

Major impact

Katherine Apps considers the practical effect *Impact v Maff* could have on employment cases

It is rare that the European Court of Justice (ECJ) hands down judgment in a case which runs through almost all of the general principles of EC law in; C 268/06 *Impact v Ministry of Agriculture and Food* [2008] ECR I-nyr (*Impact*) is such a case. *Impact* is both:

- (i) an example of the application of the key principles of EC law in an employment tribunal context (direct effect, indirect effect, effectiveness, equivalence, non discrimination etc); and
- (ii) important in cases involving the Fixed Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (SI 2002/2034).

HOW THE QUESTIONS IN IMPACT AROSE

Impact was referred to the ECJ by the Irish Labour Court in a case brought under the Irish legislation implementing Directive 99/70/EC concerning the framework agreement on fixed-term work (the Fixed Term Work Directive).

Ireland has a similar (although not identical) system to the English employment tribunal system. The similarities are more fully fleshed out in the opinion of Advocate General Kokott (herself a noted German labour lawyer) at paras 42, 60–63, 73 and 77. Essentially:

- (i) The Irish labour courts/right commissioners derive their jurisdiction wholly from statute;
- (ii) They are the forum of priority for disputes under various pieces of employment regulation/legislation;
- (iii) They have been generally presumed not to have jurisdiction to hear cases based purely on directly effective EC law rights; and
- (iv) They generally only award costs in exceptional circumstances.

Ireland implemented the Fixed Term Workers Directive almost a year after the specified date for implementation (the Irish statute covered acts after 14 July 2003; the deadline for implementation in the Directive was 10 July 2002). Irish law generally precludes retroactive application of statutes (see para 32).

Impact represented the interests of several fixed-term civil servants who wished to rely on two substantive provisions of the Directive in their national proceedings back until 10 July 2002, ie before the Irish implementing legislation came into force:

- (i) Clause 4: which is the principle of no less favourable treatment of fixed-term workers (non discrimination principle). They argued that they had been entitled to less favourable pension provision than permanent employees.
- (ii) Clause 5: which relates to the measures to be taken to prevent abuse by successively renewing fixed-term contracts, by deeming them to be contracts of indefinite duration (deemed indefinite employment provision).

THE ECJ JUDGMENT

The ECJ judgment is interesting, and useful, because these questions cause the ECJ to run through almost all of the core procedural steps in EC law.

JURISDICTION OF THE LABOUR COURTS/EMPLOYMENT TRIBUNALS

The first question essentially asks whether the Irish labour courts must, as a matter of the Community law principle of effectiveness, have jurisdiction to hear *Impact*'s case based solely on the Directive. The ECJ held that it did (paras 37-55) on the basis of the Community law principles of "effective protection" and "equivalence" of national remedies (see eg Case C 432/05 *Unibet* [2007] ECR I-2271, C 33/76 *Rewe-Zentralfinanz and Rewe-Zentral* [1976] ECR 1989 para 5C 45/76 *Comet* [1076] ECR 2043 para 13, C312/93 *Peterbroeck* [1995] ECR I-4599 and C 326/96 *Levez* [1998] ECR I-7835).

The ECJ's reasoning is almost certainly directly apt in employment tribunals. Shortly before the ECJ judgment came out, Mr Justice Elias in the Employment Appeal Tribunal followed the attorney general's detailed opinion (which came to the same

IN BRIEF

- *Impact v MAFF* has far reaching consequences for parties hoping to rely on European law arguments directly in the employment tribunal. Some previous English authorities are now in doubt. Essentially it seems to say that EC law requires tribunals to have jurisdiction.
- These consequences extend both to directly effective rights and to indirectly effective rights in EC law.

conclusion by substantially identical analysis) in a case called *Unison and GMB v Mrs Brennan and others and Sunderland City Council* UKEAT/0580/07/MAA (unreported judgment of 19 March 2008) (paras 65–68).

This has far-reaching practical consequences for those conducting European arguments in the employment tribunal. As the ECJ judgment states at para 51: "In those circumstances, where the national legislature has chosen to confer on specialised courts jurisdiction to hear and determine actions based on the legislation transposing Directive 1999/70/EC, the obligation which would be placed on individuals in the situation of the complainants—who sought to bring a claim based

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on an infringement of that legislation before such a specialised court—to bring at the same time a separate action before an ordinary court to assert the rights which they can derive directly from that Directive in respect of the period between the deadline for transposing it and the date on which the transposing legislation entered into force, would be contrary to the principle of effectiveness if—which is for the referring court to ascertain—it would result in procedural disadvantages for those individuals, in terms of cost, duration and the rules of representation, such as to render excessively difficult the exercise of rights deriving from that Directive."

