismissed on capability grounds and then reinstated following a successful appeal with back pay, was constructively dismissed when she resigned over the terms of her return to work. Her employer, a primary care trust, downgraded the original sanction to a 3 year final written warning and imposed a series of conditions on her return, including a training programme and a competency assessment. Pending her agreement to these terms, she was effectively suspended on full pay.

The EAT overturned an employment tribunal's decision that the imposition of the conditions amounted to an offer of a new contract, which the employee accepted. Although she never returned to her post, her employment had been reinstated, the effect of which was that there had been no dismissal. However, the primary care trust's handling of the disciplinary process, combined with the subsequent imposition of the conditions, amounted to a repudiatory breach of her contract. The tribunal had erred in its conclusion that the employee had waived the right to complain about breaches which occurred prior to the original dismissal.

This is an interesting case on constructive dismissal and when an employee is entitled to treat the employer's conduct as terminating the contract. We follow up some of these principles about constructive dismissal in our client briefing below.

11: Constructive dismissal: client briefing

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This client briefing sets out the key issues an organisation needs to understand when an employee makes a claim for constructive dismissal.

What is constructive dismissal?

Constructive dismissal is the term used where an employee resigns in response to their employer's conduct in breach of an important term of their employment contract. This can be a breach of an express or an implied term.

Express terms

An example of a breach of an expressed term is where an employer fundamentally changes an employee's duties without being contractually entitled to do so.

Implied terms

Implied terms are incorporated into every employment contract by law, regardless of whether they have been expressly agreed between the parties. Breach of the implied term of mutual trust and confidence is often relied on by employees where the relationship between them and their employer has irrevocably broken down.

Repudiatory breach

When an employer has breached an important express or implied term of the employment contract, an employee is entitled to treat himself as having been dismissed. The employer's conduct is often referred to as a repudiatory breach.

When will a claim for constructive dismissal succeed?

For a constructive dismissal claim to succeed the employee must show the following:

- The employer was in repudiatory breach of the employment contract.
- He resigned in response to that breach.
- He did not delay too long in resigning in response to the employers breach. If the employee continues working for any length of time without leaving he is likely to lose his right to treat the contract as breached and will be regarded as having chosen to affirm the contract.

Repudiatory conduct

Repudiatory conduct may not only be just one incident; sometimes it is a series of incidents or a pattern of behaviour which, taken as a whole, amounts to repudiatory conduct. In these circumstances, an employment tribunal may consider that any previous breaches of contract that may have been waived by the employee should be treated as part of a continuing course of conduct.

Compensation for constructive dismissal

If an employee can establish that he has been constructively dismissed, an employment tribunal will assess the loss that he has suffered. The employee may received compensation for:

- Breach of contract.
- Unfair dismissal.

Breach of contract claims

If an employee resigns without giving notice an employment tribunal will consider what loss he has suffered as a result of his employment contract terminating without notice. The compensation for that loss will be designed to put the employee in the financial position he would have been in had he been dismissed in line with his contract.

Unfair dismissal claims

Compensation for unfair dismissal is usually only available to employees who have worked for their employer for at least two years (previously one year if their employment started before 6 April 2012). An employment tribunal will consider whether the employee's dismissal was fair or unfair by looking at a range of factors including:

- The reason for dismissal.
- Whether the employer acted reasonably.

It will be difficult for a business to show that it acted reasonably if it has in fact breached a term of the employee's contract, making it more likely that the dismissal will be judged unfair.

What compensation may an employee be entitled to?

If an employee is successful in his claim for unfair dismissal, he will be entitled to a basic award calculated on the basis of his age, salary and length of service. In addition, an employment tribunal has discretion to make a compensatory award for any loss flowing from his dismissal. This takes into account the loss of earnings from the date of

termination of the employment. However, as with compensation for breach of contract, the tribunal will look at whether the employee has taken reasonable steps to mitigate his loss.

Mitigation of loss

An employee is under an obligation to mitigate his loss (for example by looking for another job). This obligation starts from his last day of employment including the duration of the period that would have been his notice period.

If the employee finds another job quickly, any compensation payable will be reduced by the amount of money he earned during the period that would otherwise have been his notice period. An employment tribunal may reduce compensation payable if it finds that the employee has not taken reasonable steps to seek alternative employment.

Time limit for constructive dismissal claims

A claim for unfair constructive dismissal needs to be lodged at an employment tribunal within three months of the date of the termination of employment, although ideally, it should be lodged as soon as possible. Modified rules will apply of course when early conciliation through ACAS comes into force in April 2014.

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