



THOMPSONS SOLICITORS

# Labour & European Law Review

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# EQUALITY BILL

**The Government has announced, as part of a new Equality Bill, that it will set up a single Commission for Equality and Human Rights (CEHR) in October 2007. The purpose of the Bill is to:**

- establish the CEHR and to define its purpose and functions
- make unlawful discrimination on the grounds of religion or belief in the provision of goods, facilities, services, premises, education and the exercise of public functions
- create a duty on public authorities to promote equality of opportunity between men and women (the gender duty) and to prohibit sex discrimination in the exercise of public functions.

For more information: [www.gnn.gov.uk/environment/dti](http://www.gnn.gov.uk/environment/dti)

## NEWS IN BRIEF

### INDUSTRIAL ACTION BALLOTS

A consultation document has been published by the Department of Trade and Industry on revising the code of practice governing industrial action ballots and employer notices. This gives practical guidance to trade unions and employers on how to apply the relevant law. The consultation ends 3 June. See: [www.dti.gov.uk/er/union/iab\\_consultation.pdf](http://www.dti.gov.uk/er/union/iab_consultation.pdf)

### WOMEN AND WORK REPORT

The Women and Work Commission, set up by the Prime Minister last year to examine the problem of the gender pay gap and other issues affecting women's employment, has produced an interim report. "A Fair Deal for women in the Workplace" was published on 8 March and can be found at:

[www.womenandequalityunit.gov.uk/women\\_work\\_commission/index.htm](http://www.womenandequalityunit.gov.uk/women_work_commission/index.htm)

### UNION GENDER GAP CLOSES

According to a recent TUC report "A woman's place is in a union", the proportion of working women in trade unions is now 29.3 per cent compared to 29.4 per cent among working men. Younger women, in particular, are more likely to join unions than men. The report shows that unionised workplaces are more likely than non-union workplaces to have equal opportunity policies, offer access to parental leave, provide financial help with childcare, monitor promotions, and pay women more. See [www.tuc.org.uk/equality/tuc-9509-f0.cfm](http://www.tuc.org.uk/equality/tuc-9509-f0.cfm)

### MINIMUM WAGE INCREASE

The Department of Trade and Industry recently announced increases to the national minimum wage. It will increase from £4.85 per hour for adults over 21 to £5.05 in October. This will rise to £5.35 in October 2006. The youth rate – for those between 18 and 21 – will increase to £4.25 per hour in October 2005 and £4.45 in October 2006.

# MATERNITY CONSULTATION DOCUMENT

**Working mothers are to be offered an extra three months' paid maternity leave under plans published recently in a consultation document by Trade and Industry Secretary Patricia Hewitt.**

The Government proposes to:

- extend maternity and adoption pay from six to nine months by April 2007 with the goal of a year's paid leave by the end of the next Parliament
- introduce a new right for mothers to transfer a proportion of their maternity leave and pay to fathers in the first year
- consider extending the right to request flexible working hours to carers of adults and parents of older children

To access the consultation paper "Work and families: choice and flexibility", go to: [www.dti.gov.uk/workandfamilies](http://www.dti.gov.uk/workandfamilies). The closing date for responses is 25 May.

# EQUAL TREATMENT CONSULTATION

**New proposals to crack down on discrimination in the workplace have been published in a consultation document by Jacqui Smith, deputy Women and Equality Minister.**

The proposals would implement the amended Equal Treatment Directive, due to come into force on 5 October.

The document entitled "Equality and Diversity: Updating the Sex Discrimination Act", sets out proposals to include discrimination against pregnancy and maternity leave in the Sex Discrimination Act (SDA).

It would also outlaw sexual harassment in employment and vocational training and update the definition of indirect discrimination in the SDA.

The consultation will close on 31 May. To access the consultation document and draft regulations, go to:

[www.womenandequalityunit.gov.uk/legislation/index.htm](http://www.womenandequalityunit.gov.uk/legislation/index.htm)



## New legislation

**The Department of Trade and Industry has published a list of legislation that comes into effect on 6 April, including:**

- implementation of a number of sections of the Employment Relations Act 2004 (see *LELR* 95)
- amendments to fees charged by the Certification Officer to list trade unions and employers and register their mergers and amalgamations
- implementation of the Information and Consultation of Employee Regulations for employers with more than 150 employees.