Essentially there is now a new distinction between:

- (i) the jurisdiction of tribunals under legislation which is derived solely from

Parliament and domestic law, eg ss 31 and 32 of the Employment Act 2002 and Employment Act 2002 (Dispute Resolution) Regulations 2004) (SI 2004/752); and

- (ii) the jurisdiction of tribunals under legislation which implements provisions of Community law. This is likely to apply to legislation, for instance much of discrimination law, which began initially simply through national legislation, but subsequently has been covered by the Framework Directive on Equality and Race Directive.

In the second case, if a claimant wishes to rely on an argument directly from the Directive/regulation, it is not an answer to say that the claimant should pursue their case in the county/High Court. There might, however, as set out below, be other hurdles in the way of such a claimant, but statutory jurisdiction is unlikely to be one of them.

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This is important because there is still Court of Appeal authority for the proposition that an English tribunal has “no jurisdiction to entertain claims for infringement of “freestanding rights” outside the scope of the specific statutes which confer and define jurisdiction” (*Biggs v Somerset County Council* [1995] ICR 811 at 829 upheld in CA [1996] IRLR 203; see also *Barber v Staffordshire County Council* [1996] ICR 379, at 395). The concept of a “freestanding right” has already been construed narrowly in the English courts. However, one of the most important features of *Impact* is that the ECJ does not use this concept of “freestanding” rights at all in its analysis. It may now be possible to argue on the basis of *Impact* that the “freestanding”/statutorily based distinction in cases like *Biggs* and *Barber*, is not compatible with European principles of effectiveness and equivalence. This potentially could have most wide ranging effects for equal pay cases based solely on Art 141 of the EC

Treaty, rather than the Equal Pay Act 1970.

DIRECT EFFECT

The second question essentially asks whether the non discrimination principle (cl 4) and the deemed continuous employment provision (cl 5) have direct effect.

The consequence of the provision having direct effect is that an individual can rely on it directly in the tribunal against a state entity as a basis for its cause of action. If a legislative provision cannot be read consistently with it, that legislative provision must be disapplied by the tribunal.

Provisions of a Directive will have direct effect if:

- (i) they are unconditional;
- (ii) they are sufficiently precise;
- (iii) the time for implementation of the Directive has passed.

The ECJ held that:

- (i) The principle of non discrimination does have direct effect: paras 59–68.
- (ii) The principle of deemed continuous employment does not: paras 69–80. Member states had too much choice as to how to prevent abuse of use of successive fixed-term contracts.

This means that, as against state entities, which fulfil the relevant conditions of being a public body in Community law, individuals can rely directly on the prohibition of less favourable treatment.

RETROACTIVE APPLICATION

In the third and fourth questions the ECJ is asked, in essence whether, if cl 5 does not have direct effect, whether the labour court is under an obligation to disregard the date on which the national law is stated to have come into force.

This is one of the more strident parts of the judgment, which shows the “mission creep” in the “principle of effectiveness” case law of the ECJ. The ECJ essentially holds that:

- (i) Although cl 5 does not have direct effect, it has strong indirect effect.
- (ii) This is reinforced by:
 - a) the judgment of the ECJ in C 144/04 *Mangold* [2005] ECR I-9981; and
 - b) the principle that member states must not take steps which go

contrary to the objective of the Directive in the period between the deadline for transposition and the date on which the transposing legislation comes into force (para 91).

- c) The ECJ had already noted that, under Irish principles of legislative interpretation the Irish regulations did not have retroactive effect. The ECJ held, in a clear and strident summary of the principle of consistent interpretation:

“The principle that national law must be interpreted in conformity with Community law none the less requires national courts to do whatever lies within their jurisdiction, taking the whole body of domestic law into consideration and applying the interpretative methods recognised by domestic law, with a view to ensuring that the Directive in question is fully effective and achieving an outcome consistent with the objective pursued by it (see *Pfeiffer and Others*, paras 115, 116, 118 and 119, and *Adeneler and Others*, para 111).”

- d) The Irish labour courts/rights commissioner must, when interpreting the principle of deemed continuous employment, extend it back to 10 July 2002.

DO “EMPLOYMENT CONDITIONS” INCLUDE PENSIONS?

The fifth question essentially goes back to the principle of non discrimination. One of the ministry’s arguments appears to be that “employment conditions” in the Directive, could not refer to pensions. Interestingly, the submissions of the UK government sought to support that restrictive meaning of the Directive.

After lengthy analysis (paras 105-134) the ECJ held that pensions are included within “employment conditions” and therefore fall within the scope of the principle of non discrimination. As set out in the next section, from a substantive perspective, this is the angle of the case which could potentially have important practical effects in English cases.

LIKELY PRACTICAL IMPACT

Impact is significant to English employment lawyers for the following reasons:

