THOMPSONS SOLICITORS

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CAREFUL THOUGHT

The TUC has just produced a new guide for trade unions on monitoring lesbian, gay, bisexual and transsexual workers.

It warns both employers and trade unions to think very carefully before embarking on a monitoring exercise.

Unless handled sensitively, the TUC says that any monitoring exercise could at best be a waste of time and at worst backfire, with staff refusing to answer the questions honestly. It says that employers and unions therefore need to work closely together to establish what is best for their own particular workplace.

For the guide, go to: *www.tuc.org.uk/equality/tuc-9303-f0.cfm*

EQUAL PAY REVIEWS

Patricia Hewitt, the Trade and Industry Secretary, told parliament in January that the number of equal pay reviews carried out by large organisations by 2006 should exceed the Government's target.

She said that 15 per cent of large employers had carried out an equal pay review by November 2003, 10 per cent were in the process of doing one and 26 per cent were planning to do one. If these are all completed, the Government's 35 per cent target will be exceeded.

But it has now upped the ante – it wants 45 per cent of large organisations to have undertaken pay reviews by April 2008.

BETTER LIFE CHANCES

The Prime Minister's Strategy Unit has recently published a document that it claims will "transform the life chances of disabled people".

The report makes recommendations across four key areas: independent living, early years and family support, transition to adulthood and employment.

The government also promises to establish a new Office for Disability Issues, a strategic unit responsible for coordinating government work on disability and ensuring that this fits with the wider equalities agenda.

To view the report, *Improving the Life Chances of Disabled People*, go to *www.strategy.gov.uk*. Contact the Strategy Unit at *strategy@cabinet-office.x.gsi.gov.uk* or 020 7276 1881 to access the report in other formats.

RACE EQUALITY

The Government has launched a strategy – Improving Opportunity, Strengthening Society – which it says will increase race equality and build a strong and cohesive society.

Measures outlined in the strategy include:

- a greater commitment to working across government to boost race equality
- closer working between the Commission for Racial Equality and public service inspectorates to monitor race equality
- closer working between the Home Office and the Office of the Deputy Prime Minister to strengthen the leadership skills of those working in local authorities to tackle racism
- a commitment to help young people from different backgrounds learn and socialise together
- the introduction of a pilot Citizenship Day later this year to provide a focal point for activities linked to the concept of citizenship

In addition to the strategy the Home Office has published a number of other documents, including:

- Race Equality in Public Services – bringing together race equality data for the key public service areas
- The Home Office Race Equality Schemes – setting out how the Home Office will meet its duties under the Race Relations (Amendment) Act 2000
- The Home Office Diversity and Equal Opportunities Report – bringing together findings from a range of diversity monitoring processes in the Home Office
- "Trust and Diversity" – an analysis of Home Office Citizenship Survey data on the relationship between diversity in socio-economic and ethnic groups and levels of trust in an area

All these documents can be found at: *www.homeoffice.gov.uk*

MAKING MORE OF ADR

ACAS (the Government's conciliation and arbitration service) has produced the first in a series of discussion papers.

Entitled *Making More of Alternative Dispute Resolution*, it is designed to stimulate debate about the use of ADR in employment relations, whatever the size of the organisation.

To contribute to the debate, go to:
www.acas.gov.uk/publications/pdf/AcasPolicyPaper1.pdf

Temporary employee

In an important judgement, the High Court has said that a worker should be deemed to be a temporary employee, making his employer liable for his conduct.

In Hawley -v- Luminar Leisure, David Hawley (a fire fighter from Southend), brought a personal injury claim against a nightclub doorman who hit him so hard that he suffered permanent brain injuries.

The doorman was employed by ASE Security Services who were contracted to provide doormen to Luminar. The company denied liability on the grounds that the doorman was neither an employee nor a temporary deemed employee of Luminar.

However, the judge disagreed and said that the control that the nightclub had over ASE's employees was "such as to make them temporary deemed employees of Luminar for the purposes of vicarious liability."

Mr Hawley was backed by the FBU which instructed Thompsons.

Credit conflict

The EAT has handed down two conflicting decisions recently on whether unfair dismissal claimants should be credited for monies already received.

In Morgans -v- Alpha Plus Security Ltd, it said that tribunals must deduct any incapacity benefit in full from a compensatory award. In Voith Turbo Ltd -v- Stowe, on the other hand, it said that a claimant did not have to give credit for earnings in a new job although this coincided with the period of paid notice by the former employer.

