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Employment Rights of Part-Time Workers

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The decision of the House of Lords in *R v Secretary of State for Employment ex parte Equal Opportunities Commission and another* [1994] IRLR 176, is the latest in a series of rulings by the highest court in the land on the inter-relationship between European law and domestic employment law. In *Hayward v Cammell Laird Shipbuilders Ltd*[1] and *Pickstone v Freemans plc*[2], the House of Lords interpreted the tortuous regulations on equal pay for work of equal value in a liberal manner, to the benefit of claimants. Similarly, the purposive approach towards the interpretation of the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE) in the light of the Acquired Rights Directive which the Law Lords adopted in *Litster v Forth Dry Dock & Engineering Co Ltd*[3], made it clear that the scope of the Regulations was far wider than had previously been thought and enhanced job protection. The implications of *Litster* for those engaged in the market testing of public services, compulsory competitive tendering and corporate rescues, amongst many others, are still being explored through the courts and the industrial tribunals. Yet the *EOC* case, in which the House of Lords was again remarkably robust in tackling an issue of crucial significance to employers and employees alike may yet prove to be the most significant step of all in the establishment of a framework of labour relations for the 21st century. The EOC described its success with no exaggeration as a "stunning victory", but *The Times* went even further, describing the judgment in its leader column as "profound" and claiming that "Britain may now have, for the first time in history, a constitutional court."

Background

Article 119 of the Treaty of Rome provides:

> "Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."

Various provisions of the Employment Protection (Consolidation) Act 1978 set out conditions which govern the right not to be unfairly dismissed, the right to compensation for unfair dismissal and the right to statutory redundancy pay. Those conditions require that an employee should have worked a specified number of hours a week during a specified period of continuous employment. In general, the qualifying periods of entitlement to each of the rights in question are (a) two years of continuous employment for employees who work for sixteen or more hours per week, and (b) five years of continuous employment for employees who work between eight and sixteen hours per week. Employees who work for fewer than eight hours per week do not qualify for any of the rights in question. It was common ground between the parties to the proceedings that the great majority of employees who work for more than sixteen hours a week are men and that the great majority of those who work less than sixteen hours per week are women – so that the "threshold" provisions in question result in an indirect discrimination against women.

In March 1990, the EOC's Chief Executive approached the Secretary of State for Employment expressing the view that the "threshold" provisions constituted indirect discrimination against women employees, contrary to Community law. The Secretary of State rejected by letter the suggestion that statutory redundancy pay and statutory compensation for unfair dismissal constituted "pay" within the meaning of Article 119 or that they fell within the Equal Treatment Directive of 1975.

The EOC therefore applied for judicial review, seeking declarations that the United Kingdom was in breach of its obligations under Article 119, the Equal Pay Directive and the Equal Treatment Directive.

At a later stage, the application was amended so as to bring in a second applicant, a woman who had been employed by Hertfordshire County Council as a cleaner for just under five years working eleven hours per week who had been made redundant, and seeking further declarations and also *mandamus* to compel the Secretary of State to introduce legislation to abolish the discriminatory provisions of the 1978 Act.

The House of Lords first considered whether the cleaner was properly joined to the proceedings and concluded that she was not. Redundancy pay is "pay" within the meaning of Article 119.[4] If the discriminatory measures in the 1978 Act were not objectively justified, she had a good claim for redundancy pay against her employers under Article 119, which by virtue of section 2(1) of the European Communities Act 1982 prevails over the discriminatory provisions of the 1978 Act. She would also have a good claim under the two Directives, which were directly applicable against her employers, who were an emanation of the State.[5] Her claim was a private law claim and indeed she had already started proceedings to enforce it in the appropriate industrial

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[1][1988] IRLR 257.
[2][1988] IRLR 357.
[3][1990] 1 AC 546; [1989] ICR 341; [1989] 1 All ER 1134; [1989] IRLR 161.
[4]*Barber v Guardian Royal Exchange Assurance Group* (C262/88) [1991] IQB 344; [1990] 2 All ER 660; [1990] ICR 616; [1990] ECR 1–1889.
[5]*Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* (C-152/84) [1986] ECR 723; [1986] 1 CMLR 688.

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tribunal. There was no good reason why such a claim should be advanced in the Divisional Court against the Secretary of State, who was not her employer and who was not liable to meet the claim, if it was sound.

