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Editor

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Halsbury's Laws of England

The reference 26 *Halsbury's Laws* (4th edn) para 577 refers to paragraph 577 on page 296 of volume 26 of the fourth edition of *Halsbury's Laws of England*.

The reference 7(1) *Halsbury's Laws* (4th edn reissue) para 267 refers to paragraph 267 on page 177 of reissue volume 7(1) of the fourth edition of *Halsbury's Laws of England*.

Halsbury's Statutes of England and Wales

The reference 40 *Halsbury's Statutes* (4th edn) 734 refers to page 734 of volume 40 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The reference 19 *Halsbury's Statutes* (4th edn) (1994 reissue) 497 refers to page 497 of the 1994 reissue of volume 19 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The Digest

(formerly The English and Empire Digest)

The reference 37(2) *Digest* (Reissue) 424, 2594 refers to case number 2594 on page 424 of the reissue of green band volume 37(2) of *The Digest*.

The reference 27(1) *Digest* (2nd reissue) 330, 2849 refers to case number 2849 on page 330 of the second reissue of green band volume 27(1) of *The Digest*.

Halsbury's Statutory Instruments

The reference 17 *Halsbury's Statutory Instruments* 305 refers to page 305 of volume 17 of the grey volumes series of *Halsbury's Statutory Instruments*.

The reference 14 *Halsbury's Statutory Instruments* (1994 reissue) 201 refers to page 201 of the 1994 reissue of volume 14 of the grey volumes series of *Halsbury's Statutory Instruments*.

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COURT OF APPEAL, CIVIL DIVISION

NEILL, ROCH, SCHIEMANN LJJ

9, 10, 11, 15 MAY, 31 JULY 1995

European Community – Equality of treatment for men and women – Equal working conditions – Dismissal – Female employees dismissed after 15 months’ employment – National rule making right to bring unfair dismissal proceedings conditional on two years’ continuous employment – Women claiming that fewer women able to comply with rule than men and applying for judicial review of rule on grounds of discrimination – Whether unfair dismissal rule contrary to Community law – Whether compensation for unfair dismissal constituting ‘pay’ – Unfair Dismissal (Variation of Qualifying Period) Order 1985 – Council Directive (EEC) 76/207 – EC Treaty, art 119.

In 1991 the two female applicants were dismissed from their respective posts of employment which they had each held for 15 months. They were unable to bring proceedings before an industrial tribunal for unfair dismissal because under the Unfair Dismissal (Variation of Qualifying Period) Order 1985 the right to bring such an action applied only to employees who had been continuously employed for two years. The applicants therefore applied for judicial review of the 1985 order, claiming that in making the order the Secretary of State had acted beyond his powers and that the order breached Council Directive (EEC) 76/207 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. They sought relief in the form of an order of certiorari to quash the 1985 order and various declarations. The applicants contended that the two-year qualifying period *prima facie* indirectly discriminated against women, since the proportion of women who could comply with that period was smaller than the proportion of men who could comply and that, unless justified, that discrimination contravened the principle of equal treatment for men and women as set out in Directive 76/207. The Secretary of State contended, *inter alia*, that the applicants lacked the standing required to bring judicial review proceedings in reliance on the directive, that the forms of relief sought were inappropriate, and that the degree of disparity between the proportions of men and women able to meet the two-year requirement was not sufficient to constitute discrimination for the purposes of Community law. The Divisional Court dismissed the application on grounds of lack of jurisdiction on the basis that an order to quash the 1985 order was an inappropriate form of relief and that on the merits the degree of disparity between the treatment of men and women was less than considerable. The court also held that, even if a *prima facie* case of discrimination had been established, the Secretary of State had failed to show any objective justification for that discrimination. The applicants appealed, contending further that the right to compensation for unfair dismissal constituted ‘pay’ for the purposes of art 119¹ of the EC Treaty and that, by making and maintaining in force the 1985 order, the United Kingdom was in

breach of its obligation under art 119 to uphold the principle that men and women should receive equal pay for equal work. The Secretary of State cross-appealed against the ruling that objective justification had not been established.