**Changes to take effect on 1 October include:**

- implementation of the amended equal treatment directive, updating the Sex Discrimination and Equal Pay Acts
- implementation regulations amending procedures for trade union recognition and de-recognition
- revision of the TUPE regulations to reflect amendments to the Acquired Rights Directive and to provide clarity to contracting-out situations
- implementation of the Employment Relations Act, changing the requirements to industrial action notices.

For more details: [www.dti.gov.uk/ewt/common\\_comence.pdf](http://www.dti.gov.uk/ewt/common_comence.pdf)

## Avoiding the question

**It is well established that tribunals can draw adverse inferences from an employer's evasive reply (or failure to reply) to questions posed in a statutory questionnaire.**

The employment appeal tribunal (EAT) has now decided in the case of *Dattani -v- Chief Constable of West Mercia Police* that the same principle applies to questions not asked under the statutory procedure.

The appeal tribunal justified its decision on two grounds. It said, first of all, that under section 65 of the Race Relations Act which refers to the questionnaire procedure, the person submitting it can choose whether to use a prescribed form or not.

Secondly, it said that all employers should be treated the same way, whether or not the questions have been asked under the statutory procedure. So if an employer is asked a direct question in writing by a potential claimant and fails to respond, or gives an evasive answer he or she can expect a tribunal to draw an adverse inference.

## Reasonably adjustable

**In *Williams -v- J Walter Thompson Group Ltd*, a woman who was totally blind started work as a computer software operator in September 1999.**

However, the employer then failed to make any reasonable adjustments to accommodate her needs over the next two years until she resigned in October 2001. She claimed constructive dismissal and cited eleven incidents of disability discrimination, eight of them direct.

Not surprisingly, the Court of Appeal said that the employer could not justify this failure, and made a finding of disability discrimination. The court said that it was significant that when JWT employed Ms Williams, it was already aware of her disability and knew that adjustments would have to be made.

## Employment continuity

**In an interesting case, the employment appeal tribunal (EAT) has decided that an employer and employee can agree on whether certain gaps in employment constitute continuity for the purposes of section 212 of the Employment Rights Act 1996.**

In *London Probation Board -v- Kirkpatrick*, the employer dismissed Mr Kirkpatrick, then upheld his appeal against dismissal, only to renege on that promise a month later and restore the original dismissal.

That meant the employee was out of time to bring a claim based on the first dismissal. The employer argued that if he was reinstated, his continuity of employment was broken with the result that he did not have one year's continuous employment.

The EAT decided in Mr Kirkpatrick's favour. It said that it was open to the parties to reach an arrangement about whether certain gaps from work could count towards continuity; that a "reinstatement" would count as such an arrangement; and that the arrangement (even if made after the gap occurs) would still count towards continuity of employment.

## SHIFTING BURDEN

**In discrimination cases, the law says that the claimant has to identify facts from which a tribunal could conclude that there has been unlawful discrimination, in the absence of an adequate explanation.**

The burden of proof then shifts to the employer to prove otherwise. If the (non-discriminatory) explanation is not adequate, the tribunal has to find the discrimination proven.

The Court of Appeal has now confirmed – in *Wong -v-Igen Ltd and ors, Emokpae -v-Chamberlin Solicitors and anor, and Webster and ors -v- Brunel University* – that the shifting burden of proof requires tribunals to adopt a two-stage approach.

It also approved and strengthened the guidelines issued in *Barton -v- Investec Securities Ltd (2003, ICR 1205)*.

Thompsons were instructed in the *Webster* case by the AUT.

### WHAT WAS THE CENTRAL ISSUE?

Although the facts in these conjoined appeals were very different, they all raised questions about how to

interpret and apply the shifting burden of proof in race and sex direct discrimination cases. The same principle also applies to disability, sexual orientation and religious and belief discrimination cases.

### WHAT DID THE COURTS DECIDE?

**Wong -v- Igen Ltd:** Ms Wong (who was of African-Caribbean origin) was employed by Leeds Careers Guidance. She complained of race discrimination, harassment and victimisation. The tribunal dismissed two of her claims, but held that it could infer discrimination in the absence of an adequate explanation for her third claim. The employment appeal tribunal (EAT) dismissed the employer's appeal, and the appeal court agreed.

**Emokpae -v- Chamberlin Solicitors:** Ms. Emokpae (a Nigerian) claimed she had been dismissed because of rumours that she was having a relationship with the office manager. She argued this would not have happened had she been a man. Again, the tribunal went through a two-stage process, relying on the *Barton* guidance. It found in

Ms Emokpae's favour and the EAT agreed.

The Court of Appeal concluded that the tribunal had failed to establish the facts from which it could have concluded there had been an unlawful act of discrimination. The case therefore failed at the first stage.

**Webster -v- Brunel University:** Ms Webster (who was of Asian origin) was having a telephone conversation with another employee when she heard someone else in the background use the term "Paki". It was not clear whether that person was an employee.

The tribunal said that she had not established facts from which it could conclude that there had been discrimination.

The EAT disagreed, but the Court of Appeal agreed with the employment tribunal. It said that she had to show, on the balance of probabilities, that the respondent had done the unlawful act.

It was not enough, as the EAT had suggested, that there was a possibility that the unlawful act was done by the respondent. It was for Ms Webster to show that the alleged discriminator had treated her less favourably.

### REVISED GUIDANCE

The Court of Appeal also revised the guidance in *Barton* as follows, to establish a two-stage test

#### Stage one:

1. The claimant has to prove, on the balance of probabilities, facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an unlawful act of discrimination.
2. At this stage a tribunal should consider what inferences could be drawn from them, and must assume that there is no adequate explanation for them. It must not take the employer's explanation into account at this stage.

#### Stage two:

3. If the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably, then the burden of proof moves to the respondent.
4. It is then for the respondent to prove, on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of race, sex, disability, religion or belief or sexual orientation.

## PAY UP

**The legal principle underpinning equal pay is a simple one – that men and women should receive equal pay for equal work or work of equal value.**

Unfortunately, the legislation has proven anything but simple to implement.

In the PCS backed case of *Robertson -v- Department for Environment, Food and Rural Affairs* (DEFRA), the Court of Appeal has said that civil servants in one Government department cannot compare their pay with civil servants in another.

### WHAT WERE THE BASIC FACTS?

The case was brought by six men employed by DEFRA. They argued that they should receive the same pay as two female senior personal secretaries in the Department of Transport, Environment and the Regions (DETR), whose jobs had been rated equivalent to theirs under the Civil Service job evaluation scheme.

Their pay had previously been negotiated centrally, but following pay delegation it was now set by individual departments.

Relying on Article 141 of the EC Treaty, the men argued that they could make an equal pay comparison across departments because they had the same employer, that the source of their pay was the same and their employer (the Crown) had the right to revoke pay delegation.

### WAS IT ENOUGH TO HAVE THE SAME EMPLOYER?

In *Lawrence -v- Regent Office Care Ltd (2003, ICR 1092)*, the European Court of Justice (ECJ) said that employees can make comparisons with people who work for different employers, as long as there is a single source responsible for the difference in pay.

The employees, however, argued that the single source argument only applied if there were different employers, and was therefore not applicable in this case. But the Court of Appeal disagreed. It said that it was necessary to consider whether the terms and conditions were traceable to one source in every case.

It said that the approach of EC law is to locate the single source with the body responsible for setting the

relevant terms. This is not determined by only addressing the formal legal question of the identity of the employer.

### WAS THE CROWN THE SINGLE SOURCE?

Not surprisingly, the men argued that the Crown, as well as being the common employer was also the single source referred to in *Lawrence*.

The Court of Appeal agreed with the appeal tribunal that, following a transfer of functions order in the mid-1990s, the pay and conditions of civil servants was now the responsibility of individual departments.

