

Parkwood Leisure Ltd v Alemo-Herron

The claimants' contracts of employment specified that their salary would be 'in accordance with collective agreements negotiated from time to time' by the National Joint Council for Local Government Services (NJC).

Alamo-Herron transferred under TUPE first to CCL Ltd in 2002 then to Parkwood in 2004. Parkwood was not a party to NJC negotiations on pay in 2004 and refused to pay the claimants at the revised rate. The claimants lodged a claim for unlawful deduction from wages. They argued that the clause in the contract relating to pay had been continuously in force since their original transfer, and therefore obliged Parkwood to pay the increased rate of pay.

The tribunal rejected the claim. The tribunal relied on the ECJ's ruling in *Werhof v Freeway Traffic Systems GmbH and Co KG* that that terms referring to a collective agreement negotiated by a third party only operate until the agreement expires, terminates or is replaced. In this case, the tribunal decided that as Parkwood had integrated the transferring employees into their core business, then TUPE operated so as to terminate any existing collective agreements (now TUPE Reg 6).

The terms negotiated by the NJC in 2004, therefore amounted to a fresh collective agreement and no contractual liability to pay the revised rate arose.

The EAT overturned the tribunal's decision noting that domestic decisions, such as *Whent* and others v. *T. Cartledge Ltd* [1997] IRLR 153, showed that the TUPE Regulations provide transferring employees with greater rights than were recognised in *Werhof*, i.e. domestic law has approved the 'dynamic' approach to employment contracts, under which pay can be set in line with occurrences and decisions involving only third parties. Parkwood appealed.

The Court of Appeal upheld Parkwood's appeal. Although domestic cases such as *Whent* were consistent with a 'dynamic' interpretation of TUPE, they were wrong in the light of *Werhof* and should not be followed. *Werhof* meant that Article 3(1) must have always required a 'static' interpretation of clauses in employment contracts which refer to third party collective agreements. Thus the UK had no obligation to provide any stronger protection for employees when implementing the Directive. The claimants' claims therefore failed.

Keeping You One Step Ahead

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Lyons v Mitie Security Ltd

Mr Lyons' paid holiday entitlement was four weeks, accrued evenly across the year. Leave must be requested 4 weeks in advance: any request of a shorter period would be considered on its merits and in terms of staffing requirements. By the last week of the leave year, Mr Lyons had no more work scheduled for that month and 9 days holiday still due to him. He asked for payment of those 9 days before the end of the leave year on 31 March.

Mitie's response on the leave point was that Mr Lyons was contractually obliged to give four weeks' notice of a leave request, he could not carry leave over and he could not be paid in lieu of leave while still actively working. Mr Lyons resigned and claimed constructive unfair dismissal, with part of the claim based on Mitie's refusal to pay him his holiday pay. An employment tribunal dismissed his claims. It did not accept his key contention that Mitie's refusal to grant leave, and consequently to pay him holiday pay, could amount to a fundamental breach of contract.

Considering Regulations 13, 15 and 17 of the WTR (the right to leave and the position on notice requirements for leave), the EAT asked whether an employer is legally obliged to permit an employee to take all of his paid leave within the leave year, even if the leave is requested towards the end of the leave year when it may not fit with the staffing patterns of the business. Noting the absence of case law, the EAT was satisfied that the right to statutory leave has been made subject to notice provisions, and thus the loss of leave at the end of the leave year could follow. The EAT also noted that the right to annual leave is expressed in the WTR as an 'entitlement'.

Therefore the right to statutory leave in Regulation 13 of the Working Time Regulations is not unchallengeable; either statutory or contractual notice requirements could correctly operate so as to result in the loss of the right to leave at the end of the year leave in respect of leave not taken: i.e. if you are able to take it, then "use it or lose it"

Standard Life Health Care Ltd v Gorman and ors

Mr Gorman and five colleagues were agents selling medical insurance for Standard Life. They resigned, all together at the same time, to go and work for a competitor. All professed to resign with immediate effect, rather than giving the employer the three months' notice required by their contracts.

Standard Life, claiming that the six were in serious breach of their duties of good faith, commenced proceedings. It refused to accept the breaches and terminate their contracts; rather it insisted on retaining them for the full three month period, suspended them, and sought, as emergency relief, injunctions, which were granted, to prevent them selling health insurance for any other firm. Mr Gorman and his colleagues were paid solely by way of commission. They had no basic rate of pay, therefore they had no salary.

Mr Gorman and his five colleagues appealed against the injunctions arguing that they had a right to work, of which they were being deprived.

The Court of Appeal rejected their claims. An employee who has a right to work has that right subject to the qualification that he has not, as a result of some prior breach of contract or other duty, demonstrated in a serious way that he is not ready or willing to work and that he has not rendered it impossible or reasonably impracticable for the employer to provide work. The obligation in this case to provide work in circumstances where the agents, as here, had broken their duties of good faith and had registered themselves to work with a competitor, has ceased to exist. Mr Gorman and his five colleagues had rendered it impossible for the employer to provide work.