Held – (1) Employees in private employment had sufficient standing to rely on Directive 76/702 in order to bring judicial review proceedings challenging national rules which set a threshold of two years' continuous employment before a claim of unfair dismissal could be made. On the evidence before the court it had been demonstrated that, for the period leading up to the applicants' dismissals, there had been and continued to be a considerable and persistent difference between the numbers and percentages of men and women in the groups that did comply and the groups that did not comply with the two-year qualifying period, that the Secretary of State had failed to establish any objective justification for the discriminatory impact of the two-year qualification period, and that at the time of their respective dismissals the effect of the two-year qualifying period was incompatible with the principle of equal treatment as enshrined in the directive. It followed that the applicants had established that at the material time the 1985 order indirectly discriminated against women and, since it would be inappropriate to quash the 1985 order, they were therefore entitled to declaratory relief. The appeal would accordingly be allowed to that extent and the cross-appeal would be dismissed (see p 9 f g, p 12 c to e, p 17 b to h, p 25 b, p 26 h, p 27 f and p 30 c to g, post); *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910, [1995] 1 AC 1 and *Enderby v Frenchay Health Authority* Case C-127/92 [1993] ECR I-5535 applied; *Francovich v Italy* Joined cases C-6/90 and C-9/90 [1991] ECR I-5357 considered.

(2) Although there was a strong argument that compensation for unfair dismissal was consideration received by the former employee (albeit indirectly) from his former employer in respect of his employment and was therefore 'pay' for the purposes of art 119 of the EC Treaty, the matter was not acte clair. It followed that the court would not grant the applicants relief on the grounds that, by making and maintaining in force the 1985 order, the United Kingdom was in breach of its obligation under that provision of the Treaty. The applicants' claim for relief under art 119 would accordingly be dismissed (see p 16 e g to j and p 30 d, post); *Barber v Guardian Royal Exchange Assurance Group* Case C-262/88 [1990] 2 All ER 660, [1990] ECR I-1889, *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1992] 1 All ER 545 at 562, [1992] ICR 341, *Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910, [1995] 1 AC 1 and *Mediguard Services Ltd v Thame* [1994] ICR 751 considered.

Notes

For Community provisions and case law on equal pay and equal working conditions, see 52 *Halsbury's Laws* (4th edn) paras 21-12, 21-13, 21-16.

For the EC Treaty, art 119, see 50 *Halsbury's Statutes* (4th edn) 306.

For the Unfair Dismissal (Variation of Qualifying Period) Order 1985, see 7 *Halsbury's Statutory Instruments* (1993 reissue) 244.

Cases referred to in judgment

Algemeene Transport (NV)—en Expeditie Onderneming van Gend & Loos v Nedelandse administratie der belastingen Case 26/62 [1963] ECR 1.

