THOMPSONS SOLICITORS

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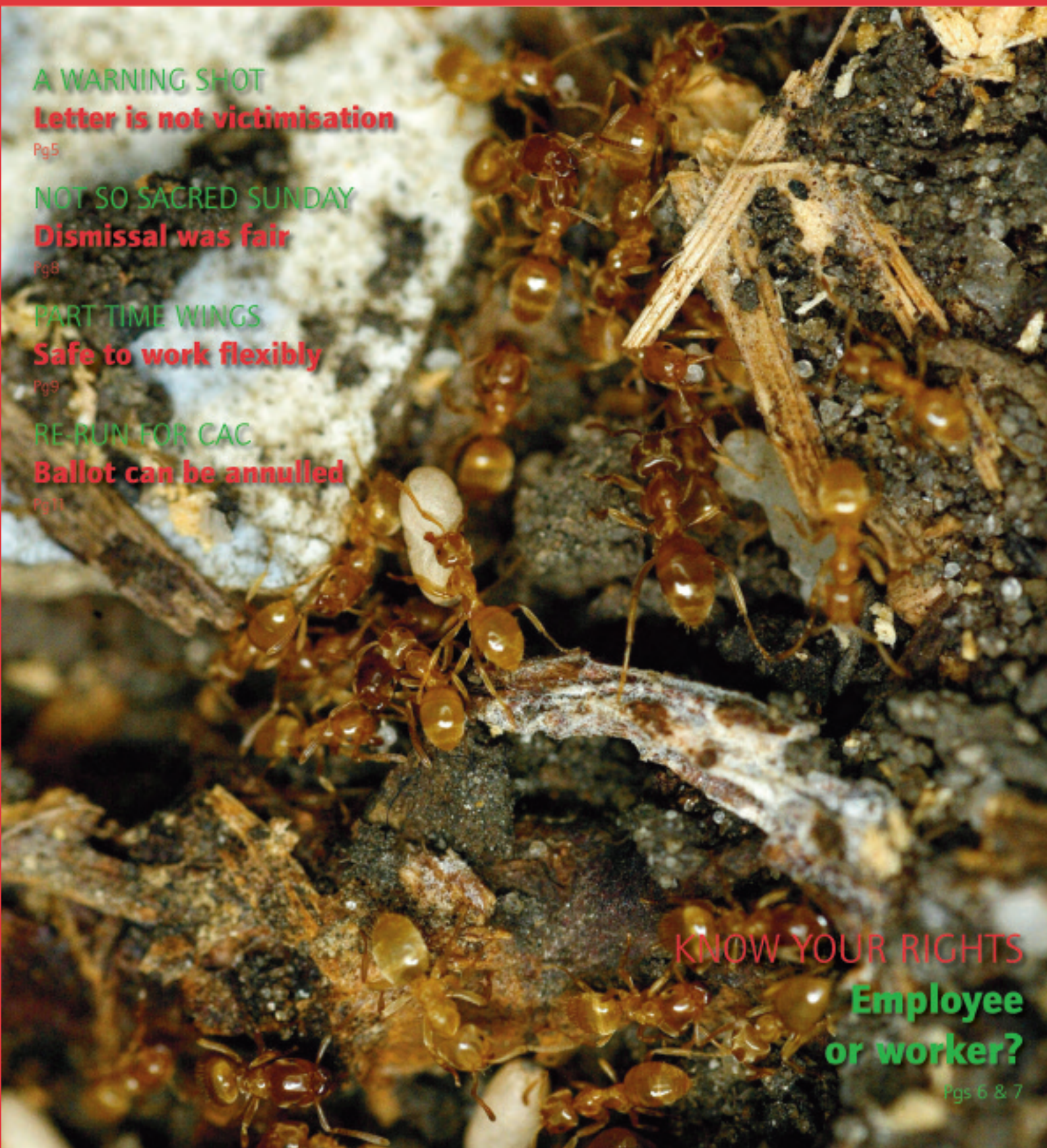


MODERNISATION FUND

The Government has invited unions to make bids from the Union Modernisation Fund to improve efficiency.

The money (between £5 and £10 million) is to support projects for training union reps, reviewing internal structures and making more use of new technologies.

The bid period ends on 3 October 2005, and application packs can be downloaded from: *www.dti.gov.uk/er/union_mod_fund.htm*.

