THOMPSONS SOLICITORS

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# AGE POSITIVE

**Given the imminence of the introduction of legislation against age discrimination, the Age Positive team in the Department for Work and Pensions has produced a timely guide for employers. It should also be of interest to unions.**

The booklet provides a simple three-step checklist to help employers identify where their business currently stands in relation to ageist practices and highlights ways of eliminating ageism from their workplace.

The checklist covers recruitment, selection, training and development, redundancy and retirement, and tells them where to find additional help. In general, the Age Positive campaign promotes the benefits of employing a mixed-age workforce that includes older and younger people.

Go to: *www.agepositive.gov.uk/complogos/ACFA9.pdf* for a copy.

# CHILDCARE CHALLENGE

**Finding good quality, affordable childcare can be one of the biggest challenges facing parents, and employers could be doing a lot more to help ease the financial burden on employees, according to a new childcare guide from the TUC.**

*Who's looking after the children?* says employers could consider opening a workplace nursery that offers cheaper places to staff. Or it suggests, a group of employers in a locality might choose to come together to offer a crèche for all employees to use.

Childcare vouchers – which are tax exempt for both employer and employee – or childcare subsidies are other popular ways of helping parents survive the childcare years.

Simple changes like allowing parents the flexibility to change their hours to fit in with nursery drop-off and pick-up times can make the world of difference, says the guide.

In workplaces where unions have been able to negotiate the introduction of term time working, annualised hours or job-share arrangements, both parents and employers have seen enormous benefits.

You can go to: *www.tuc.org.uk/extras/TUC_Childcare.pdf* to download a copy.

# ACAS CUTS

**An inquiry by the Trade and Industry Select Committee into the work of ACAS (a DTI agency) has been urged by Thompsons to judge the service by whether it is a force for good in raising employment standards.**

Both employers' and employees' organisations are concerned about the impact of the loss of 150 jobs – about 16 per cent of total staff numbers – on the service.

ACAS conciliation services cost about £400-£450 per case, as opposed to £2,000 per case for a tribunal hearing. When multiplied by the number of cases that ACAS deals with every year, the figures represent a £30 million saving to the Treasury.

The committee, which started meeting in January this year, is looking into the remit of ACAS and how it performs, both now and in the future; how ACAS contributes to increased productivity; and its general performance and accountability.

The committee's work has, however, stalled for the time being because the DTI is conducting an internal review into the agencies it funds that give advice on employment law.

# VIDEO NICETY

**Anyone who is in the process of making a tribunal claim should find a new video from ACAS (the Government's conciliation service) very helpful.**

The video is an extract taken from the *Essential Guide to Employment Tribunals* DVD. Tony Cooper, an experienced ACAS conciliator, talks through what ACAS does so that claimants can avoid ending up in an employment tribunal. See the video at *www.acas.org.uk/conciliationvideo/index.htm*

# MEASURING TIME

**Parliament has approved regulations that remove the "partly unmeasured working time" exemption from the Working Time Regulations (WTR).**

Under section 20(2) of the WTR, workers whose hours are pre-determined (say, by their contract of employment), but who volunteer to do more hours, are not protected by the regulations during those extra hours.

Go to: *www.opsi.gov.uk/si/si2006/20060099.htm* to access the statutory instrument.

# TUPE guidance

**Although the revised TUPE regulations (due to come into force on 1 April 2006) have not yet been published, the DTI has already issued guidance about them.**

The Transfer of Undertakings (Protection of Employment) Regulations 2006 will make a number of changes to the current law that will be covered in detail in April's LELR. The main changes include:

- widening the regulations to cover cases where services are outsourced, insourced or assigned to a client by a new contractor (known as "service provision changes")
- a new duty on a transferor to supply information (called "employee liability information") to the new employer about transferring employees
- provisions clarifying how employers and employees can agree to vary contracts
- provisions clarifying the circumstances under which it is unfair for employers to dismiss employees for reasons connected with a relevant transfer.

Go to: *www.dti.gov.uk/er/individual/tupeguide2006regs.pdf* to download the guidance.

# Employment timetable

**The DTI has published a list of regulatory changes due to come into force this year.**

There are two main commencement dates – 1 April 2006 and 1 October 2006.

The list includes:

- minor pensions amendments to the Information and Consultation Regulations (April)
- revisions to the TUPE regulations (April)
- legislation to outlaw age discrimination (October)
- annual revision of the National Minimum Wage (October)
- extensions to the scope of the dispute resolution procedures (October)
- changes under the Work and Families Bill (October)
- amendments to the law on collective redundancies (October).

Go to: *www.dti.gov.uk/ewt/common_comence5.htm* to access the change.

# Consult on pensions

**Employers will soon have to consult their employees before making certain changes to occupational and personal pension schemes.**

The Occupational and Personal Pension Schemes (Consultation by Employers and Miscellaneous Amendment) Regulations 2006 are due to come into force on 6 April, and will apply initially to businesses with more than 150 employees. That will come down to 100 in April 2007, and to 50 in April 2008.

The draft regulations set out a default method for information and consultation, if nothing else has been agreed with trade unions or under the Information and Consultation Regulations.

Go to: *www.opsi.gov.uk/si/si2006/draft/20063891.htm* to access the regulations.

# Family friendly drafts

**As well as all the other changes to the law recently announced by the DTI, it has now published draft regulations on family-related leave and flexible working. All are due to take effect in April 2007:**

- The Maternity and Parental Leave (Amendment) Regulations 2006 will introduce a number of changes, including 'Keeping in Touch Days', allowing mothers to work for a limited number of days during their statutory maternity pay period without losing their entitlement.
- The Paternity and Adoption Leave (Amendment) Regulations 2006 will amend provisions relating to adoption leave in the Paternity and Adoption Leave Regulations 2002.
- The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006 will give carers the right to request to work flexibly.

Also included in the consultation is the proposal to extend statutory paid maternity leave from six months to nine, along with the introduction of a new right for mothers to transfer a proportion of their maternity leave and pay to fathers. These are to be introduced as part of the Work and Families Bill (currently going through Parliament), and other legislation.

The closing date for consultation is 18 April 2006. Go to: *www.dti.gov.uk/er/work_families_regs_jan2006.pdf* to access the document.

# REGULATING DISPUTES

**In October 2004, the Government introduced new dispute resolution regulations, requiring employees to put their grievance in writing before they lodge a tribunal claim.**

In Shergold -v- Fieldway Medical Centre (IDS 797), the employment appeal tribunal (EAT) has said that a resignation letter setting out general complaints can amount to a grievance under the Employment Act (Dispute Resolution) Regulations 2004.

## WHAT WERE THE BASIC FACTS?

After 17 and a half years as an audit clerk for a GP practice, Mrs Shergold resigned in a letter dated 31 October 2004, which set out a number of complaints about a colleague, Jacqui Smith.

The two GPs asked her to a meeting at the beginning of November to discuss her complaints, at which one of them said that, if she had a grievance against Ms Smith, she should follow the formal procedure.

In any event, the meeting did not resolve any of her concerns and her employment ended on 24 December. She then lodged a claim of constructive dismissal.

The medical practice responded by saying that the resignation letter was not a grievance and, although she had been advised to lodge one at the meeting, she had not done so. Nor had she ever stated that her resignation letter was a grievance.

## WHAT DID THE TRIBUNAL DECIDE?

And the tribunal agreed. It said that Mrs Shergold's resignation letter could not be construed as a grievance.

In particular, it said that it did not raise two of the allegations that she had mentioned in her application to the tribunal and which she was now relying on as part of her claim. As a result, the GPs had not had a chance to respond to them.

## WHAT DID THE EAT DECIDE?

The EAT, however, disagreed. It said that, although the purpose of the regulations was to encourage conciliation, the courts had to be careful not to bog people down in endless technicalities.

It emphasised, therefore, the minimal nature of the statutory requirements – basically, that the grievance just has to be in writing. Under the standard grievance procedure, it does not even have to set out the particulars of the grievance, as they can be clarified at any time before the meeting that the employer has to set up to hear it.

Nor does it make any difference if the grievance is set out in a document that doubles as something else (in this case a letter of resignation), particularly if there is plenty of time to resolve the grievance before the resignation takes effect.

The EAT said that the regulations do not require employees to make clear that they are lodging a grievance when they write their letter. Nor is there any requirement for the employee to comply with any company or contractual grievance procedure.

The EAT agreed with the tribunal, however in that the *"grievance in question must relate to the subsequent claim, and the claim must relate to the earlier grievance, if the relevant statutory provision is to be complied with."* So if the grievance relates to unpaid holiday pay, the subsequent claim cannot be based on race or sex discrimination with no reference to holiday pay.

But that does not mean that the wording of the grievance has to be identical to the wording in the claim, not least because the person bringing the grievance is not required under the regulations to set out their reasons when lodging it.

*Dear Sir or*

In this case, Mrs Shergold's complaint centred on the conduct of Jacqui Smith – both her letter of resignation and her subsequent claim were on exactly the same basis. The fact that the GPs had not had a chance to respond to two of the allegations in her subsequent claim was completely irrelevant.

## COMMENT

Despite this ruling, it is better for union officials to ensure that members' grievances do specify the grievance clearly and give enough background to prevent the employer raising procedural points.

# CAUSING A COMMOTION

**Employees now have the right to ask to work flexibly, but if their employer refuses the application, do they have to lodge a separate grievance before they can complain to a tribunal?**

The employment appeal tribunal (EAT) has said in Commotion Ltd -v- Rutty (IDS 797) that one document can fulfil two different functions – both as a grievance letter and an application to request to work flexibly.

Madam...

## WHAT WERE THE FACTS IN THE CASE?

Mrs Rutty had worked full time for Commotion as a warehouse packer for two years, when a court granted her a residence order to look after her granddaughter.

She informally asked the warehouse manager if she could work three days a week, but he refused. She then applied in writing in August 2004 to vary her working hours under the flexible working provisions in section 80F of the Employment Rights Act 1996.

That was also refused (as was her appeal) on the grounds that her employer wanted everyone in the warehouse to work uniform hours to create a team spirit.

She then resigned, claiming in her notice letter that she had raised the issue of varying her working hours as a grievance and claiming breach of contract.

## WHAT DID THE TRIBUNAL DECIDE?

The tribunal found in Mrs Rutty's favour, saying that the company had not satisfied any of the reasons given in the legislation for rejecting an application for flexible working.

It said that the company's argument that her different working hours would have "a detrimental impact on performance" had not been substantiated. Instead, it accused Commotion of having an "outdated response" to a request for part time working.

As for the breach of contract claim, the tribunal rejected the employer's argument that it was inadmissible on the basis that she had not lodged a grievance. It said there was no point in her lodging another grievance before making her tribunal claim, as the company's mind was already made up.

## WHAT DID THE COMPANY ARGUE ON APPEAL?

On appeal, Commotion argued that it was not convinced that the tribunal had made a clear ruling about whether Mrs Rutty had lodged a grievance when making her application for flexible working, but if it had, it was wrong to have done so.

It said that she should have followed two distinct procedures – one to make a request to work flexibly, and another for lodging a grievance. These were completely separate and distinct.

As for her application to work flexibly, the company argued that the tribunal was not entitled to undertake an objective assessment of its decision, never mind decide whether it was objectively justified.

## WHAT DID THE EAT SAY?

But the EAT disagreed on all counts. It pointed out that the disputes resolution regulations allow for a document *"which contains or constitutes the presentation of a grievance [and which] can also fulfil another function about the same or different subject matter."*

Although the company had tried to argue that Mrs Rutty could not have been aggrieved by the time she made her formal request, the EAT disagreed. It concluded that she was clearly aggrieved, because she had said so in her resignation letter.

The EAT also said that Mrs Rutty was entitled to present a complaint to a tribunal on the basis that the decision to reject her application for flexible working was based on incorrect facts. *"It must follow that the Tribunal is entitled to investigate the evidence to see whether the decision was based on incorrect facts."*

It agreed that tribunals cannot decide whether an employer has acted fairly or reasonably when rejecting the application, but they must have the right to look at the reason that the employer is relying on and decide if that is factually correct. In this case, the tribunal was entitled to conclude that Commotion had no evidence to justify their refusal.

## a brief overview of

# UNITY IS

**Thanks mainly to the efforts of the trade union movement, employees are now entitled to a whole range of different rights at work. These are usually set out in their individual contracts of employment (see LELR 108 for more details).**

But they can also be found in collective agreements. These are agreements (or arrangements built up over the years from custom or practice) that trade unions negotiate, on their behalf, with employers.

Although individual workers are not involved in the negotiations, they still benefit from the process. They cover union members, as well as any other workers in the bargaining units covered by the recognition agreements.

In this article, ***Joe O'Hara***, a solicitor from Thompsons Employment Rights Unit in London, summarises the law on collective agreements and answers some frequently asked questions.

### WHAT IS A COLLECTIVE AGREEMENT?

Section 178(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 defines a collective agreement as *"any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers' associations."*

It has to be about one of the seven topics specified in the legislation:

- terms and conditions of employment or the physical conditions of work
- engagement, non-engagement, termination or suspension of employment or the duties of employment of one or more workers
- allocation of work or duties between workers or groups of workers
- discipline
- membership or non-membership of a trade union
- facilities for union officials
- machinery for negotiation or consultation and other procedures, including trade union recognition.

To be legally binding in their own right, all collective agreements now have to be in writing (except for agreements reached before February 1974), and must state in black and white that the two sides intended it to be a legally enforceable contract.

It is very unusual for the terms of a collective agreement to be legally binding, but they can be enforced if they are "incorporated" into the contract of an individual worker. This is known as the "normative effect" of a collective agreement.

When this happens, only the individual employee can enforce the term. This is because the legal mechanism is not the collective agreement between the employer and the union, but the contract between the employer and the employee.

### HOW DOES A TERM BECOME INCORPORATED?

In a number of ways, for instance, when the annual pay round or other negotiation results in a collective agreement for a percentage pay increase, each employee's contractual rate of pay is increased accordingly.

The usual route to incorporation, though, is when the contract of employment cross-refers to the collective agreement. Section 1(4)(j) of the Employment Rights Act 1996 requires written statements of particulars of employment to contain particulars of *"any collective agreement which directly affects the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made"*.

So contracts or written statements should contain clauses such as:

*"Your terms and conditions are set by agreement between [NAME OF EMPLOYER] and [NAME OF UNION]"*

or

*"Your terms and conditions are directly affected by collective agreements made by [NAME OF EMPLOYER] and [NAMES OF UNIONS]"*.

It can also be incorporated when the collective agreement actually says that one or more of its terms will be incorporated into the contracts of the employees to whom it applies; and when both the collective agreement and the individual contracts cross-refer.

It is very important to ensure that terms are incorporated, so union officials should make a point of checking the contracts (or written statements) of new starters, to ensure that they contain all the information required by the legislation, especially cross-references to

# STRENGTH

collective agreements. However, not all terms are suitable for incorporation.

## WHICH TERMS CAN BE INCORPORATED?

It is fairly obvious that rates of pay or pay increases are meant to be put into employees' contracts, otherwise they would be stuck on their original rates of pay for ever. The same applies to terms specifying hours, holidays and sick pay. As a rule of thumb, terms that are "individual" in nature will be incorporated into individual contracts.

But unless the two sides stipulate otherwise, terms that are "collective" in nature (such as collective disputes procedures and recognition agreements) are not usually incorporated and so cannot be enforced.

The union cannot enforce them because the collective agreement is not legally binding, but neither can the employee because the term is not part of their contract.

So if a union negotiates a term that is not obviously individual in nature, it needs to take care to get the wording right. Take *Kaur -v- MG Rover Group Ltd (2004)* as a good example. In this case, the workforce and the unions agreed full flexibility in exchange for a promise of "no compulsory redundancies".

However the Court of Appeal looked at where the key phrase appeared, decided it was collective and not individual in nature and so was not incorporated into the contracts of the individual MG Rover workers.

A similar problem can arise with facilities agreements for union officials, which are hybrid terms – they are usually found in the recognition agreement but are meant to benefit individual workers so long as they are accredited union representatives.

When concluding negotiations on a collective agreement, union officials should therefore make sure that they agree the right wording for terms that are not obviously individual in nature, but which they want to be incorporated into their members' contracts. This is important because collective agreements frequently contain a mix of both collective and individual terms.

Strictly speaking, each time a union finalises a collective agreement that directly impacts on contracts, the employer should issue what is called "a section 4 statement" up-dating the written particulars. In practice, they hardly ever do, but ensuring that these are issued is one way for unions to reduce any doubt about which terms are incorporated.

## WHAT ABOUT "NO-STRIKE" CLAUSES?

The 1992 Act contains a special provision to ensure that "no-strike" clauses (which are very rare anyway) are incorporated only with the full knowledge and intent of the union and the individual worker.

Section 180 says that the collective agreement must be reached with an independent trade union, be in writing and expressly state that the no-strike clause is incorporated into the contract.

The agreement must be reasonably accessible to the employee at their place of work and be available for them to consult during working hours. In addition, the employee's contract must expressly incorporate the no-strike clause.

Photo: Jess Hurd/reportdigital

# OUT CLUBBING

**In a claim for negligence, the essential question is: who was responsible for preventing the negligent act?**

In Hawley -v- Luminar Leisure Ltd, the Court of Appeal has said that Luminar Leisure was liable for David Hawley's injuries even though they did not directly employ the bouncer who caused them.

Mr Hawley's union, the FBU, instructed Thompsons to act on his behalf.

## WHAT WERE THE BASIC FACTS?

Jeffrey Warren was employed from 1998 by ASE Security Services as a doorman at the Rock Café in Southend, which was owned and run by Luminar. At an incident in August 2000, Mr Warren hit Mr Hawley so hard that the former firefighter fell and suffered permanent brain damage.

Mr Hawley sued Luminar as well as ASE, arguing that the nightclub had so much control over the security staff that it had effectively become their "temporary deemed employer".

Before the case came to trial, however, ASE went into liquidation and did not file a defence. The court issued judgement against them anyway (known as a "default judgement").

Their insurers then refused to indemnify ASE, saying that the assault was intentional. They were then added to the proceedings as third defendants.

## WHAT DID THE HIGH COURT DECIDE?

The judge said that the insurers should pay up under the terms of a policy that covered legal liability for damages arising from "accidental bodily injury to any person".

The judge also said that Luminar was vicariously liable for the actions of Mr Warren on the basis that they had sufficient control over ASE's employees to make them "temporary deemed employees".

## WHAT DID THE PARTIES ARGUE?

Luminar argued that they had contracted with ASE as a "specialist independent contractor" to be responsible for security at the club. They said that although they may have told ASE's employees where they should stand and which customers to admit, this did not mean that they controlled the ways in which ASE's employees carried out their work.

Alternatively, they argued that, given the recent decision in *Viasystems (Tyneside) Ltd -v- Thermal Transfer (Northern) Ltd and ors* (LELR 107), ASE should also be found to be vicariously liable for Mr Warren's behaviour. In other words, that there was dual liability.

The insurers, not surprisingly, argued that only Luminar was vicariously liable for Mr Hawley's injuries, and that they should not therefore have to pay up under the terms of ASE's insurance policy which, they pointed out, only covered accidental injury.

## WHAT DID THE COURT OF APPEAL DECIDE?

The court found that Luminar was in overall charge of security; that the doormen were all part of the Luminar team; and that all of them wore the club's uniform.

Luminar decided which customers to admit, which to exclude and which to reject. They told the doormen where to stand and when to move. And the Luminar management exercised detailed control not only over what the door stewards did but how they were to do it.

On that basis, the court said that *"Luminar had control of and responsibility for ASE's employees in fact and by virtue of the contractual provisions."*

As for dual liability, the court said that *"there has been effectively and substantially a transfer of control and responsibility from ASE to Luminar."* The answer to the question as to who was "entitled and therefore obliged to control Mr Warren's act so as to prevent it", was Luminar.

And the court said that the insurers also had to pay up. The question of whether Mr Hawley's injuries were "accidental" had to be judged from the perspective of the assured (in other words, ASE), not the individual perpetrator or the victim.

Because the policy referred to circumstances that could give rise to "criminal proceedings", the court said that the concept of "accidental bodily injury" in the policy could therefore extend to bodily injury which was intended by the perpetrator, if not by the assured.

# EQUALLY VALUED

**In equal pay cases, claimants have to show (among other things) that the difference in pay that they are complaining about can be attributed to a "single source".**

The employer, on the other hand, has to show that there is a material factor (or reason) that accounts for the difference in pay, and which has nothing to do with sex.

In Armstrong and ors -v- Newcastle upon Tyne NHS Hospital Trust (2006, IDS 797), the Court of Appeal said that employers do not have to provide justification for a pay disparity unless the material factor is itself tainted by sex discrimination, and that workers working for one trust could not compare their pay with workers at another.

## WHAT WERE THE BASIC FACTS?

In 1985, the mainly female domestic ancillary workers at Newcastle Health Authority lost their right to bonus payments when their work was contracted out, but the mainly male porters kept theirs as their work was not contracted out.

The authority was then divided into two trusts, but merged again in 1998. In 2001 some of the women brought claims of equal value with porters at the Royal Victoria Infirmary (RVI) against what had become their common employer, the Newcastle upon Tyne NHS Hospital Trust.

Because some of the women worked at a different hospital from the men, they first had to show that working for the same trust amounted to "the same employment" under the Equal Pay Act, or else constituted a "single source" of employment under article 141 of the EC Treaty.

*Royal Victoria Infirmary*

For its part, the trust had to show that the difference in pay between the two groups had nothing to do with sex discrimination.

## WHAT DID THE TRIBUNALS DECIDE?

The employment tribunal and the appeal tribunal said that the domestics and the porters working at different hospitals did not work "in the same employment", as the bonus schemes related to essentially different employment regimes.

And they also said their claims fell outside the scope of Article 141 because they were not all employed in the same establishment or service. There was, therefore, no "single source" of employment.

However, it found in favour of those domestics who did work at the RVI, saying that the trust's justification for the difference in pay (basically, that the porters would have put up more of a fight against a tendering process) was tainted by sex.

It said that the women had been adversely affected by the withdrawal of the bonus arrangements, and was not convinced by the trust's efforts to justify the difference.

The domestics who did not work at the RVI appealed, as did the trust, arguing that the tribunal was wrong to dismiss its material factor defence.

## WHAT DID THE COURT OF APPEAL DECIDE?

The court agreed with the tribunals that there was no single source of employment for the domestics who did not work at the RVI.

It relied on the case of *Department for Environment, Food and Rural Affairs -v- Robertson*, in which another Court of Appeal said that it was not enough for civil servants in different departments to have a common employer. There also had to be a single source responsible for the difference in pay. The same principle applied in this case.

As for the material factor defence, the court was guided by the House of Lords decision in *Glasgow City Council -v- Marshal* that employers do not have to justify a difference in pay, unless it can be shown to be due to sex discrimination. It upheld the trust's appeal and remitted the issue to the tribunal.

## COMMENT

In direct conflict with the EAT in *Sharp* (LELR 107), this decision means that claimants have to show sex discrimination before the employer has to justify the pay difference. It also makes it far harder for claimants to rely on comparators who work for another employer, even if they had previously worked for the same employer and still had the same terms and conditions as them.

# Holiday blues

**The Working Time Regulations give workers the right to four weeks' paid annual holiday. But who exactly is a worker?**

In Bacica -v- Muir (2005, IRLR 35), the employment appeal tribunal (EAT) has said that just because someone does the work themselves, it does not make them a worker.

## WHAT WERE THE BASIC FACTS?

Mr Muir started work for Mr Bacica as a painter and decorator in August 2003. He used his own paint brushes, but Mr Bacica supplied the rollers, paste tables and wallpaper. Mr Muir was required to do the work himself.

He worked under the Construction Industry Scheme Regulations (CIS) whereby tax was deducted from his earnings, but he paid his own National Insurance contributions. He also worked, at times, as a private hire taxi driver and did other private work and had a set of accounts prepared for him every year.

Mr Muir made a claim for unpaid holiday pay, arguing that he was a "worker" within the meaning of the Working Time Regulations and therefore entitled to paid annual leave.

And the employment tribunal agreed, on the basis that Mr Muir had to do the work personally.

## WHAT DID THE PARTIES ARGUE ON APPEAL?

On appeal, Mr Bacica argued that:

- the tribunal had not considered whether Mr Muir was self-employed
- he had a contract for services (as opposed to employment) with Mr Muir
- there was no mutual intention to create an employment relationship
- Mr Muir clearly saw himself as self-employed as he had a CIS card and a set of accounts prepared for him every year
- it was quite normal to expect a self-employed person to carry out the work personally
- if he was a worker, why was he not claiming holiday pay from his other employers?

Mr Muir, on the other hand, argued that he had taken advice from the Citizens Advice Bureau, which had told him that if he took instructions to do a job, he was a worker.

## WHAT DOES THE LAW SAY?

Under the Working Time Regulations (WTR), "workers" are entitled to holiday pay. But to satisfy the definition, they must work under a contract and do the work themselves for someone who must not be a client of a business that they run. This is to exclude the self-employed.

In the case of *Redrow Homes (Yorkshire) Ltd -v- Wright* (LELR 93), the Court of Appeal held that contract bricklayers who undertook personally to perform work or services for the company were "workers" within the meaning of the regulations.

> '...if a person renders services or performs work on the basis that the person to or for whom he does so is a customer of his business, he is not then to be regarded as a worker'


## WHAT DID THE APPEAL TRIBUNAL DECIDE?

The EAT, however, said that it *"cannot be correct to suggest that the mere rendering of a service personally makes a person a 'worker'. To do so is to ignore the last clause in the definition which makes it clear that if a person renders services or performs work on the basis that the person to or for whom he does so is a customer of his business, he is not then to be regarded as a worker."*

This meant, the EAT concluded, that Mr Muir was carrying on a business on a self-employed basis. He had a CIS certificate, had business accounts prepared and submitted to the Inland Revenue, he was free to work for others, was paid at a rate which included an overheads allowance and was not paid if he didn't work.

The EAT concluded therefore that all these factors indicated that Mr Muir was, in fact, running a business and that the work he performed for Mr Bacica was one of his business activities. The fact that the work was performed by him personally was irrelevant. He was not, therefore, entitled to holiday pay.

# Life on the ocean wave

**European law says that there should be no restrictions on the freedom of nationals in member states to set up and manage companies and firms in other member states.**

At the same time the European Social Charter has a number of objectives including the promotion of employment and improved living and working conditions.

The Court of Appeal has said in Viking Line ABP and anor -v- International Transport Workers' Federation and anor (2006, IRLR 58) that courts have to find a balance between the two sets of rights, and referred a number of questions to the European Court of Justice (ECJ).