As a result, there were different pay scales and terms of service applying in different departments, and there was no single source to which the differences in pay could be attributed.

### HAD THE CROWN DELEGATED?

The men argued, however, that the Crown continued to be the single source or “the body responsible” because there was still a Minister for the Civil Service (the Prime Minister) who could reassert his power over individual departments at any time.

The Court of Appeal was,

however, not convinced. It said that although there was a theoretical possibility of the Crown exercising its power, that did not make it “the body responsible” for the actual negotiations and decisions on pay by individual departments resulting in the differences about which the men were complaining.

### WHAT DID THE COURT DECIDE?

The court therefore decided that DEFRA was the single source responsible for the men’s pay and conditions of employment, and DETR was the single source responsible for the comparators’ pay and conditions.

There was no one source to which the pay of the men and their comparators could be attributed. The fact that the Crown was the common employer was not enough to make it the single source responsible for determining levels of pay in both DEFRA and DETR.

### COMMENT

This is a disappointing decision, which suggests that employers can departmentalise their organisation in order to avoid equal pay claims. The case is being appealed.

# TAKING

**Under the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRA), union members and officials have the right to a certain amount of time off to learn the skills to do their job properly.**

**Bernie Wentworth**, a solicitor from Thompsons' Employment Rights Unit in Liverpool, reviews when and how a trade unionist can exercise these rights and what to do if an employer refuses to allow them.

There are separate rights for time off for union learning and health and safety representatives, which are not covered in this article.

## WHO QUALIFIES FOR PAID TIME OFF WORK FOR UNION DUTIES?

Employers who recognise a union for collective bargaining purposes must allow employees, who are officials of that independent trade union, to take reasonable paid time off during their working hours to carry out their union duties or undergo relevant training.

An official is an employee who has been elected or

appointed in accordance with the rules of the union to be a representative.

## WHO QUALIFIES FOR TIME OFF WORK FOR UNION ACTIVITIES?

The right to unpaid time off for trade union activities applies to all members of independent trade unions that are recognised by the employer for bargaining purposes.

For instance, a union member may claim time off work to take part in a union activity such as a workplace meeting. Although they have no right to be paid, the ACAS (Advisory, Conciliation and Arbitration Service) code recommends that the employer should pay "in certain circumstances, for example to ensure that workplace meetings are fully represented".

In *Luce -v- London Borough of Bexley (1990)*, a teacher was denied time off to attend a lobby of Parliament organised by his union to protest about the Education Reform Bill. The employment appeal tribunal (EAT) said that the lobby was not capable of being a trade union activity.

## DO MEMBERS AND OFFICIALS NEED PERMISSION?

The simple answer is yes. Members and officials also have to give as much notice as possible to management and advise them of the purpose, time, place and location of the duty or relevant training requested.

There is no absolute right to take time off but an employer should not refuse a reasonable request to do so. If it is refused, the member should raise this under the grievance procedure and may complain to an employment tribunal.

The law does not say what would happen if a member takes time off, following an employer's unreasonable refusal. In that event, a member should seek advice from their union.

## WHAT GUIDANCE IS THERE?

The TULRA provisions are supplemented by the ACAS code of practice on time off, which gives practical guidance that will be taken into account by an employment tribunal.

## WHAT DUTIES QUALIFY?

The right to reasonable time off applies to relevant negotiations

or other duties agreed by the employer. The duties must be agreed between the official and the union; concern something for which the employer has recognised the union; and relate to the ACAS list below:

- terms and conditions of employment
- the physical working environment
- recruitment, termination and suspension of employment
- allocation of work
- discipline
- union membership
- facilities for union officials negotiating consultation and other procedures.

## WHAT TYPE OF TRAINING QUALIFIES?

The training must:

- be relevant to those official duties
- be approved training by the TUC or the official's own union.

The fact that the TUC or the union may consider that a course is relevant is not conclusive. The ACAS code of practice suggests that an employer should consider releasing an official for initial training in basic skills as soon as they take office.

## THE TIME

Additional training is likely to be required when circumstances change, or when new legislation is likely to be relevant.