TUC PUBLICATIONS

The TUC has produced a number of publications recently. These include:

- *The EU temp trade*, which shows that the UK is one of only three European countries where temps get paid less than their permanent counterparts. To see the report, go to www.tuc.org.uk/extras/eu_agency.pdf
- *Black workers, jobs and poverty,* which analyses official statistics to show that unemployment among the UK's ethnic minority communities currently stands at 11 per cent (five per cent for white workers). Go to *www.tuc.org.uk/publications* for a copy of the report.
- The TUC has also published *Health and Safety Executive's Management Standards for Work-related Stress – A Guide for Safety Representatives*. Go to *www.tuc.org.uk/h_and_s/tuc-10147-f0.cfm* for a copy of the guide.

DATA PROTECTION

Previously available in four different parts, the Office of the Information Commissioner has now updated and consolidated the Employment Practices Data Protection Code to help employers comply with the Data Protection Act 1998.

The new code consolidates the four separate parts – Recruitment and Selection; Employment Records; Monitoring at Work; and Information About Workers' Health – into one document. It also reflects the Court of Appeal's guidance in *Durant -v- Financial Services Authority* (LELR 86) on what constitutes a "relevant filing system" under the Act.

Go to: *www.informationcommissioner.gov.uk/eventual.aspx?id=437* to access the new code.

WORK CHANGES

A comprehensive study of the British workplace has shown a sweeping change in the way that employees balance work and family responsibilities.

The 2004 Workplace Employment Relations Survey found that since the last survey in 1998:

- paid paternity leave has increased by a staggering 44 per cent to 92 per cent
- parental leave has increased to 73 per cent from 38 per cent
- homeworking has increased by 12 per cent to 28 per cent
- term time only working has doubled to 28 per cent
- flexi-time is up from 19 per cent to 26 per cent
- job sharing has increased by ten per cent to 41 per cent

To access the survey, go to: *www.dti.gov.uk/er/inform.htm*.

ANNUAL REPORTS

CAC

This year's report by the Central Arbitration Committee shows a fall of 20 per cent in new recognition applications on the previous year, with a total of 83 in 2004/5.

To view a copy of the report, go to: *www.cac.gov.uk/cac_2_annual_report/annual_report.htm*

ETS

In its annual report for the year 2004/5, the Employment Tribunal Service, which provides administrative support to tribunals and the employment appeal tribunals, reported that:

- 86,181 claims were registered, compared with 115,042 the year before. The 25 per cent decrease is mainly due to fewer multiple cases
- 1038 cost orders were made, with 283 in favour of the applicant and 755 in favour of the respondent

Go to: *www.ets.gov.uk/annualreport2005.pdf* for a copy.

MINIMUM WAGE

Changes to the minimum wage come into effect on 1 October 2005, as follows:

- the rate for adult workers increases from £4.85 to £5.05 per hour
- the rate for younger workers (18 to 21) increases from £4.10 to £4.25 per hour

Age regulations

Draft regulations on age discrimination published recently by the Department of Trade and Industry are due to come into force on 1 October.

The new regulations will:

- ban age discrimination in terms of recruitment, promotion and training
- ban all retirement ages below 65 – except where objectively justified
- remove the current upper age limit for unfair dismissal and redundancy rights.

They will also introduce:

- a duty for employers to consider an employee's request to continue working beyond retirement; and
- a requirement for employers to give written notification to employees at least six months in advance of their intended retirement date to allow people to plan for their retirement.

The consultation period ends on 17 October. Go to *www.dti.gov.uk/er/equality/age.htm* for a copy of the document.

Discrimination rules

A number of changes to sex discrimination and equal pay legislation in employment and vocational training are being introduced by the Government in October 2005.

These include:

- a new definition of indirect sex discrimination
- a new formulation of harassment and sexual harassment
- provisions to make clear that less favourable treatment of women on grounds of pregnancy or maternity leave is unlawful sex discrimination
- a new eight-week time limit for responses to a sex discrimination questionnaire

Go to: *www.womenandequalityunit.gov.uk/publications/sda_changes_explanation_2005.doc* for a copy.

Mr Melia

The appellant in Melia -v- Magna Kansei Ltd **(LELR 100) has asked us to point out that the findings of the tribunal (leading to the reduction in his compensation) followed a protracted search by his employer for material to justify his dismissal.**

Hope for equal pay

Having been promoted to the position of group purchasing manager, Mrs Hope discovered that she was being paid less than the man who had previously done the job. To add insult to injury, she did even more work, as she did not have a deputy.