This issue will therefore have to be resolved by the higher courts.

The way ahead?

The decision of the High Court in Kaur -v- MG Rover Group Ltd (see LELR 89) that certain employees could not be made redundant has been overturned by the Court of Appeal.

It has said that a provision in a collective agreement that there would be no compulsory redundancies had not been incorporated into Mrs Kaur's contract of employment. It was an "aspiration" rather than a binding contractual term.

This was because of "*the vagueness of the term and because any entitlement would depend on the activities of others in the workforce,*" the court said.

The court added: "*In so far as the statement formed part of a bargain with the unions, the commitment was solely on a collective basis.*"

EAT says burden shifts to employer

In Webster -v- Brunel University, the EAT has overturned the decision by a tribunal about when the burden of proof shifts to the employer.

In this case, Ms Webster, an Indian woman, 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 the person was an employee or a visitor.

The tribunal said that because she failed to establish that the person was an employee the burden of proof did not shift to the employer. The EAT has now said that once she established that the person could have been an employee the burden shifted to the employer. The decision has been appealed.

First sexual orientation ruling

Although he may not have welcomed the publicity, Rob Whitfield has become the first person to win a case under the Employment Equality (Sexual Orientation) Regulations introduced in December 2003.

In Whitfield -v- Cleanaway UK, he brought a claim against his employer on the basis that he had suffered a campaign of sustained abuse and homophobic insults. The taunts were made not just by co-workers but also by senior managers who, by their behaviour, indicated that they thought such discrimination was acceptable.

Mr Whitfield was awarded over £35,000 in compensation and his case has graphically highlighted the need for legislative protection for lesbian, gay and bi-sexual workers.

EQUAL DISCRIMINATION

Under the Sex Discrimination Act, a woman can claim direct sex discrimination if her employer treats her less favourably than a man. To succeed, however, she has to show that the reason is because of her sex. It does not have to be the only reason, but it does need to be the main one.

In Brumfitt -v- Ministry of Defence and anor (2005, IRLR 4), the employment appeal tribunal (EAT) said that, although Ms Brumfitt had been badly treated, it was not because of her sex.

WHAT WERE THE FACTS?

Ms Brumfitt served in the RAF for 13 years until May 2003. From January 1999 she was based at RAF Cosford, under the supervision of Sergeant Fitzpatrick, an officer well known for his offensive language.

Photo: Duncan Walker

In February 2001 she attended a one-day course conducted by Sgt Fitzpatrick. During the day, he made a number of obscene remarks to both the men and women in the audience. Ms Brumfitt complained about his behaviour and when this was not resolved to her satisfaction, she brought a claim of sex discrimination.

The tribunal rejected her claim, saying that, although she had been victimised by Sgt Fitzpatrick when he completed her 2002 annual appraisal, she had not been discriminated against on account of her sex. Everyone on the course had been subject to the same treatment, irrespective of their gender.

Nor was there any basis to conclude that the inadequate investigation of her complaint of sex discrimination had anything to do with her gender.

WHAT DID THE PARTIES ARGUE ON APPEAL?

Ms Brumfitt argued that women in general were more likely to be offended by his language than men. The burden was therefore on the MoD to prove they had not discriminated against her and they had failed to do that.

The MoD, on the other hand, argued that she had to show she had been treated differently on account of her sex. The fact that she was offended by the language used was irrelevant to the "but for" test. It pointed out that the other woman on the course had found it funny, whereas some of the men had been offended.

WHAT DID THE EAT DECIDE?

"But for" test: The EAT agreed with the tribunal that the "but for" test had not been satisfied. The tribunal had found, as a matter of fact, that Sgt Fitzpatrick had not singled out Ms Brumfitt and that his conduct was insensitive to everyone present, irrespective of their gender.

It said that the relevant questions in any claim of direct discrimination are:

- has the complainant been treated less favourably than the comparator with whom she is to be compared, and
- has she been treated in that way because of her sex

Sexual harassment: the EAT also rejected the proposition that the facts met the definition of sexual harassment under a European amending directive which does not require a comparator.

However, as the EAT pointed out, she could not rely on it as it does not come into effect until late 2005.

Human rights: Ms Brumfitt also argued that her human rights under the European Convention had not been protected, particularly her right to a private life and her right to be protected from discrimination.

The EAT decided that the circumstances of her case did not fall within any of the articles under the Convention.

The investigation: Ms Brumfitt argued that the tribunal should have found that her employer's inadequate investigation into her complaints amounted to direct sex discrimination.

However, the EAT said that a failure to investigate a complaint of sex discrimination properly is not necessarily sex discrimination. All the usual requirements still had to be satisfied.

The EAT therefore dismissed her appeal.

DISABLING INSURANCE

In personal injury claims, the courts have to observe certain principles when calculating compensation for future losses.

In Atos Origin IT Services Ltd -v- Haddock (2005, IRLR 20), the employment appeal tribunal (EAT) said that the same principles apply to disability discrimination claims.

WHAT WERE THE FACTS?

Mr Haddock had worked for Sema, a multinational company employing over 20,000 people worldwide, in a variety of senior roles from 1983.

He was diagnosed with severe depression in early 1998 and was off work until July, when he returned part time to a less demanding job.

Unfortunately, at the end of that year, a new manager took over who redeployed him to a more junior post. Mr Haddock had another breakdown and did not return to work, although he remained on the payroll.

In April 1999, he made a claim for disability discrimination. The tribunal found in his favour and awarded him compensation totalling £65,000 for psychiatric injury, injury to feelings and aggravated damages.

Sema, which had not submitted any evidence or been represented up until that point, then asked for an extension of time to contest the compensation award.

The tribunal refused the request, and after a number of court hearings (which went as far as the Court of Appeal), it was withdrawn.

However, the Court of Appeal made clear that even though the company had not entered a notice of appearance in response to the original claim, that did not mean it could not appeal against the tribunal's assessment of compensation.

WHAT HAPPENED NEXT?

Mr Haddock then asked the employment tribunal to determine a number of factors relating to the assessment of his future loss, including the effect that the company's permanent health insurance scheme would have on his compensation.

Basically, the scheme said that, if Mr Haddock became permanently incapable for work, the employers could recoup up to 75 per cent of his salary from the insurers as long as certain conditions were fulfilled. This was not a contractual benefit as Mr Haddock could not enforce the policy directly against the insurer.

The tribunal said it had two options. The first, assuming that Sema continued to receive 75 per cent of his normal salary from the insurers, was to calculate his loss on the basis of 25 per cent of that salary.

The second was to base the calculation on his entire annual salary and to order Sema to pay a capital sum.

The tribunal decided on the second approach to avoid the possibility of Mr Haddock having to take action against the insurer in the event that the payments ceased (for whatever reason).

The company appealed against this, and Mr Haddock appealed on the basis that Sema had no right to take part in the proceedings because it had not entered a notice of appearance at the outset.

WHAT DID THE EAT DECIDE?

The EAT dismissed Mr Haddock's argument, saying that there was nothing to stop it from hearing the company's appeal against compensation.

It also said that the tribunal was wrong to decide that the lump sum compensation for future loss should not make any allowance for payments that Mr Haddock might receive under his employer's PHI scheme.

Although calculating future loss in personal injury cases (the essence of this case) is an inexact science, it said that there are certain rules that the courts have to follow. In particular, that payments made under an accident or health insurance policy to which the employer contributed (but not the employee) must be deducted when calculating an award for pecuniary loss. Otherwise the claimant would benefit twice – once from the employer and once under the policy.

The same deductions have to be made for someone claiming under the Disability Discrimination Act as a personal injury claimant. It made no difference that the payments were to be made in the future. As a result, the EAT concluded that the approach taken by the employment tribunal was incorrect.

a brief overview of

DO YOU

Following a thorough review of the 1999 Employment Relations Act, a new and updated version of the legislation received royal assent at the end of last year (see LELR 95).

The review followed a specific commitment by the Government in its 1998 "Fairness At Work" white paper to keep a watching brief on the operation of the statutory recognition and de-recognition procedures introduced in the 1999 Act.

Joe O'Hara, a solicitor from Thompsons' Employment Rights Unit in London, now looks specifically at what the new Act says about recognition. The changes will come into effect on 5 April 2005.

Bectu members vote on a strike b recognition and other

Photo: Jess Hurd (Report Digital)

WHAT INFORMATION HAS TO BE PROVIDED?

To allow the Central Arbitration Committee (CAC) to assess the level of support for recognition, each side will have to supply certain information:

- the workers in a specified bargaining unit (from the employer)
- the number of members among those workers (from the union)
- the likelihood of the majority of those workers being in favour of recognition (from both)

HOW WILL THE CAC DECIDE THE BARGAINING UNIT?

The new law will confirm that the CAC cannot decide to accept the employer's proposal for a bargaining unit or impose its own unless it first rejects the union's proposal. Nor can it decide there is no appropriate unit – it has to find some bargaining unit, even if it is not the one proposed by the union.

It will also have the right to shorten the four-week period for the parties to reach agreement, if it does not think they are likely to do so.

WHAT INFORMATION DOES THE EMPLOYER HAVE TO GIVE TO THE UNION?

Within a week of the CAC accepting an application, the employer will have to give both the union and the CAC:

- a list of the categories of workers in the proposed unit
- a list of the workplaces at which they work
- an estimate of the numbers employed

CAN THE UNION COMMUNICATE WITH THE WORKERS?

A union will not have to wait for a ballot before it can ask the CAC to arrange for

RECOGNISE ME?

information to be sent to each worker in the bargaining unit. In future, it will be able to do so once the CAC has accepted its application.

As with the current provisions, the union has to foot the print and postage bill and the costs of the "qualified independent person" who does the mailing.

If the employer fails, after a formal warning, to co-operate by giving the CAC the names and addresses of the workers to allow the mailing to take place, the CAC can award recognition without a ballot.

CAN THE CAC ORDER A BALLOT?

The CAC can order a ballot even where the union has a majority of the bargaining unit in membership, if a significant number of union members tell the CAC that they do not support recognition and the CAC considers the evidence to be credible. This gives the CAC some discretion to discount or reject letters from the employer.

WHAT TYPES OF BALLOTS ARE THERE?

There are three types of ballot: work place, postal ballot and a combination of the two. In future, the CAC will be able to allow workers to vote by post if they cannot get to work on the day of the ballot.

However the workers must request a postal vote "far enough in advance of the ballot for this to be practicable." This is unlikely to safeguard the voting rights of a worker who takes ill just before the start of a ballot.

WHAT RULES WILL HAVE TO BE OBSERVED DURING A BALLOT?

Employers will not be allowed to induce a worker not to go to a union meeting (for instance by giving everyone the afternoon off), nor to threaten action against anyone who attends.

The existing duty to give the union access to the workplace for a meeting has been strengthened to prevent an employer from:

- unreasonably refusing a request for the meeting to take place without the employer being present
- attending an access meeting without being invited
- recording or asking to be informed about what happened at the meeting
- refusing to promise not to record or be informed about what happened at the meeting

Both employers and unions must refrain from using any "unfair practice" during the ballot period (such as offering money, coercing workers to reveal how they voted, or threatening to dismiss them) to influence the outcome of the vote.

Either side can complain to the CAC within one working day after the close of voting. If it upholds a complaint, the CAC can issue one or more remedial orders requiring a party to mitigate the effects of its unfair practice.

Basically, this means that if the employer fails to comply the CAC can award recognition; if the union is the guilty party, it can reject the application for recognition.

If the complaint is made before the start of the ballot, the CAC can postpone it. If the unfair practice includes the use of violence or the dismissal of a union official, it can award recognition or rejection of the union's application even if it has not made a remedial order.

It can cancel an initial ballot, or where that ballot has been completed, it can annul it without disclosing its results. Alternatively, the CAC can arrange for a further ballot where an unfair practice has occurred.

CAN THE CAC GET INVOLVED IN INTER-UNION DISPUTES?

The simple answer is no. In *TGWU -v- ASDA* (see **LELR 95**), the union applied for recognition. ASDA already had a partnership agreement with GMB, although this did not cover bargaining on pay, hours or holidays. It did provide, however, for negotiations on facilities relating to shop stewards. The TGWU's claim could not succeed, therefore, because the GMB was already recognised.

Similarly, the NUJ was thwarted when it applied to the Mirror Group for recognition (see **LELR 96**), despite the fact that it had the support of the majority of the members in the bargaining unit. The CAC said that it could not go behind a recognition agreement between Mirror Group and the (non-affiliated) BAJ, even though BAJ only had one member.

THE LAST STRAW

In general terms, it is a high risk strategy for employees to resign and claim constructive dismissal. But it is even more so when the last act relied on was not in itself unreasonable, although it was the "final straw" in a series of acts.

The Court of Appeal has now said in London Borough of Waltham Forest -v- Omilaju (2005, IRLR 35) that because the particular straw in this case was perfectly justifiable on the part of the employer, Mr Omilaju's case could not succeed.

WHAT WERE THE BASIC FACTS?

Mr Omilaju worked in Waltham Forest's housing department for nine years until 2001. Between February 1998 and August 2000, he issued five sets of proceedings against the council alleging unlawful direct discrimination, victimisation and interference with trade union activity. All his claims were dismissed.