With that matter disposed of, the Law Lords turned to the merits of the EOC's claim.

Locus Standi

The Secretary of State argued that the EOC had no *locus standi* to bring the proceedings. The question therefore was whether the EOC had a sufficient interest in the question of whether the "threshold" provisions for the 1978 Act were compatible with Community law regarding equal pay and equal treatment, given that under section 53(1) Sex Discrimination Act 1975, the EOC's duties include working towards the elimination of discrimination and promoting equality of opportunity between men and women generally.

Lord Keith said:

> "If the admittedly discriminatory provisions of the Act of 1978 as regards redundancy pay and compensation for unfair dismissal are not objectively justified, then steps taken by the EOC towards securing that these provisions are changed may very reasonably be regarded as taking the course of working towards the elimination of discrimination. The present proceedings are clearly such a step ... In my opinion, it would be a very retrograde step now to hold that the EOC has no *locus standi* to agitate in judicial review proceedings questions relating to sex discrimination which are of public importance and affect a large section of the population."

Only Lord Jauncey dissented from that view.

Was Judicial Review Appropriate?

The Secretary of State further argued that the EOC's case did not involve any decision or justiciable issue susceptible of judicial review. The EOC argued that the Secretary of State's letter to the Chief Executive refusing to change the law was the reviewable decision. However, the Law Lords concluded that the real object of the EOC's attack was the "threshold" provisions themselves. Thus the question was whether judicial review was available for the purpose of securing a declaration that certain UK primary legislation is incompatible with European Community law. The Secretary of State argued that Order 53, rule 1(2), which gives the court power to make declarations in judicial review proceedings, is only applicable where one of the prerogative orders would be available. The House of Lords considered that to be too narrow a view. It would mean that while a declaration that a statutory instrument is incompatible with EC law could be made, since such an instrument is capable of being set aside by *certiorari*, no such declaration could be made with regard to primary legislation. However, in *R v Secretary of State for Transport, ex parte Factortame Ltd and others*,[6] certain provisions of UK primary legislation were held to be invalid in their purported application to nationals and Member States of the EC, but without any prerogative order being available to strike down the legislation in question – which remains valid as regards nationals of non-member States. At no stage in the course of litigation was it suggested that judicial review was not available. The *Factortame* case was thus a precedent in favour of the EOC's recourse to judicial review in the present proceedings.

Jurisdiction of the Divisional Court

The *Factortame* ruling also answered the third procedural point taken by the Secretary of State, *ie*, that the Divisional Court had no jurisdiction to declare that the UK or the Secretary of State was in breach of obligation under Community law. There was, said the House of Lords, "no need for any such declaration". A declaration that the "threshold" provisions of the 1978 Act were incompatible with Community law would suffice for the purposes sought to be achieved by the EOC and were capable of being granted consistently with the precedent afforded by *Factortame*. This did not involve, as the Secretary of State had contended, any attempt by the EOC to enforce the international treaty obligations of the UK.

Similar considerations answered the Secretary of State's fourth procedural point, *ie* that the Divisional Court was not the appropriate forum to decide the substantive issues at stake. Those issues were similar in character to those which were raised in *Factortame*. The Divisional Court was the only English forum in which the EOC, having the capacity and sufficient interest to do so, was in a position to secure the result which it desired. Although the incompatibility issue could have been contested in proceedings before the European Court of Justice instituted by the European Commission, that was no reason for concluding that the Divisional Court was not an appropriate forum for an application by the EOC designed towards a similar end. Indeed, there were grounds for taking the view that the Divisional Court is the more appropriate forum since the European Court of Justice has said that it is for the national court to determine whether an indirectly discriminatory pay practice is founded on objectively justified economic grounds.

Were the Threshold Provisions Justified?

The onus of providing an objective justification of the "threshold" provisions of the 1978 Act rested on the Secretary of State.

The original reason for the provisions appears to have been the view that part-time workers were less

[6]C-213/89 [1990] 2 AC 85; [1991] AC 603; 3 CMLR 589.
[7]C107/84, *Bilka-Kaufhaus GmbH v Weber von Harz* [1987] ICL 110.

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committed than full-time workers to the undertaking which employed them. In responding to the EOC's Chief Executive in 1990, the Secretary of State stated that their purpose was to ensure that a fair balance was struck between the interests of employers and employees. Those grounds were not now put forward as an objective justification for the thresholds. It was claimed before the House of Lords that the threshold had the effect that more part-time employment was available than would be the case if employers were liable for redundancy pay and compensation for unfair dismissal to employees who worked for less than eight hours a week or between eight and sixteen hours a week for under five years. It was contended that if employers were under that liability, they would be inclined to employ fewer part-time workers and more full-time workers, to the disadvantage of the former.

In an important passage, Lord Keith said:

"The bringing about of an increase in the availability of part-time work is properly to be regarded as a beneficial social policy aim and it cannot be said that it is not a necessary aim ... the purpose of the thresholds is said to be to reduce the cost to employers of employing part-time workers. The same result, however, would follow from a situation where the basic rate of pay for part-time workers was less than the basic rate for full time workers. No distinction in principle can properly be made between direct and indirect labour costs. While in certain circumstances an employer might be justified in paying full time workers a higher rate than part time workers in order to secure the more efficient use of his machinery (see *Jenkins v Kingsgate (Clothing Production) Ltd* [1981] ICR 715) that would be a special and limited state of affairs. Legislation which permitted a differential of that kind nationwide would present a very different aspect and considering that the majority of part-time workers are women would surely constitute a gross breach of the principle of equal pay and could not possible be regarded as a suitable means of achieving an increase in part-time employment. Similar considerations apply to legislation which reduces the indirect cost of employing part-time labour. Then as to the threshold provisions being requisite to achieve the stated aim, the question is whether on the evidence before the Divisional Court they have been proved actually to result in greater availability of part-time work than would be the case without them. In my opinion that question must be answered in the negative ... The fact is, however, that the proportion of part-time employees in the national workforce is much less than the proportion of full-time employees, their weekly remuneration is necessarily much lower, and the number of them made redundant or unfairly dismissed in any year is not likely to be unduly large. The conclusion must be that no objective justification for the thresholds in the Act of 1978 has been established."

A substantive subsidiary issue was whether or not compensation for unfair dismissal was "pay" within the meaning of Article 119 and the Equal Pay Directive. There was, said Lord Keith, much to be said in favour of the view that compensation for unfair dismissal was "pay" in that sense, but the European Court has yet to pronounce upon the issue and there may be a question whether the answer to it could properly be held to be an *acte clair* or whether the resolution of it would require a reference to the European Court. However, such a reference was unnecessary for the disposal of the present case, since discrimination as regards the right to compensation for unfair dismissal, if not objectively justified, was clearly in contravention of the Equal Treatment Directive.

Accordingly, declarations were made that the threshold provisions were incompatible with Article 19 and the two Directives. The EOC had also sought a declaration to the effect that the Secretary of State was in breach of those provisions of the Equal Treatment Directive that required Member States to introduce measures to abolish any laws contrary to the principle of equal treatment. The object of such a declaration was to enable part-time workers who are not employed by the State and who have been deprived of the right to obtain unfair dismissal compensation by the restrictive thresholds in the 1978 Act, to take proceedings against the UK for compensation based upon the decision of the European court in *Francovich v Italian Republic*.[8] The House of Lords has, however, concluded, that such a declaration would be quite inappropriate: if there was any individual who believed that he or she had a good claim to compensation under the *Francovich* principle, it was the Attorney General who would be defendant in any proceedings directed to enforcing it and the issues raised would not necessarily be identical with those arising in the present case.

Conclusions

In the immediate aftermath of the decision, it was a little difficult to gauge precisely the extent of its likely effect – but almost all commentators considered that it would be dramatic. The Department of Employment has acknowledged that UK legislation will need to be amended to comply with the ruling (which in any event has immediate force) and the EOC has claimed that the decision affords new protection to no fewer than 640,000 individuals. Part-timers dismissed before the decision in the *EOC* case may present complaints and even those for whom the statutory time limits have expired may – if they act expeditiously – be able to persuade industrial tribunals to hear late claims. Echoing the unsuccessful arguments advanced by the Secretary of State, some employers have suggested that companies will now be more reluctant to take on part-timers in future. Whether that gloomy prediction will be borne out, time alone will tell.

[8] C-6/90 and C-9/90, [1992] IRLR 84.