Thankfully, the EAT in Hope -v- SITA (UK) Ltd rejected the company's argument that a woman cannot succeed with a "like work" argument when she is found, as a matter of fact, to be doing more work than her male comparator.

The judge made clear that "*the fact that a promoted woman undertakes more duties than her male predecessor cannot result in a conclusion that the two are not undertaking like work in order to justify her being paid less.*"

Claim form rules

Under the new rules governing employment tribunal claim forms, claimants have to enter a minimum amount of information before the forms can be admitted.

In Richardson -v- U Mole Ltd, the claimant did not use the new form (ET1) and he failed to say that he was an employee. As a result, the tribunal refused to admit the claim.

The employment appeal tribunal said, however, that his employment status was implied by the dates that he gave for his employment; and that because the omission was immaterial to the claim he was bringing, the tribunal had the power to admit the form.

Employers take heart

After having a heart attack brought on by stress at work, a pub manager "in a very rough area" made a personal injury claim against his employer.

Although there was conflicting evidence as to whether the employer had been put on notice that the claimant was likely to have a heart attack if nothing was done to alleviate the stress, the county court found in his favour.

The Court of Appeal, however, has overturned the decision in Harding -v- The Pub Estate Company Ltd. It said that no one, including the GP, had foreseen that he might have a heart attack and that, therefore, it was not reasonably foreseeable by the employer.

EQUAL PAY ADDS UP

Under section 1 of the Equal Pay Act 1970, a woman whose work is rated as equivalent to that of a man is entitled to be employed on terms no less favourable than his, unless the employer can justify the difference in pay.

In Degnan and ors -v- Redcar and Cleveland Borough Council (2005, IRLR 615), the Court of Appeal has said, however, that all similar elements of the contracts have to be lumped together and then divided by the hours in the working week, rather than be considered separately.

WHAT WERE THE BASIC FACTS?

Two women cleaners, a schools assistant and a home help brought equal pay claims against the council, comparing themselves with gardeners, refuse workers and drivers and road workers.

All the male comparators were employed on work rated as equivalent to the women, and for which they were paid the same hourly rate. However, the men also received a number of bonuses and/or attendance allowances.

For instance, the gardeners got a fixed bonus of 40 per cent; refuse workers and drivers 36 per cent; and road workers 33 per cent.

WHAT DID THE TRIBUNALS DECIDE?

Applying the "same subject matter test" from *Hayward -v- Cammell Laird Shipbuilders (No.2) (1988, IRLR 257)*, the tribunal held that the terms in the men's contracts relating to basic pay and bonus pay had to be aggregated, but that the attendance allowance was to be treated separately.

This allowed the women to compare themselves with the relevant male comparator most advantageous to them for the bonus, as well as the most advantageous comparator for the attendance allowance. As a result, some of the women ended up with better pay than the men.

The employment appeal tribunal (EAT) said this was wrong. It said that all the payments received by the men should be aggregated and divided by the number of hours in the working week.

That hourly rate should then be compared with the woman's hourly rate. If it turned out to be more, the woman's hourly rate should be increased to make up the difference.

WHAT DID THE COURT OF APPEAL DECIDE?

The Court of Appeal agreed with the EAT that the "*employment tribunal had fallen into error when finding functional and conceptual differences between basic pay and the attendance allowance.*" Instead the attendance allowances related to the same "subject matter" as the hourly rate and bonuses and had to be treated as a single term.

The women were not, therefore, entitled to compare themselves with the relevant male worker most advantageous to them for the purpose of the bonus element of pay, and then (as a separate exercise) the most advantageous male comparator for the purpose of the attendance allowance element.

The court said that this also "*had the desirable result that it will facilitate what was intended by the Equal Pay Act, namely equalisation, rather than the upward movement of the women's rate of monetary pay to a level higher than that of any single male comparator.*"

SECTION 1(2)(B), EQUAL PAY ACT 1970

Where the woman is employed on work rated as equivalent with that of a man in the same employment:

(i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term.

A WARNING SHOT

Section 4 of the 1975 Sex Discrimination Act says that victimising someone for bringing a claim under the Equal Pay Act is, in itself, a discriminatory act.

In St Helens MBC -v- Derbyshire and ors (see LELR 94 for the EAT decision), the Court of Appeal has said that the women were not victimised by their employer when they were sent letters warning them of the implications of continuing with their equal pay claims for the future of the school meals service.