## WHAT WERE THE BASIC FACTS?

Viking was a Finnish passenger ferry operator with seven vessels, including *Rosella*, sailing under the Finnish flag between Estonia and Finland. The crew of the *Rosella* belonged to the Finnish Seamen's Union (FSU) affiliated to the International Transport Workers' Federation (ITF), based in London.

In October 2003, Viking decided to reflag the *Rosella* because it was making a loss. The company wanted to employ an Estonian crew at much lower wages than its current Finnish crew.

The FSU got in touch with the ITF which issued a circular asking all its 600 affiliated unions not to negotiate with Viking, in support of its general policy to eliminate flags of convenience.

In November 2003, the FSU threatened strike action. Viking settled the dispute in December agreeing not to reflag before February 2005, but the ITF did not withdraw its circular.

## WHAT HAPPENED NEXT?

Prior to the peace agreement coming to an end, Viking asked an English court in August 2004 for an injunction preventing the ITF and FSU from taking industrial action and asking ITF to withdraw its circular.

The company argued that industrial action aimed at preventing them from reflagging the *Rosella* amounted to a restriction of their right to establish themselves (in this case in Estonia) under article 43 of the EC Treaty, and their freedom to provide services under article 49.

The Judge in the Commercial Court agreed with them and granted an injunction.

## WHAT DID THE PARTIES ARGUE ON APPEAL?

Viking argued that the free movement of establishment and the free movement of services were guaranteed by the treaty. Union activity was not exempt under the treaty, and therefore unions were prohibited from doing anything that inhibited those rights.

The unions, on the other hand, argued that they had a fundamental right to take action to preserve jobs recognised by Title XI of the EC Treaty and Article 136.

## WHAT DID THE COURT OF APPEAL DECIDE?

As the case raised such important issues relating to the interaction of key provisions of the EC Treaty, the court decided to refer a number of questions to the European Court of Justice (ECJ), looking at the scope of and restrictions on the free movement of provisions and the right of establishment under articles 43 and 49.

It also asked the ECJ to consider the actions of the ITF, specifically its policy on flags of convenience.

The court emphasised the need to find a balance between the employer's free movement rights and the social rights of trade unions.

It felt, however, that Viking was unlikely to get over the hurdles presented by Title X1, unless the company could persuade the ECJ that the unions' activities amounted to direct discrimination. Its general view was that Viking would have an uphill struggle to establish that.

It refused to grant Viking an injunction, saying that it *"should only be available to it after a full trial of the action, including answers to the questions posed."* On that basis, the court set aside the previous judgement until the ECJ had a chance to hear the questions referred to it.


## COMMENT

This is an important case, as the ECJ is being asked to rule on the rights of collective labour in the increasingly business-oriented European law regime.

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**LELR AIMS TO GIVE NEWS AND VIEWS ON EMPLOYMENT LAW DEVELOPMENTS AS THEY AFFECT TRADE UNIONS AND THEIR MEMBERS**

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CONTRIBUTORS TO THIS EDITION **Nicola Dandridge**
**Honor Lamont**
**Joe O'Hara**
**Victoria Phillips**

EDITOR **ALISON CLARKE**

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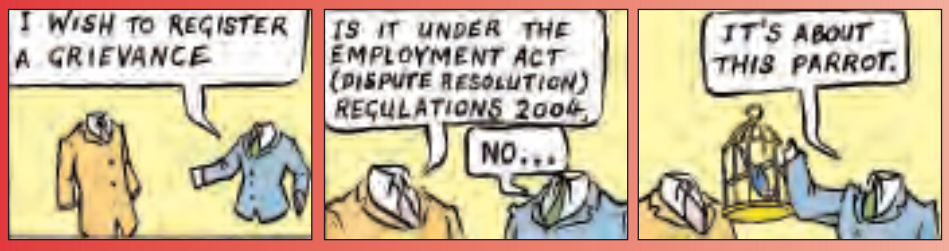


"LAW SUIT"
BY
BRIAN GALLAGHER

brian@bdgart.com
www.bdgart.com

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