### DO OFFICIALS GET PAID FOR TIME OFF?

An official who has been allowed time off work for trade union duties during work hours is entitled to be paid in full for the reasonable time off.

The employer only has to pay, however, for those hours during which the official is contractually required to be at work.

### HOW IS REASONABLENESS ASSESSED?

The legislation and the code of practice emphasise both sides acting reasonably. If the employer and the official cannot agree, the employment tribunal must decide whether the employer's assessment came within a band of reasonableness.

For time off to be reasonable, the following criteria are relevant:

- the amount of time off
- the purposes for which it is sought
- the occasion for which it is

sought (including frequency)

- the conditions subject to which time is granted

When assessing reasonableness certain circumstances are taken into account including:

- the effect on the employer's business operations
- the extent of the member's need to take time off work in order to participate effectively

It is also relevant to take into account how much time the member has already been permitted to take off or has been promised, on either trade union activities or other grounds.

In *Wignall -v- British Gas Corporation (1984)* a member was refused 10 days off work to prepare a union magazine. The EAT decided that the employers were reasonable in refusing the request because the member was already permitted 12 weeks' leave a year, partly paid and partly unpaid.

Time off may be sought for any activity – it is not for the tribunal to decide. However, it must take into account the nature of that activity when assessing the reason for refusing the time off.

The activities of the union

refer to any activity in which the union properly engages except for industrial action (which is excluded).

### WHAT TIME LIMITS APPLY TO TRIBUNAL CLAIMS?

A claim must be made within three months of the date when the request for time off was refused. However, the member should first raise any complaint under the employer's grievance procedure.

### WHAT AWARDS CAN TRIBUNALS MAKE?

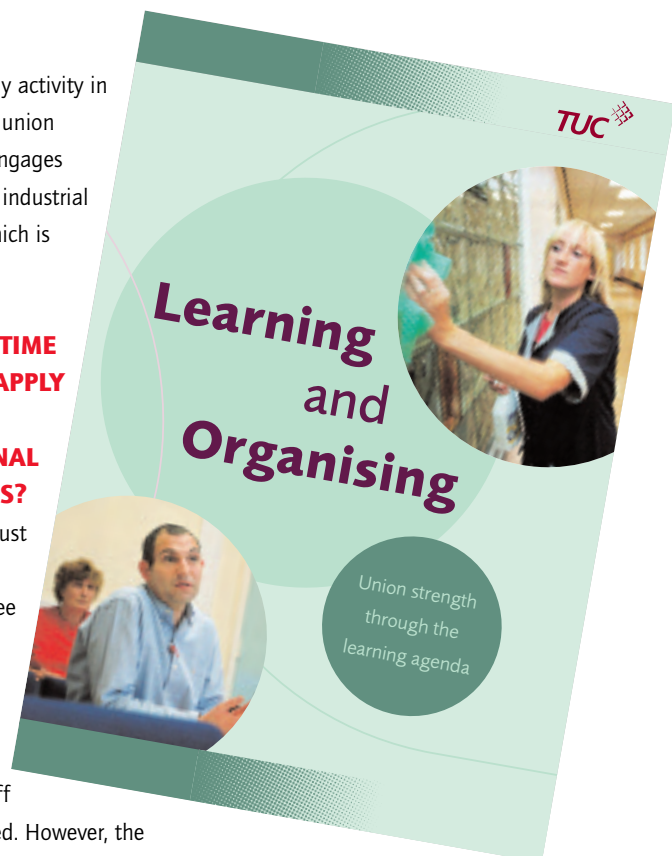
If the employer fails to allow time off or gives too little time off, the member should raise this under the grievance procedure and can complain to an employment tribunal.

If the member's complaint is substantiated, the tribunal may make a declaration that time off should be granted and award

financial compensation. The tribunal can award whatever it considers just in the circumstances. The tribunal can award compensation for financial loss and injury to feelings.

### HOW CAN TRIBUNAL CLAIMS BE AVOIDED?

A clearly worded formal agreement on time off can prevent disputes on the definition of time off, the reasonableness or otherwise of a refusal, or indeed the nature and timing of a request for time off.



