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Employment — calculation of week's pay in unfair dismissal cases — national minimum wage can impact on calculation

EMPLOYMENT APPEAL TRIBUNAL

Published April 12, 2002

Paggetti v Cobb

The national minimum wage could impact on the calculation of a week's pay in unfair dismissal cases.

The Employment Appeal Tribunal (Judge Peter Clark, Ms J. Drake and Mr K. M. Young) so held on March 22, 2002 in allowing the appeal of Mr Peter Paggetti against a decision of a London employment tribunal promulgated on December 5, 2000 and finding that Mrs J. Cobb unfairly dismissed Mr Paggetti from his job as a groom.

Mr Paggetti challenged the method of calculating the basic and compensatory awards.

JUDGE PETER CLARK said that the appellant had contended below that he worked a 63-hour week for £120 (£1.88 per hour) but the matter was not examined further.

However, where it was contended that an employee was paid less than the national minimum wage that was a matter which must be investigated by a tribunal when assessing both basic and compensatory awards in such cases of unfair dismissal. It was no answer that an applicant made no claim under the minimum wage legislation per se.

In particular, the minimum wage impacted on the calculation of a week's pay for sections 221 to 229 of the Employment Rights Act 1996; and when calculating a week's pay for the purposes of section 221(2) of the 1996 Act, the calculation was to be treated as subject to the statutory minimum wage.

Limitation of actions — alleged professional negligence of solicitor — when time begins to run

COURT OF APPEAL

Published April 12, 2002

Khan v R. M. Falvey & Co (a Firm)

The limitation period started to run against a solicitor from when an action in which he was instructed might have been struck out for want of prosecution, not when it was in fact struck out.

The Court of Appeal (Lord Justice Schiemann, Lord Justice Chadwick and Sir Murray Stuart-Smith) so held on March 22, 2002 when allowing an appeal by the defendant, R. M. Falvey & Co, West Wimbledon, from a decision of Mr Justice Mackinnon dated April 27, 2001.

The claimant, Malik Javid Kahn, brought an action for damages for loss suffered as a consequence of the defendant's alleged professional negligence in failing to take procedural steps in actions in which it was instructed and which were subsequently struck out for want of prosecution.

SIR MURRAY STUART-SMITH said that in so far as *Hopkins v Mackenzie* ([1994] TLR 546; [1995] PIQR 43) purported to hold that there could be no damage before the actual strike-out, it was not correct or consistent with *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* ([1997] TLR 617; [1997] 1 WLR 1627).

The claimant had not pleaded any damage prior to the strike-out, but that did not mean that he suffered no damage before that time.

If it was clear, as in this case, that the value of his chose in action, consisting of his chance of recovery in the actions which were struck out, had been substantially diminished before the limitation date, the action would be statute-barred.

Landlord and tenant — local authority landlord failing to deal adequately with rubbish generated at flats — in breach of obligation to keep common parts clean and tidy

COURT OF APPEAL

Published April 16, 2002

Long v Southwark London Borough Council

Before Lord Justice Ward, Lord Justice Chadwick and Lady Justice Arden

Judgement March 27, 2001

A local authority landlord that failed to deal adequately with the disposal of refuse generated by the occupants of a large block of flats was in breach of its obligation to take reasonable steps to keep common parts clean and tidy. It could not be satisfied by delegation to contractors unless there was an adequate system for monitoring their performance.

The Court of Appeal so held in a reserved judgment dismissing an appeal by Southwark London Borough Council from an order of Judge Goldstein in Central London County Court, on April 12, 2001, to pay £13,500 damages to Katherine Long, a tenant of Townsend House, Bermondsey.

Mr Ashley Underwood, QC and Miss Kerry Bretherton for the landlord; Mr Jan Luba, QC and Miss Bethan Harris for the tenant.

LADY JUSTICE ARDEN said that the tenant's flat was next to a cabin housing a large paladin bin into which ran a rubbish chute. The chute was inadequate in size and tenants frequently left rubbish beside the bin. The tenant complained of noise from other tenants banging the chute, of smells and maggot infestation.

By condition 18(4) of her tenancy agreement the landlord was "to take reasonable steps to keep the estate and common parts clean and tidy..."

In 1993 the tenant had been awarded £600 compensation from an arbitration tribunal who also directed that the landlord should check rubbish daily and clean and disinfect the facilities.

The judge's finding that the common parts were not kept clean and tidy was unchallenged: rubbish piled up outside

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the tenant's door and in the cabin and the chute was not regularly cleaned.