The women's union – the GMB – instructed Thompsons to act on their behalf.

WHAT WERE THE BASIC FACTS?

Over 500 female catering staff brought equal pay claims against the council in 1998. The vast majority of the women agreed a settlement, but 39 pursued their claim and were ultimately successful.

However, two months before the hearing in 2001, they received a letter from the council, warning them that it could not absorb the cost of their claims, and asking them to withdraw. The second (sent to all catering staff) warned that everyone's job would be at risk, if the 39 who had not settled were successful.

The women said that the letters made them feel that they would be blamed for the consequences, if they were successful. The council justified the letters, saying that the purpose was simply to get the women "to face facts and to take a responsible view of reality".

WHAT HAPPENED AT THE TRIBUNAL STAGE?

The original tribunal dismissed the women's claim, but the employment appeal tribunal (EAT) allowed their appeal and remitted the case to a second tribunal, which then found in their favour. It said the letters contained "what was effectively a threat".

The council appealed against that decision and the second EAT dismissed their appeal, saying that the women had been penalised for exercising their statutory rights. The council appealed again to the Court of Appeal.

WHAT DID THE COURT OF APPEAL DECIDE?

To ascertain whether the council could rely on the "honest and reasonable employer" defence, the Court had to ask a number of questions: who was the right comparator; whether the employees received less favourable treatment than the comparators would have done; whether the employees suffered "detriment" (or disadvantage) as a result; and whether that treatment was "by reason that" the employees had brought protected proceedings.

The Court of Appeal agreed with the findings of the employment tribunal to the extent that the appropriate comparators were non-litigants as well as ex-litigants; that there had been less favourable treatment; and that the women had been subject to a detriment.

WHAT WAS THE QUESTION AT ISSUE?

Relying on *Chief Constable of West Yorkshire Police -v- Khan (2001, ICR 1065)*, a majority of the Court of Appeal said that the main sticking point was "*whether the conduct complained of falls within the description of an honest and reasonable attempt by the Council to compromise the proceedings.*" This, according to Khan, was not the same as victimisation.

The majority of the judges could see no reason why an employer facing equal pay proceedings could not take steps to try to persuade the women to settle the claim without infringing the victimisation provisions. Otherwise, they said: "*the ability of employers to take reasonable steps to protect themselves in litigation is much attenuated as compared to what it would be in other, non-protected litigation.*"

They therefore remitted the issue – again – to another tribunal to determine whether the council's actions fell within the scope of the "honest and reasonable employer" defence.

A lone judge disagreed, however. He said the tribunal was right in its finding of victimisation, because the council could have written to the women's union or their legal representatives if its aim was simply to resolve the outstanding claims. It was also unnecessary to involve the other catering staff.

a brief overview of

AN EMPLOYEE

Although it may seem obvious whether someone is an employee or not, the answer is not always that straightforward. Even the courts sometimes have difficulty in figuring it out.

It is, however, crucial, to know because it determines what, if any, employment rights people have. For instance, only employees can claim unfair dismissal, redundancy payments, notice pay, the right to receive written reasons for dismissal and various family leave rights, including the right to flexible working, parental leave and paternity leave (see box).

In this article, ***Jo Seery***, a solicitor from Thompsons' Employment Rights Unit in Newcastle, looks at how to decide whether someone is an employee or a worker (for instance, someone who works on a casual basis).

WHO IS AN EMPLOYEE?

According to section 230(1) of the Employment Rights Act 1996, an employee is someone who works under a contract of employment. This, however, is not defined by statute so the courts have constructed a number of tests to help them decide whether someone is an employee.

Although each case is decided on its own merits, there are some essential elements that must be satisfied:

- The individual has to have a contract with the employer
- The individual has to carry out the work personally
- There has to be "mutuality of obligation" between the two parties
- The employer has to have "control" over the work that the employee does

WHEN IS THERE A CONTRACT?

In *Hewlett Packard Ltd -v- O'Murphy (2002, IRLR 4)*, the employment appeal tribunal (EAT) held that an IT specialist, whose company contracted with an employment business to find him work with a third party was not their employee, as there was no contract between him and the third party.

The issue can be even more complicated for agency workers, but with notable exceptions. In *Franks -v- Reuters Ltd (2003, IRLR 423)*, Mr Franks had been working for one client for six years, as an agency worker. The Court of Appeal said he had effectively been integrated into the employer's organisation. Although the length of the assignment was significant, the court stressed that length of service would not always mean that there was an implied contract.