# STRESSED OUT

**Employers have a duty to take reasonable care to ensure their employees are not injured at work.**

The Court of Appeal has decided in six appeals about stress at work (IDS 775) that the key issue is whether the injuries were reasonably foreseeable. It confirms the principles in the Court of Appeal case of *Hatton* and minimises the potential effect of the decision in *Barber* (LELR 90).

Details of the four most relevant cases follow.

**HARTMAN -V- SOUTH EAST ESSEX MENTAL HEALTH & COMMUNITY CARE NHS TRUST**

Mrs Hartman, who had a history of depression, had been a nursing auxiliary at a children's home since 1989. Following an accident in 1996 in which a child was killed, her hours increased significantly, putting her under great pressure (of which the trust was aware). In early 1999, she applied for ill health retirement because of depression.

The Court of Appeal did not think that the trust was in breach of its duty of care to

Mrs Hartman. It said that working in a children's home was not in itself unduly stressful, and that she worked without any problems for a number of years, including the post-accident period. As for the issue of overwork, it said that there was nothing to indicate she was unable to cope.

**WHEELDON -V- HSBC BANK LTD**

Mrs Wheeldon worked in a job-sharing scheme in two very busy branches. She complained to her manager from time to time about the pressure she was under, but nothing changed.

Following two depressive episodes in 1999, her GP told the bank that her mental ill health would continue to deteriorate if her duties were not reduced. The bank obtained a psychiatric report that confirmed her work was perpetuating her problems. Neither her hours nor her duties changed and her health deteriorated.

The Court of Appeal said that the bank's failure to act allowed her depression to "flourish". Although very unusual for a part timer to succeed in a stress-related

claim, the harm she suffered was not just reasonably foreseeable but had, in fact, been foreseen.

Thompsons were instructed by Unifi.

**MELVILLE -V- THE HOME OFFICE**

As a prison health care officer, Mr Melville had recovered the bodies of eight suicide victims. After the last one (whom he had to cut down), he suffered nightmares and flashbacks and retired with a stress related illness.

The Home Office argued that, unless employers are aware of some particular vulnerability, they are entitled to assume that the employee is up to the normal pressures of the job. The fact that it had procedures to deal with the risks inherent in Mr Melville's job showed that it had done all it could.

But the Court of Appeal disagreed. It said that the question of whether the particular employee has shown signs of impending harm is only relevant when the employer has not foreseen a risk, and the employee's workload would not ordinarily carry a foreseeable risk. That was not the case here.

It added that just because an employer offers a counselling or occupational health service should not lead to the conclusion that he or she has foreseen a risk of psychiatric injury. And if it is available, the employer is unlikely to be found in breach even if the harm was foreseeable.

**BEST -V- STAFFORDSHIRE UNIVERSITY**

Mr Best, a senior lecturer, retired on grounds of ill health in 2000 aged 46. He ascribed his breakdown to an unmanageable workload, and said the university should have provided more support.

The Court of Appeal, however, did not think that his breakdown was reasonably foreseeable. It said that although Mr Best had complained of overwork, he did not mention it when he applied for promotion in early 1997, nor at any of his appraisals.

There was no medical evidence of any depression, nor any evidence that more administrative help would have averted the breakdown, not least because 70 per cent of it was due to non work-related causes.



## WORK YOUR TIME

### **The Working Time Directive states that workers should not work, on average, more than 48 hours per week.**

However, workers can agree to opt out of the directive, if they want to work longer than that.

In *Pfeiffer and ors -v- Deutsches Rotes Kreuz, Kreisverband Waldshut Ev* (2005, IRLR 137), the European Court of Justice (ECJ) has said, among other things, that this right must always be made available to individual workers and cannot be absorbed into a collective agreement.

### **WHAT WAS THE COMPLAINT?**

Seven emergency workers complained that, when calculating their maximum weekly working time, their employer – the German Red Cross – took no account of periods of “duty time” which they were required to undertake as part of their job.

Under German law, duty time is when the worker is at work and obliged to stay attentive so they can respond to a call. This is different from on-call time when the worker just has to be available for duty, and stand-by

time when he or she has to be available at short notice. Only duty time constitutes full time work, the other two being categorised as rest time except when the worker is carrying out his or her duties.

