No sex discrimination in Utopia

An employee who worked for three years in Paris, then for the same company in London for two years, could not bring claims of sex discrimination in relation to her time in Paris.

By Jane Mulcahy

The Employment Appeal Tribunal ("the EAT") decided, in Tradition Securities and Futures *SA v X&Y* [2008] IRLR 934, 18 August 2008, that an employee who had worked for three years in Paris before working for the same company in London for two years could not bring claims of sex discrimination in relation to her time in Paris as these were not justiciable in the Employment Tribunal.

The case concerned section 10(1) of the Sex Discrimination Act 1975 ("the SDA"), prior to its amendment in 2005, which provided that employment was to be regarded as at an establishment in Great Britain unless the employee did her work wholly outside Great Britain.

Tradition argued that the right to bring a discrimination claim before the Employment Tribunal had to be addressed by reference to the claimant's situation at the time of the alleged unlawful discrimination. At the time of the alleged acts of discrimination committed against the claimant between October 2001 and September 2004 in Paris, the Employment Tribunal in England had no jurisdiction. That position could not be changed retrospectively by reason of things allegedly done later in London.

It was conceded for the claimant that had her employment ended before she had moved to the London office, her claims could not have been brought in England, as she would then have failed the statutory test, the alleged acts having taken place while she was working wholly outside Great Britain.

The claimant nevertheless argued that the acts across the whole period of time should be treated as continuing as, under European law, they would have been unlawful in France or England. Therefore, viewing the period from 2001 to 2006 as a whole, the claimant did not work wholly outside Great Britain. By the end of her two years working in England, the Employment Tribunal had jurisdiction.

The EAT refused to accept this. The reliance on European law was a two edged sword, since the natural forum for a complaint of sexual harassment and discrimination in Paris was the Paris Labour Court. In any event, the EAT's task was to interpret the SDA. It carried out this task by reference to hypothetical facts, noting that, if the claimant had worked in a theoretical Utopia instead of France, where European law did not apply and there was no legal protection against discrimination "it would be very curious if the…[E]mployment [T]ribunal thereby retrospectively

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acquired jurisdiction to consider her complaints of harassment and discrimination in Utopia".

Hence the EAT allowed Tradition's appeal and declared that the Employment Tribunal had no jurisdiction to consider the claimant's complaints in so far as they related to her employment in Paris before October 2004.

Paul Goulding QC and David Craig (instructed by Mishcon de Reya) appeared for Tradition.

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