The only question was whether the landlord had taken "reasonable steps" in accordance with 18(4) to satisfy its obligations.

Its defence was (i) it had appointed contractors and instructed them to carry out a maintenance programme for refuse; (ii) had given notice to tenants reminding them of the permitted use of the facilities, and (iii) that condition 24(4) of the agreement only contemplated half-yearly inspections.

The obligation to take reasonable steps could not be satisfied by delegation unless there was an adequate system for monitoring the performance by contractors of their functions. The inadequate supervision was a failure to take reasonable steps for the purpose of condition 18(4).

Moreover, the judge was entitled to conclude that the notice to the tenants was not, of itself, sufficient. Nor did the third defence avail the landlord.

The fact that the landlord provided low cost public housing formed part of the factual background and as such was relevant to the interpretation of condition 18(4).

But there was no room for compromise on basic standards of cleanliness and 18(4) should not be read as subject to some implicit proviso that the landlord should have the resources to fund the steps otherwise considered to be reasonable.

Her Ladyship went on to consider the implied covenant of quiet enjoyment, concluding that the judge had erred in distinguishing the House of Lords decision in *Mills v Southwark London Borough Council* ([1999] TLR 710; [2001] 1 AC 1) and in finding that the landlord's action amounted to breach of the covenant of quiet enjoyment.

Lord Justice Ward and Lord Justice Chadwick agreed.

Solicitors: Ms Lyn Meadows, Southwark; Evans & Co, Southwark.

Disability discrimination — General Medical Council — not a 'trade organisation' for purposes of statute

EMPLOYMENT APPEAL TRIBUNAL

Published April 16, 2002

General Medical Council v Cox

Before Mr Justice Holland, Mr P. R. Jacques and Mrs R. A. Vickers

Judgment March 22, 2002

The General Medical Council was not a trade organisation for the purposes of section 13 of the Disability Discrimination Act 1995.

The Employment Appeal Tribunal so held in allowing the appeal of the General Medical Council against a decision of a London employment tribunal, promulgated on December 1, 2000.

The issue below and on appeal was of a preliminary nature: was the GMC a trade organisation within sections 13 and 68 of the 1995 Act. The tribunal had found the GMC to fall within the provisions.

In 1992, the applicant, Miss Heidi Cox, was a student at St George's Hospital Medical School but her studies were terminated following an accident, which left her a paraplegic. Nevertheless, she had since achieved further academic distinctions and had applied to the medical school at Oxford University.

However, following extensive consultation, in particular with the GMC, the university had decided that it could not accommodate Miss Cox's disability without some modification which must give rise to a shortfall as against GMC requirements. Miss Cox brought a claim against the GMC.

Mr James Goudie, QC and Mr Brian Napier for the GMC; Mr Andrew Henshaw for Miss Cox.

MR JUSTICE HOLLAND, giving the reserved judgment of the tribunal, said that although the employment tribunal had stated that the GMC was primarily a regulatory body which existed for the protection of the public, it inexplicably went on to conclude that that body nevertheless came within the relevant provisions as a trade organisation within section 13(1)(a) of the 1995 Act.

The fact was that the purposes underlying the creation of the GMC were clear from the Medical Act 1858 and the Medical Act 1983: at its inception the purpose for which the organisation was created was for the protection of the public, and particularly those who had to consult a medical practitioner. That position had not changed.

The functions of the council were in great substance directly or indirectly concerned with setting and attaining the professional standards that served to protect the public.

Furthermore, particular attention was to be drawn to the role of the Privy Council in the functioning of the GMC since the intimate involvement of that quintessentially public body was quite incompatible with the notion of the GMC as a trade organisation.

The consequence was that the GMC fell outside the legislation against disability discrimination. It was also noteworthy that in the context of race and sex discrimination the relevant Acts provided for claims where there was discrimination by a qualifying body whereas the 1995 Act contained no such equivalent provisions as to qualifying bodies.

Parliament must be taken to have intended the distinction, conceivably because of a perceived impact, were such redress available, upon academic and professional standards, and to the detriment of the public. When deciding between disability discrimination and safety, Parliament had arguably put the latter first.

In dismissing the complaint the tribunal paid tribute to the courage and determination of the applicant, conscious that the law had not permitted it to be constructively supportive to her.

Solicitors: Field Fisher Waterhouse; Mrs Jocelyn Murphy, Aldgate.