WHAT IS PERSONAL SERVICE?

This does exactly what it says on the tin - the individual has to perform the work personally. In the case of *Express and Echo Publications Ltd -v- Tanton (1999, IRLR 36)*, the Court of Appeal held that because the driver's contract said he did not have to do the work personally, it could not be a contract of employment.

However, a limited or occasional power to subcontract may not be fatal. In *MacFarlane and anor -v- Glasgow City Council (2001, IRLR 7)*, the EAT held that just because a gymnastic instructor could arrange a replacement from a register maintained by the council, if she was unable to attend, did not mean she could not be an employee.

IS MUTUALITY OF OBLIGATION IMPORTANT?

This criterion (which means that the employer has to offer the work and the employee has to do it) is essential for an employment contract.

That is why it is so difficult for casual workers to establish that they are employees. In *Carmichael -v- National Power plc (2000, IRLR 43)*, the House of Lords would not imply a clause into an agreement with two casual workers (who were employed as and when), that the employer had to provide work for them.

The same approach was followed in *Stevedoring and*

Picture: Duncan Phillips/reportdigital.co.uk

OR A WORKER?

Haulage Services Ltd -v- Fuller (2001, IRLR 627),in which dockers were employed under a contract, which stated expressly that there was "*no obligation on the part of the company to provide such work for you nor for you to accept any work so offered*".

This criterion is also difficult for agency workers to meet. For instance, in *Stevenson -v- Delphi Diesel Systems Ltd (2003, ICR 471)* an agency worker (who was then taken on as a permanent employee) tried to claim that the period he had spent with the company as an agency worker should count so that he could claim unfair dismissal. The EAT disagreed, saying that during the agency phase, there was no mutuality of obligation.

WHAT ABOUT CONTROL?

This criterion (which means the employer ultimately controls what the employee does) is also crucial to prove that someone is an employee.

This, again, is difficult (but not impossible) for agency workers. Take the case of *Dacas -v- Brook Street Bureau (UK) Ltd (2004, IRLR 358)*, in which Ms Dacas had worked at a local authority hostel for the local council for six years, but as an agency worker.

The Court of Appeal said that, despite an express clause to the contrary, there was an implied contract of employment between the council and Ms.Dacas.

ARE OTHER CRITERIA NEEDED?

Even if all these elements are present, employment status is not automatic. Employment tribunals will also take into account the intention of the parties, the extent to which a person doing the work provides their own equipment, bears a degree of financial risk or is integrated into the business.

They will not, however, work through a checklist. They have to think about every aspect of the relationship with no single factor being decisive.

But even if someone is not an employee, they may be a worker, which gives them some rights, although not as many (see box).

WHO IS A WORKER?

A worker is defined in regulation 2 (1) of the Working Time Regulations 1998 as someone who works under a contract of employment or *"any other contract, whether express or implied ... whereby the individual undertakes to do or perform personally any work or services for another party to the contract"*, provided they are not a client or customer of the individual's profession or business.

This therefore includes many casual, freelance and self employed workers. In the case of *Torith Ltd -v- Flynn (EAT 0017/02)*, the EAT said that a self-employed joiner who worked exclusively for a firm of building contractors, was a worker, although he completed his own tax returns, paid his own tax and national insurance and provided his own hand tools.

COULD THINGS BE IMPROVED?

It is very disappointing that the law on the status of employees and workers is still so unclear. In view of the complexities of the current legislation, an overhaul is long overdue. The Government should take the bull by the horns and create a level playing field so that all workers benefit from all employment rights.

STATUTORY RIGHTS	EMPLOYEE	WORKER
Dismissal	✓	
Redundancy	✓	
Notice	✓	
Maternity Leave	✓	
Parental Leave	✓	
Fixed Term Employment	✓	
Dismissal and Disciplinary Statutory Grievance Procedure	✓	
National Minimum Wage	✓	✓
Protected Disclosure	✓	✓
Working Time	✓	✓
Part Time Work	✓	✓
Right to be Accompanied	✓	✓
Unlawful Deduction of Wages	✓	✓

NOT SO SACRED SUNDAY

There are a number of (limited) options for employees when their employer announces a change to their terms and conditions. One is to stay in the job and protest, another is to resign and complain of unfair dismissal.