1 Article 119, so far as material is set out at p 6 a to 7 a b, post

- Amministrazione delle Finanze dello Stato v Simmenthal SpA* Case 106/77 [1978] ECR 629.
- Arbeiterwohlfahrt der Stadt Berlin eV v Bötzel* Case C-360/90 [1992] ECR I-3589.
- Barber v Guardian Royal Exchange Assurance Group* Case C-262/88 [1990] 2 All ER 660, [1991] QB 344, [1991] 2 WLR 72, [1990] ECR I-1889, ECJ.
- Becker v Finanzamt Münster-Innenstadt* Case 8/81 [1982] ECR 53.
- Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84 [1986] ECR 1607.
- Coghlan v Cumberland* [1898] 1 Ch 704, CA.
- Costa v ENEL* Case 6/64 [1964] ECR 585.
- Enderby v Frenchay Health Authority* Case C-127/92 [1993] ECR I-5535.
- Equal Opportunities Commission v Secretary of State for Employment* [1994] 1 All ER 910, [1995] 1 AC 1, [1994] 2 WLR 409, HL; *rvsg* [1993] 1 All ER 1022, [1993] 1 WLR 872, CA; *affg* [1992] 1 All ER 545, [1992] ICR 341.
- Factortame Ltd v Secretary of State for Transport (No 2)* Case C-213/89 [1991] 1 All ER 70, [1991] 1 AC 603, [1990] 3 WLR 818, [1990] ECR I-2433, ECJ and HL.
- Foster v British Gas plc* Case C-188/89 [1990] 3 All ER 897, [1991] 1 QB 405, [1991] ECR I-3313, ECJ.
- Francovich v Italy* Joined cases C-6/90 and C-9/90 [1991] ECR I-5357.
- Humblet v Belgium* Case 6/60 [1960] ECR 559.
- Jenkins v Kingsgate (Clothing Productions) Ltd* Case 96/80 [1981] 1 WLR 972, [1981] ECR 911, ECJ.
- Jones v Chief Adjudication Officer* [1990] IRLR 533, CA.
- Kowalska v Freie und Hansestadt Hamburg* Case C-33/89 [1990] ECR I-2591.
- Mediguard Services Ltd v Thame* [1994] ICR 751.
- Meyers v Adjudication Officer* Case C-116/94 [1995] All ER (EC) 705, ECJ.
- Nimz v Freie und Hansestadt Hamburg* Case C-184/89 [1991] ECR I-297.
- R v Epping and Harlow General Comrs, ex p Goldstraw* [1983] 3 All ER 257, CA.
- R v Secretary of State for Education, ex p Schaffter* [1987] IRLR 53.
- Rinner-Kühn v FWW Spezial Gebäudereinigung GmbH* Case 171/88 [1989] ECR 2743.
- Ruzius-Wilbrink (ML) v Bedrijfsvereniging voor Overheidsdiensten* Case C-102/88 [1989] ECR 4311.
- Teuling v Bedrijfsvereniging voor de Chemische Industrie* Case 30/85 [1987] ECR 2497.
- g Appeal**
- By notice dated 16 June 1994, Ms Nicole Seymour-Smith and Ms Laura Perez, appealed with leave from the decision of the Divisional Court (Balcombe LJ, McCulloch J) ([1994] IRLR 448) made on 20 May 1994 dismissing their application for judicial review of the Unfair Dismissal (Variation of Qualifying Period) Order 1985, SI 1985/782, which set a threshold of two years' continuous employment
- h** before a claim of unfair dismissal could be made on the ground that the making of the order was beyond the powers of the Secretary of State and contrary to Council Directive (EEC) 76/207. The Secretary of State for Employment cross-appealed against the Divisional Court's ruling that, even if a *prima facie* case of discrimination had been established, he would have failed to show any objective
- j** justification for that discrimination regarding objective justification. The facts are set out in the judgment of the court.

Robin Allen QC (instructed by Gay Moon) for the appellants.

Stephen Richards and Nicholas Paines (instructed by the Treasury Solicitor) for the Secretary of State.

31 July 1995. The following judgment of the court was delivered.

NEILL LJ.

Introduction.

The appellants in these proceedings are Ms Nicole Seymour-Smith and Ms Laura Perez. Both appellants commenced their relevant periods of employment (with different employers) in February 1990. Ms Seymour-Smith was dismissed on 1 May 1991. Ms Perez was dismissed on 25 May 1991. Both appellants sought to complain to an industrial tribunal that they had been unfairly dismissed and sought compensation, but they were unable to register their applications. The reason for their inability to proceed was that the general right of an employee not to be unfairly dismissed (conferred by s 54(1) of the Employment Protection (Consolidation) Act 1978) does not apply to a dismissal where the employee has not been continuously employed for the minimum period specified in s 64(1)(a) of the 1978 Act. The period specified in s 64(1)(a) is, and was at all material times, two years ending with the effective date of termination. The two appellants had been employed for about 15 months at the dates of their respective dismissals.

Before turning to the history of the present proceedings it may be convenient to say something about the genesis of the two-year rule.