In accordance with the Working Time Directive, German law stipulated that daily working time should not exceed eight hours on average. However, it also allowed for an opt out under a collective or works agreement to extend the hours if working time regularly included significant periods of duty time.

The collective agreement at the Red Cross allowed for varying extensions of the working day, depending on the amount of regular duty time required of the worker.

### **WHAT WAS THE ECJ ASKED TO DECIDE?**

The German court asked the ECJ to decide the following issues:

- 1 Does the directive apply to emergency workers?
- 2 Does the road transport exclusion under the directive apply to land-based emergency medical services?
- 3 Do individual employees have

to agree expressly and freely to the opt-out, or can someone’s employment contract refer to a collective agreement which allows an extension?

- 4 Can individual workers rely directly on Article 6 (which states that average working time for each seven-day period, including overtime, must not exceed 48 hours) if member states do not transpose the directive properly into national law?

### **WHAT DID THE ECJ DECIDE?**

The court decided that:

- 1 The exclusion of certain civil protection services under the directive to ensure the proper operation of those services does not apply to emergency workers who are protected under the directive.
- 2 The concept of “road transport” does not encompass an emergency medical service.
- 3 For the opt out from the maximum period of weekly working time laid down to be valid, the worker’s consent must be given not only individually but also expressly and freely. It is not enough

for the worker’s employment contract to refer to a collective agreement which permits such an extension. The court’s use of the word “freely” suggests that an opt-out cannot be contained in a job offer or even in a contract of employment as a condition of employment.

- 4 Workers can rely directly on Article 6 if the directive has not been properly transposed into national law. That means that periods of duty time must be taken in to account when calculating the maximum daily and weekly working time. National law must always be interpreted in conformity with European law which takes precedence.



# Consult under TUPE

**Under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE), employers are required to consult with employee representatives before the transfer about how it might affect them.**

In *Howard -v- Millrise Ltd t/a Colourflow (in liquidation) and anor (2005, IRLR 84)*, the employment appeal tribunal (EAT) has said that even if there are no elected employee representatives, the employer still has to consult with any individuals affected by the transfer.

## WHAT WERE THE FACTS?

After working as a printer for Millrise Ltd for just over a year, Mr Howard was given one month's notice of redundancy on 15 April 2003. On 30 April, the company went into liquidation and its undertaking was transferred as a going concern to SG Printers, trading as Colourflow.

Mr Howard subsequently made a number of tribunal claims against both companies, neither of which turned up for the hearing. The employment tribunal upheld his claims of

unfair dismissal and unauthorised deductions from wages, but rejected his argument that he had a right to compensation because he had not been consulted about the transfer.

The tribunal said that the provisions under regulation 10(2A) of TUPE (see box 1) "appeared to apply only to appropriate representatives", and therefore Mr Howard was not entitled to be compensated for not having been consulted.

## WHAT DID THE EAT DECIDE?

The EAT, however, disagreed. It said that although regulation 10(2A) refers only to appropriate representatives, regulation 10 (8A) says that "*if, after the employer has invited affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to each affected employee the information*" that is required under the regulations (see box 2).

It said that this provision required the employer to set the ball rolling by inviting affected employees (assuming there were no recognised trade union representatives or other elected or appointed representatives already in place) to elect representatives for the purposes of TUPE.

The employers in this case failed to do so, and because they did not appear before either the tribunal or the EAT,

### BOX 1

## Regulation 10(2A) TUPE

For the purposes of this regulation the appropriate representatives of any employees are:

- (a) if the employees are of a description in respect of which an independent trade union is recognised by their employer, representatives of the trade union, or
- (b) in any other case, whichever of the following employee representatives the employer chooses:
  - (i) employee representatives appointed or elected by the affected employees otherwise than for the purposes of this regulation, who (having regard to the purposes for and the method by which they were appointed or elected) have authority from those employees to receive information and to be consulted about [the transfer] on their behalf
  - (ii) employee representatives elected by them, for the purposes of this regulation, in an election satisfying the requirements: of reg. 10A(1).