In Copsey -v- WWB Devon Clays Ltd, the Court of Appeal has said that Mr Copsey (a Christian) was not unfairly dismissed for refusing to accept a shift change that involved working on a Sunday.

WHAT WERE THE BASIC FACTS?

After winning significant new business in late 1999, Devon Clays decided to extend its operating hours, and introduced a system of annualised hours with a rotating shift pattern, including some Sunday working in April 2000.

Four operatives, including Mr Copsey, refused to work on Sunday, and the company agreed that they could work on a six-day basis. However, after securing more new business in March 2002, Devon Clays said that everyone had to work seven days a week or be made redundant.

Mr Copsey again refused, and was offered work in a different plant operating a five-day rotating shift. He refused this and the company then offered him other vacancies, which he also refused. He was dismissed with effect from 31 July 2002, without a redundancy payment.

Mr Copsey said he had been unfairly dismissed because, as a Christian, he could not do a job that might involve working on a Sunday. He said this constituted "interference with his right to manifest religious belief" under article 9 of the European Convention on Human Rights (ECHR).

WHAT DID THE TRIBUNALS DECIDE?

The employment tribunal decided that Mr Copsey was dismissed, not because of his religious beliefs, but because he would not agree to a contractual variation in his working hours. The reason for the change was a sound business reason which the company had explained during its consultation with both the workforce and the unions.

It said that Devon Clays had acted reasonably and done everything it could to accommodate Mr Copsey's beliefs. His dismissal was therefore fair. The employment appeal tribunal (EAT) agreed, and said that the ECHR did not apply because Devon Clays was not a public authority.

Mr Copsey went to the Court of Appeal, arguing (among other things) that although Devon Clays was a private employer, the tribunal was a public authority, which should have applied article nine, as well as section three of the Human Rights Act 1998.

WHAT DID THE COURT OF APPEAL DECIDE?

The Court of Appeal agreed that Mr Copsey had not been unfairly dismissed, although the three judges reached their decisions in different ways.

One judge said that a number of European decisions in the European Court of Human Rights (*Ahmad -v- UK*; *Stedman -v- UK*) made clear that, if the employer's working practices and the employee's religious convictions are incompatible, the employee has the option of resigning in order to manifest his or her religious beliefs.

Another felt, however, that what was fatal to Mr Copsey's

Picture: Geoff Crawford/reportdigital.co.uk

case was the argument of "reasonable accommodation." He concluded that if an employer wants to change a contract term, then an employee may be able to rely on article 9. However, because the employer in this case acted reasonably and did everything it could, Mr Copsey's claim for unfair dismissal failed.

The third judge came to the same conclusion, arguing that domestic law was capable of resolving the issue. He said that what was important was "*striking a balance (which is, really by definition, what fairness normally involves) between the competing interests of the parties, namely the employer's requirement to run his business properly, and the employee's requirement to observe his religion*".

PART TIME WINGS

Under the Sex Discrimination Act, employers sometimes have to provide a "sound business reason" if they refuse a worker's request to work flexibly or part time.

In British Airways plc -v- Mrs Jessica Starmer, the employment appeal tribunal (EAT) rejected BA's justification that the financial and business consequences of Mrs Starmer's request outweighed her need to work part time.

Mrs Starmer's union, BALPA, instructed Thompsons to act on her behalf.

WHAT WERE THE FACTS?

Mrs Starmer, who trained as a pilot with British Airways (BA), was employed by the company as a co-pilot from May 2001. In March 2004 she asked to halve her hours under the right to request legislation. BA refused, saying that she could only reduce them by a quarter.

Then in September the same year, BA introduced a new policy which stated that anyone who had not flown a minimum of 2000 hours would not be allowed to work less than 75 per cent of full time hours.

Mrs Starmer complained of unlawful indirect sex discrimination as well as a breach of the right to request to work flexibly. The employment tribunal agreed. It said that the "provision, criterion or practice" (PCP) requiring her to work either full time or 75 per cent of a full timer's hours, was to her detriment. Although it applied equally to men, it would affect far more women than men.

It also said that BA had not followed the flexible working procedure within the required timescale when it failed to provide Mrs Starmer with written reasons for refusing her request.

The tribunal rejected BA's justification for the indirect discrimination on the basis that it was resource-led, as well as on grounds of safety (an argument it had not raised when it made its original decision).

WHAT DID THE PARTIES ARGUE AT APPEAL?

On appeal, BA argued that there was no PCP in operation when Mrs Starmer made her application to reduce her working hours. The refusal was a one-off management decision that did not apply to anyone else.

There was therefore no pool to which it applied, and the company could not be said to have indirectly discriminated against her. BA accepted that although the policy introduced in September 2004 constituted a "provision, criterion or practice", this did not apply to Mrs Starmer. As such, the statistics on which the tribunal relied were artificial and irrelevant.

Mrs Starmer pointed out, however, that it was up to her to identify the PCP, and that there was nothing in the law to say that a one-off discretionary decision cannot be a PCP.

BA also argued that Mrs Starmer presented a safety risk in that she was very junior and had not gained enough experience to fly on a 50 per cent contract. She argued, on the other hand, that she had an excellent flying record and, after a performance review on her return from maternity leave, had been found to be completely safe.

WHAT DID THE EAT DECIDE?

Provision, criterion or practice – the EAT said that the requirement for Mrs Starmer to work 75 per cent of the full time hours, and not 50 per cent, may not be a criterion or practice, but it certainly was a provision. It agreed with her that a PCP can be a one-off, discretionary decision which does not have to actually be applied to others.

Disparate Impact – the EAT agreed with the tribunal that the statistics showed that considerably more women than men work part time and that the PCP therefore affected far more women than men.

Justification – the EAT agreed with the tribunal's conclusion that "*the Respondent has not given any cogent evidence as to why it would be unsafe or in any way unsuitable for the Claimant ... to fly at 50% of full-time*".

One way or another

In discrimination cases, trade union officials invariably recommend that members claim against both the harasser and their employer.

And with good reason. For the first time, an employment appeal tribunal (EAT) has decided in Way & Intro-Cate Chemicals -v- Crouch that courts can make both parties liable for the full amount of compensation on a joint and several basis.

WHAT WERE THE BASIC FACTS?

Ms Crouch brought a claim of sex discrimination against her employer and an individual employee (Mr Way), claiming that she had been dismissed because she had ended her relationship with Mr Way.

The tribunal made an award of just over £40,000 against both the company and Mr Way, on the basis of joint and several liability. In other words, that each of them was liable to pay the full amount in the event that one of them could not pay up.

It decided this was fair because Mr Way was the managing director of the company and the major shareholder. Both the company and Mr Way appealed against the decision on compensation.

WHAT DID THE COMPANY ARGUE AT APPEAL?

At the EAT, Mr Way and Intro-Cate Chemicals argued, firstly, that the tribunal should either not have awarded any compensation, or should at least have reduced it because of Ms Couch's contributory conduct.

Secondly, they argued that Mr Way could not be held to have committed the unlawful act of discrimination (of dismissing Ms Crouch) because only her employer, Intro-Cate Chemicals, could do that.

Finally, they argued that the employment tribunal did not have jurisdiction to make an award of joint and several liability, but that if it did, it made an error of law in this case.

WHAT DID THE EAT DECIDE?

The EAT rejected every ground of appeal, bar the last, stating that, in cases of sex discrimination (but not unfair dismissal), tribunals are entitled to make an award on a joint and several basis. It noted that there was similar language in all the discrimination legislation – race, disability, religion and belief and sexual orientation.

As this was the first decision of an EAT allowing joint and several awards of compensation in a discrimination case, it set out a number of factors that tribunals should bear in mind:

> *'the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage in question'*

- In most cases, the present practice of apportioning liability between individual employees and employers should continue
- If a tribunal makes such an award, it should set out its reasons clearly
- Tribunals must take into account section 2 (1) of the Civil Liability (Contribution) Act 1978 which provides that "*the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage in question.*" In other words, it will hardly ever be appropriate for a tribunal to make a joint and several award which is 100 per cent against each respondent
- It is not permissible for tribunals "*to make a joint and several award of compensation because of the relative financial resources of the respondent.*" For example, tribunals cannot make the award because it thinks a company is more likely to satisfy it, or because it may be insolvent
- The word "responsibility" in Section 2 (1) of the 1978 Act refers both to the extent to which each wrongdoer caused the damage and to their relative blame

The EAT then went on to say that it was certainly not permissible for a tribunal to make a joint and several award of compensation because of the relative financial resources of the respondents, as it had done in this case. On that basis alone, the EAT allowed the appeal against compensation.

Re-run for the CAC

Under the statutory recognition procedures in the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A), the Central Arbitration Committee (CAC) can order a ballot and issue a declaration of recognition (or non-recognition).