The Industrial Relations Act 1971 introduced into English law a new right not to be unfairly dismissed. The legislation followed recommendations in favour of the creation of such a right by the International Labour Organisation in 1963 and by the Donovan Commission in 1968. By s 28 of the 1971 Act, however, it was provided that the right did not apply to the dismissal of an employee who had not been continuously employed for a minimum period of 104 weeks. In 1974 the period of 104 weeks was reduced to 26 weeks by para 10 of Sch 1 to the Trade Union and Labour Relations Act 1974, and the 26 weeks' period was re-enacted in s 64(1)(a) of the 1978 Act as originally passed. By s 149(1)(c) of the 1978 Act, however, the Secretary of State was empowered to vary the operation of s 64(1). This power was exercised in 1979 when the qualifying period under s 64(1)(a) was increased to one year by the Unfair Dismissal (Variation of Qualifying Period) Order 1979, SI 1979/959.

In 1980 the Employment Act 1980 was passed which introduced a two-year qualifying period for those who were employed in firms employing less than 20 employees. It is unnecessary, however, to make any further reference to this special provision. We are concerned with the extension to the qualifying period introduced by the Unfair Dismissal (Variation of Qualifying Period) Order 1985, SI 1985/782, which substituted two years as the qualifying period in s 64(1)(a) of the 1978 Act.

The appellants contend that the proportion of women who can comply with the two-year qualifying period is smaller than the proportion of men who can comply. Accordingly, the appellants seek to argue that the two-year period indirectly discriminates against women.

The present proceedings.

On 12 September 1991 McCullough J gave leave to the appellants to bring proceedings seeking an order of certiorari to quash the 1985 order and seeking other relief including a declaration. The appellants asserted that the making of the 1985 order was beyond the powers of the Secretary of State and that it was contrary to the European Communities Act 1972 and Council Directive (EEC) 76/207 on

a the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions (the equal treatment directive).

b We shall have to refer later to the equal treatment directive in more detail. At this stage it is sufficient to note that the substance of the appellants' case is that the two-year qualifying period *prima facie* indirectly discriminates against women and, unless justified, contravenes the principle of equal treatment for men and women, with regard to working conditions including any conditions governing dismissal, which is enshrined in particular in arts 1 and 5 of the directive.

c The appellants' application for judicial review came before the Divisional Court in 1994. The application was dismissed. The judgments are reported as *R v Secretary of State for Employment, ex p Seymour-Smith* [1994] IRLR 448.

d In his judgment Balcombe LJ identified the three principal issues which had been considered. (1) Jurisdiction. (2) *Prima facie* discrimination or disparate adverse impact. (3) Justification.

Though McCullough J in his judgment adopted somewhat different headings his judgment followed the same pattern.

e The issue of jurisdiction, as identified by Balcombe LJ, embraced two questions. The first question was whether the appellants had the requisite standing to seek judicial review at all. The second question concerned the relief which the court might grant. On the first question Balcombe LJ concluded that, although the rights conferred by a directive are not necessarily of direct effect in a domestic court because directives are addressed to member states, in the present case the appellants had the necessary standing to seek judicial review.

f Balcombe LJ addressed the second question, that is the question concerning relief, on the basis that the appellants were not interested in anything less than an order to quash the 1985 order. He concluded that even if the appellants could succeed on the merits the only appropriate form of relief would be a declaration. He was of the view that it would not be right to make an order to quash the 1985 order.

g For the purpose of considering Balcombe LJ's first issue, McCullough J used the heading 'Standing, rights flowing from the Directive and relief'. However, McCullough J considered that the three elements in the heading which he used were so connected with one another that it was better to consider the position compendiously and 'to ask whether, if discrimination could be shown, they should be granted relief in reliance on the terms of the Directive in these particular proceedings' (see [1994] IRLR 448 at 455 (para 63)).

h McCullough J's analysis of the appellants' claim was that in reality they were trying to enforce the directive against their employers despite the fact that the directive gave them no such rights. He said that the position might have been different had the proceedings included or been a prelude to a claim for damages against the UK government. McCullough J concluded that he would not in any event have thought it right to grant certiorari and that a declaration would be of no use to them. At the end of this part of his judgment he put the matter as follows
j ([1994] IRLR 448 at 456 (para 84)):

'If the conclusions to which I have come lead to the further conclusion that the Court should hold, either as a matter of law or in the exercise of its discretion, that the applicants lack the necessary standing to make this application, then I reach that conclusion. I do not, however, think it necessary to decide whether an application should fail because of want of standing or