

Hacking and Paterson and anor v Wilson EAT IDS 915

Ms Wilson, a property manager, went on maternity leave. She made a formal request for flexible working upon her return. However, the employer’s policy was to refuse any requests for flexible working put in by all property managers. It therefore rejected her request.

Unable to combine working full time with her childcare arrangements, Ms Wilson resigned. She presented a tribunal claim for indirect discrimination contrary to S.1(2)(b) of the Sex Discrimination Act 1975. However, the employer applied for Ms Wilson’s claim to be struck out on the basis that it had no reasonable prospect of success. The employer argued that the pool had to be defined by reference to the provision criteria or practice (PCP) at issue and was therefore confined to those property managers at the company who wanted flexible working. Since all such managers (whether male or female) would be refused any request to work flexibly, there could, in the employer’s view, be no case of indirect discrimination.

The tribunal refused to strike out the claim. It considered that Ms Wilson had put forward an arguable case both that the pool should extend to all the company’s property managers and that consideration of this pool indicated prima facie indirect discrimination.

The tribunal, however, considered that the pool was not necessarily confined to those managers who were affected by its flexible working policy.

The EAT upheld the tribunal’s decision not to strike out the claim. When assessing whether the employer’s refusal of Ms Wilson’s request for flexible working following her maternity leave amounted to indirect sex discrimination, the appropriate pool for comparison was restricted to property managers who also wanted to work flexibly.

The fact, however, that everyone in that pool would have received a negative response did not necessarily mean that there was no case of indirect discrimination against women. The question was whether the refusal of the claimant’s request gave rise to a particular disadvantage that was liable to be experienced by women, as a group, as opposed to men, as a group.

The EAT therefore remitted the case to the tribunal to consider – with specific reference to a pool consisting of property managers who wanted flexible working – whether or not the employer’s refusal to allow flexible working put female property managers as a group at a ‘particular disadvantage’.

Keeping You One Step Ahead



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Lancaster University v The University and College Union EAT IDS 914

Between 1996 and 2009, when University staff whose fixed-term contracts were about to expire, the University would consult with the individuals concerned and then provide the union with lists of staff whose contracts were due to expire. The union had gone along with this procedure for over 12 years, but when a new union official was appointed she immediately identified that the information and consultation procedures adopted in the preceding period were not compliant with S.188 of the Trade Union and Labour Relations (Consolidation) Act 1992, as 20 or more redundancies had been proposed within 90 days on each occasion.

The union official applied to a tribunal for a protective award under S.189 TULR(C)A in respect of the University's failure to inform and consult on the last occasion. The tribunal found that the University's established procedure did not comply with S.188. The tribunal referred to the Court of Appeal's decision in *Susie Radin Ltd v GMB and ors* in terms of remedy.

The *Susie Radin* case was authority for starting with the maximum award payable, 90 days, and only reducing it if there are mitigating factors. The tribunal considered that there was a significant mitigating factor - that the union 'effectively condoned' the University's practices for around 12 years. It therefore chose to make an award of 60 days' pay.

The EAT rejected the University's appeal against the liability and remedy decisions. The failure to undertake any meaningful consultation and to provide the full information required under S.188 TULR(C)A meant that there had been very serious breach. As to the award of 60 days' pay and not 90 days', the tribunal was effectively saying that, because of the history, the University may not have been fully alert as to the need for collective consultation and only became aware of it over a period of time. It had been 'lulled into a false sense of security' and in these circumstances 60 days' pay was reasonable.

GISDA Cyf v Barratt [2010] IRLR 1073

Following a succession of appeals in this case, the Supreme Court were asked to consider: what is the effective date of termination (EDT) where an employer notifies an employee by letter that they have been summarily dismissed on grounds of a repudiatory breach of contract? Under the Employment Rights Act 1996, where a contract of employment is terminated without notice, the effective date of termination is the date on which the termination takes effect.

The Court of Appeal held that this is not when the employer decided to dismiss, or when the dismissal letter was written, or when it was posted, or when it was delivered. Instead, it is when the employee actually reads the letter of dismissal (or had a reasonable opportunity of reading it).

On appeal to the Supreme Court (SC), it was argued that on a conventional contractual approach, that a contract can be terminated unilaterally without the other party being aware of it, and that whether it remained in force should not depend on what the other party did or had an opportunity to do.

The SC rejected this new ground of appeal and explaining that the need to segregate intellectually common law principles relating to contract law, even in the field of employment, from statutorily conferred rights, is fundamental.

Given this context, the SC held that the EDT cannot be when the dismissal letter is sent, since that could mean that the limitation period could either expire completely before the employee became aware or could be unrealistically shortened. The correct principle is that time does not begin to run until an employee has been informed that he or she has been dismissed, or has had a reasonable opportunity of discovering that. In determining whether the employee had a reasonable opportunity to find out about the dismissal, the correct test is to take into account the reasonableness of his or her behaviour rather than concentrating entirely on what is practically feasible.

The SC added that the best way to ensure that there is no misunderstanding about the EDT is informing employees face-to-face that they have been dismissed.