### BOX 2

## Regulation 10(8) TUPE

Where:

- (a) the employer has invited any of the affected employees to elect employee representatives, and
  - (b) the invitation was issued long enough before the time when the employer is required to give information under para. (2) above to allow them to elect representatives by that time, the employer shall be treated as complying with the requirements of this regulation in relation to those employees if he complies with those requirements as soon as is reasonably practicable after the election of the representatives.
- (8A) If, after the employer has invited affected employees to elect representatives, they fail to do so within a reasonable time, he shall give to each affected employee the information set out in paragraph (2).

they were unable to put forward a defence of "reasonable practicability".

Mr Howard therefore had the right under regulation 11(1) to make a complaint to a tribunal.

The EAT remitted the matter back to the employment tribunal to decide on a suitable award, which may be deemed to be anything up to 13 weeks' pay.

# Deduct from TUPE

**Under the Transfer of Undertakings (Protection of Employment) Regulations 1981 (TUPE), the existing terms and conditions of employees have to be honoured by the new employer.**

However, in *Ackinclose and ors -v- Gateshead Metropolitan Borough Council* (2005, IRLR 79), the employment appeal tribunal (EAT) has said that employees transferred back to the primary employer are not entitled to the benefit of any improved terms and conditions which come into force during the transfer period.

Thompsons were instructed by the GMB.

## **WHAT WERE THE BASIC FACTS?**

In 1995, Gateshead MBC transferred the schools meals service to Castle View Services, a private sector organisation. It was transferred back in January 2000. Both transfers were covered by the TUPE regulations.

At the time of the original transfer, the terms and conditions of manual staff were governed by a national

agreement, known as the White Book. However, in April 1999 a new agreement covering both manual and white collar workers came into force, known as the Green Book. This reduced the hours of full-time staff, so increasing their hourly rate.

On transferring back to the local authority in 2000, the staff in the outsourced school meals service finally received the benefit of the improved pay rate. They then claimed that they were also entitled to it for the period between 1 April and 31 December 1999.

## **WHAT DID THE TRIBUNAL DECIDE?**

The tribunal had to decide whether it was just the contract incorporating the White Book that had transferred over, or whether it was the whole of the national bargaining machinery. The tribunal decided it was the latter.

The employers appealed this decision and the EAT set it aside, not because it thought it was necessarily wrong, but because it felt that there were other areas that the tribunal needed to explore further before reaching a conclusion.

The tribunal reconsidered its decision and decided it had been wrong. It found that, as there was no evidence to support an implied term that the Green Book applied to outsourced employees, the express term of the new agreement took precedence. This stated that it applied only

to "employees of local authorities or other authorities of equivalent status in the UK."

## **WHAT DID THE PARTIES ARGUE?**

The employees argued that, because the manual workers' National Joint Council (NJC) could agree to changes in the White Book (which were incorporated into the contracts of the school meals' employees), it also had the power to handover to the new NJC and to accept the new Green Book. This, in turn, then became part of their contracts.

The employers argued that there was no such "bridge" between the old White Book and the Green Book. They pointed out that the contract did not allow for the collective bargain to be "as defined from time to time", so there was no requirement for the employer to adopt future provisions.

It was not, therefore, possible to substitute a new collective bargain for an old one without the agreement of the outsourced employees. Their terms and conditions could only be varied under the old agreement.

## **WHAT DID THE EAT DECIDE?**

The EAT agreed with the employers. It said that "*the contract only made reference to the NJC Manual Workers as a negotiating body, and only made reference to their handbook (the White Book) as*



*the relevant collective bargain."*

Without any further reference or incorporation, the EAT said: "*it seems to us that no successor body or successor agreement can be held to be part of the contract of employment."*

## **COMMENT**

Union negotiators need to be careful that collective agreements specifically allow for terms and conditions negotiated subsequent to the transfer to be incorporated into the transferred employees' terms and conditions. And when unions are consulted over TUPE transfers, they should ensure that there is an appropriate clause inserted in the transfer document.



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