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ABSENCE OF APPEAL IN UNFAIR DISMISSAL CASES, THE CONCEPT OF "WORKING TIME" UNDER THE WORKING TIME DIRECTIVE AND PART-TIME WORKERS

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SUMMARY

Our October 2021 update includes recent case developments with regard to whether a lack of an appeal renders dismissals unfair, the concept of "working time" under the Working Time Directive as well as less favourable treatment for part-time workers.

THE COURT OF APPEAL CONCLUDES THAT THE ABSENCE OF AN APPEAL WILL NOT, IN ITSELF, RENDER A DISMISSAL UNFAIR PROVIDED AN EMPLOYER HAS ADOPTED A FAIR REDUNDANCY SELECTION PROCESS. HOWEVER, THE LACK OF AN APPEAL WILL BE ONE OF THE FACTS TO BE CONSIDERED IN DETERMINING FAIRNESS.

Two Claimants, who worked as teachers at a community secondary school, were made redundant by Gwynedd Council following a reorganisation of schools in the area. The school at which the Claimants worked was permanently closed in 2017 and was replaced with a new school on the same site. The Claimants were given the opportunity to apply and interview for a role at the new school but both were unsuccessful and were dismissed by reason of redundancy. There was no consultation over the closure, and the claimants were not offered a right of appeal. The Claimants both brought claims for unfair dismissal.

At first instance the employment tribunal held the dismissals were unfair because of the failure to provide the Claimants with a right of appeal, the absence of consultation and because of the manner in which they were required to "apply for their own jobs". The tribunal also stated that it requires "truly exceptional circumstances" to refuse an employee the right to appeal against a dismissal and that such exceptional circumstances did not exist in this case. The Council appealed, arguing that the tribunal had applied the guidelines for employers carrying out redundancy dismissals inflexibly. The EAT dismissed the appeal and upheld the tribunal's decision that the Claimants had been unfairly dismissed.

The Council appealed to the Court of Appeal on a number of grounds, one of which was that it was an error of law to apply a test of "truly exceptional circumstances" in determining the fairness of the lack of a right of appeal. The Court of Appeal rejected the Council's appeal and upheld the decisions that the Claimants had been unfairly dismissed. The Court agreed it would be wrong to find a dismissal unfair solely because of the failure to provide a right of appeal. The absence of an appeal is just one of many factors to be considered in determining whether a dismissal is unfair.

Why this matters?

The case highlights the importance of a fair redundancy process. Whilst the Court of Appeal concluded that the absence of an appeal will not in itself render a dismissal unfair, it is still a fact to be taken into account and employers should exercise caution and seek legal advice before/during a redundancy process so that they are prepared strongly to defend claims of unfair dismissal.

Gwynedd Council v Barratt & others

THE ECJ HELD THAT A REST BREAK GRANTED TO A WORKER DURING DAILY WORKING TIME, DURING WHICH THE WORKER MUST BE READY TO RESPOND TO A CALL-OUT WITHIN A TIME LIMIT OF TWO MINUTES IF NECESSARY, CONSTITUTES "WORKING TIME" UNDER ARTICLE 2 OF THE WORKING TIME DIRECTIVE (DIRECTIVE 2003/88).

In *XR v Dopravni podnik hl m Prahy* the Claimant was employed as a firefighter. The Claimant was subject to a shift-working regime and during each 12-hour shift was entitled to two food and rest breaks of 30 minutes each. Between 6.30am and 1.30pm, the Claimant could go to the canteen, situated around 200 metres from his work station, provided that he remained on standby to be picked up on two minutes' notice in front of the canteen in the event of an emergency (communicated by a transmitter that he took with him on his break). Breaks were included in the calculation of the Claimant's remuneration **only** if they were interrupted by a call-out. Any uninterrupted rest breaks were unpaid.

The Claimant challenged the way his remuneration was being calculated, arguing that all breaks – including those that were not interrupted by a call-out – constituted working time. The Prague District Court granted the Claimant's claim. However, on appeal, the claim was rejected by the Supreme Court of the Czech Republic who referred the case back to the Prague District Court. The Prague District Court subsequently sought a preliminary ruling from the European Court of Justice as to whether a rest break in these circumstances should be considered "working-time" within the meaning of Article 2 of the Directive.