In R (on the application of Ultraframe (UK) Ltd) -v- Central Arbitratation Committee (2005, IRLR 641), the Court of Appeal has now said that the CAC also has the right to investigate and re-run a ballot that turns out to be unreliable.

WHAT WERE THE BASIC FACTS?

Two trade unions applied to the CAC for recognition at Ultraframe UK Ltd. The CAC was not convinced that the unions had enough members, and held a secret ballot of the workers constituting the bargaining unit.

The ballot showed a majority of workers voting were in favour of recognition, but they were four votes short of the necessary 40 per cent of the bargaining unit (see box).

The unions complained to the CAC that some of their members had not received ballot papers. The CAC agreed and ordered the ballot to be re-run.

WHAT DID ULTRAFRAME ARGUE AT THE HIGH COURT?

Ultraframe argued that the CAC had no power to order a re-run and applied to the High Court for a judicial review.

The judge agreed and said that the CAC only had the right to "arrange" for the ballot to be held by a qualified independent person (QIP), and then act on the result of the ballot as required by paragraph 29 (see box).

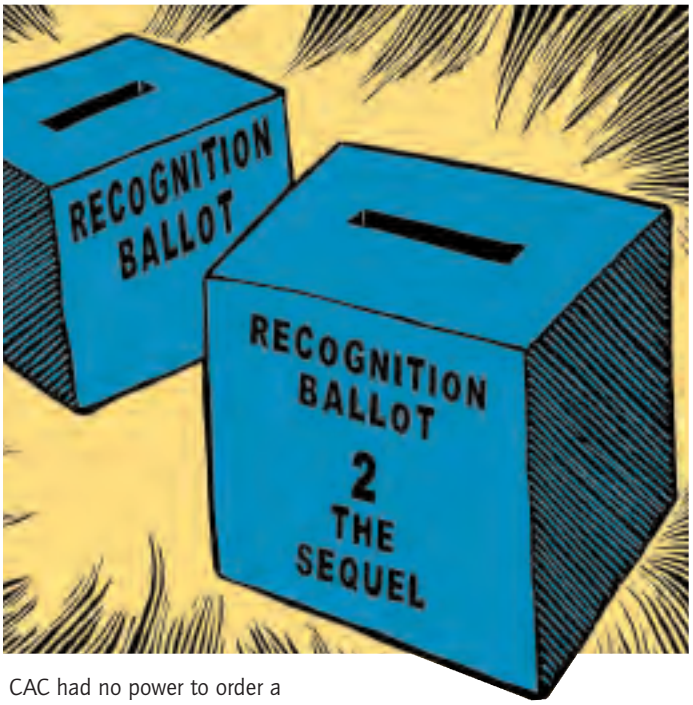
The High Court said that the CAC had no power to act as it did and that it was obliged to act on the QIP's figures "*as delivered to it even if it had incontrovertible evidence that they had been produced by mistake, or even by fraud.*"

WHAT DID THE COURT OF APPEAL DECIDE?

Fortunately, the Court of Appeal disagreed. It said that the CAC's duty is "stated in emphatic terms" in paragraph 29 to emphasise that the CAC has to treat the ballot as definitive and not merely consultative.

That did not mean, however, that "*Parliament has deprived the CAC of any power to investigate, and if needs be to decline to act upon, a ballot that it thinks or knows to be unreliable as an answer to the question posed by it .... And the answer that would have to be given to a party aggrieved by the conduct of the ballot, be they employer or worker, that all that they can do is to go off to court should be equally surprising.*"

The court said that this outcome could not have been what parliament intended. The High Court judge was therefore wrong and the CAC had the right to investigate and, when appropriate, to annul a ballot of workers about whether they wanted a union to bargain collectively for them.



PARAGRAPH 29, TULR(C)A

1) As soon as is reasonably practicable after the CAC is informed of the result of a ballot by the person conducting it, the CAC must act under this paragraph.
2) The CAC must inform the employer and the union or unions of the result of the ballot.
3) If the result is that the union is (or the unions are) supported by:
   (a) a majority of the workers voting, and
   (b) at least 40 per cent of the workers constituting the bargaining unit,
   the CAC must issue a declaration that the union is (or the unions are) recognised as entitled to conduct collective bargaining on behalf of the bargaining unit.
4) If the result is otherwise the CAC must issue a declaration that the union is (or the unions are) not entitled to be so recognised.

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