Applying previous case law, the ECJ concluded that Article 2 of the Directive must be interpreted as meaning that the break granted to a worker during their daily working time, during which the worker must be ready to respond to a call-out within a time limit of two minutes if required, constitutes "working-time". The reasoning is that it is apparent from an overall assessment that the limitations/requirements imposed on the worker during the relevant rest break objectively and

significantly affect the worker's ability to manage freely their own time and to devote their break time to their own interests.

Why this matters?

Although the principles applied by the ECJ are consistent with previous case law decisions, the decision serves as a reminder of the classifications of "working-time" and "rest periods" under the Directive. The concepts are mutually exclusive and there is no intermediate category. The decision also reiterates the purpose of the Directive which is to protect the health and safety of workers. Employers should ensure that they are facilitating genuine and uninterrupted rest breaks where workers do not have to be on-call or available to work at short notice or they risk facing claims. This decision will not be binding in the UK but courts and tribunals may take the ECJ's decision into account when applying the Working Time Regulations 1998, which entitle workers to an uninterrupted 20-minute rest break, away from their workstation if their daily working time is more than six hours.

XR v Dopravní podnik hl m Prahy

THE EAT CONCLUDES THAT IT IS LAWFUL FOR PART-TIME WORKERS NOT TO RECEIVE PAID BREAKS IF THE REASON IS THAT THEY ARE WORKING SHORTER SHIFTS AND NOT DUE TO THEIR PART-TIME STATUS.

In *Forth Valley Health Board v James Campbell*, the Claimant was a part-time phlebotomist (a person who takes blood) contracted to work for an average of 16 hours per week on a six-week rota. The Respondent's policy was that employees received a paid 15-minute break when they worked shifts lasting 6 hours or more. The Claimant worked 4-hour shifts during the week, during which he would not receive a paid 15-minute break. By contrast his colleague, a full-time worker who worked 6-hour shifts during the week, was given a paid 15-minute break. When the Claimant worked a 6-hour shift at the weekend, he did receive the paid 15-minute break in the same way his full-time colleague did. Despite this, the Claimant claimed that denying him the break during his weekday 4 hour shifts constituted less favourable treatment on the ground of his part-time status and argued that the Respondent was therefore in breach of Regulation 5 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 (the "Regulations").

The tribunal at first instance found in favour of the Claimant. However on appeal the EAT disagreed and dismissed the claim. The EAT held that the tribunal had erroneously applied a "but for" discrimination causation test to the question of whether the detrimental treatment of the Claimant was "on the ground" that he was a part-time worker. The statutory discrimination test in the Regulations would only have been met if the *sole* ground for the less favourable treatment was that he was a part-time worker. The EAT held that the reason for the Claimant not always receiving a paid 15-minute break was in fact the length of the shift worked, not his part-time status. This was evidenced by the fact that when the Claimant worked a 6-hour shift at the weekend, he received a

paid 15-minute break so it was possible for a part-time worker to receive the paid break if they worked shifts of 6 hours.

Why this matters?

This case serves as a reminder of the limitations of Regulation 5 of the Regulations (and the Regulations themselves) in that a claim by an employee is only likely to succeed if the *sole* reason for the less favourable treatment is the fact that the worker is part-time. If there are other reasons for the less favourable treatment (as there were in this case) this is likely to be detrimental to an employee's claim.

Forth Valley Health Board v Campbell

ROUND UP OF OTHER DEVELOPMENTS

COVID-19 – temporary self-certification system introduced for those working in care homes who are medically exempt from vaccination: the Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021 (SI 2021/891) provides that from 11 November 2021, all care home workers and anyone entering a care home must be fully vaccinated unless they are exempt. The Department of Health and Social Care (DHSC) have since published a letter setting out how, on a temporary basis, people working or volunteering in care homes will be able to self-certify that they meet the medical exemption criteria for a Covid-19 vaccine. This is potentially a significant loophole.

COVID-19 – government publishes Autumn and Winter Plan (England): a number of steps are outlined in "Plan B" which the government considers may be needed to help control transmission of the virus during the winter months. These include legally mandating face coverings in certain settings and also requesting people to return to working from home if they can, for a limited period of time. The government stated that as much prior notice as possible would be given to the public and Parliament and that clear guidance and communications would be issued. Many businesses have now implemented their 'Back to the Workplace' policies and so would need to be ready to amend their approach accordingly.

This article was co-written with Trainee Solicitor Jemma Green.

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