The council, however, refused to pay Mr Omilaju's salary during July and August 2001 when he was absent from work (without leave) to attend the hearing. He could have applied for special unpaid or annual leave, in accordance with the council's rules, but chose not to do so.

He then resigned in September 2001, claiming constructive unfair dismissal, race discrimination, harassment and victimisation. He said that the failure to pay his salary was a breach of the express terms of his contract and had destroyed his trust and confidence in his employer. This, he said, was "*the last straw in a series of less favourable treatments that I have been subjected to over a period of years*".

WHAT DID THE TRIBUNALS DECIDE?

The employment tribunal dismissed his claim. It said that the council's refusal to pay him was "*perfectly reasonable and justifiable conduct of his employer acting fully in accordance with the terms of the applicant's contract*". It could not, therefore, be relied on as the "last straw" in a series of acts.

The appeal tribunal disagreed and allowed Mr Omilaju's appeal against the decision that he had not been constructively dismissed.

WHAT DID THE COURT OF APPEAL DECIDE?

The Court of Appeal, however, found against him. It said that the test for constructive dismissal is whether the employer's conduct amounted to a repudiatory breach of the contract of employment.

It recognised that an employee may end up resigning over a relatively minor incident, but which is the "last straw" in a series of incidents. However, it emphasised that although the final straw may be relatively insignificant, it must not be utterly trivial. But what quality does a final straw have to have for an employee to rely on it as a repudiation of the contract?

WHAT IS A "FINAL STRAW"?

According to the Court of Appeal, the "*only question is whether the final straw is the last in a series of acts or incidents which cumulatively amount to a repudiation of the contract by the employer.*"

It said that the last straw "*must contribute, however slightly, to the breach of the implied term of trust and confidence.*" It emphasised that the final straw does not have to be "unreasonable" or "blameworthy" conduct, although it may often be.

It added that an entirely innocuous act on the part of the employer cannot be a final straw, even if the employee genuinely, but mistakenly, interprets the act as hurtful and destructive of their trust and confidence in their employer.

The test of whether the employee's trust and confidence has been undermined must be objective.

In this case, Mr Omilaju could not rely on the "final straw" doctrine because he had resigned in response to his employer's failure to pay him. It therefore agreed with the tribunal that this was perfectly justifiable behaviour.

COMMENT

Despite the court's comment that the action by the employer does not have to be unreasonable or blameworthy, there are very few cases in which conduct that is otherwise reasonable and unblameworthy could amount to a final-straw type act.

TIME OUT FROM THE REGULATIONS

Under section 12 (1) of the Working Time Regulations 1998, workers are entitled to a rest break of at least 20 minutes every six hours.

This does not apply, however, to workers whose activities "involve the need for continuity of service or production" (regulation 21(c)) such as those who work at docks or airports; or where "there is a foreseeable surge of activity" in the work (regulation 21 (d)).

In Gallagher and ors -v- Alpha Catering Services Ltd t/a Alpha Flight Services, the Court of Appeal overturned a tribunal decision that airline catering workers were excluded from the right to such breaks.

WHAT WERE THE FACTS IN THIS CASE?

Mr Gallagher and his colleagues worked in the Service Delivery Department for Alpha, transporting food to and from the airport. There were often intervals when they got to the airport but could not work straight away. During downtime (as it was known), drivers and loaders were not permitted to sleep and were at their employer's disposal. There were also times when the work was very intense.

These fluctuations in work activity arose for a number of reasons – because of something unforeseeable such as fog, or because of the time of day (mornings were busier than afternoons, for example). Overall, the company's business was extremely time-critical.

The employees complained that although they were entitled to rest breaks the company had refused to provide them, contrary to the regulations. Mr Gallagher itemised seven specific occasions when Alpha required him to work for more than six hours without a rest break.

Alpha responded by arguing that the claimants had no right under the regulations to take breaks and, in any event, they did have breaks during their downtime. It provided statistics showing that the days to which Mr Gallagher referred were days on which he had substantial amounts of downtime.

WHAT DID THE TRIBUNALS DECIDE?

The employment tribunal decided that the employees were exempted from the protection of the regulations because the employer's activities involved the need for "continuity of service or production". However, it said that the routine fluctuations of activity were not "surges of activity" within the meaning of the regulations. Nor did the periods of downtime qualify as rest breaks.

The EAT allowed the employees' appeal, saying that the regulations only exclude a worker's right to rest breaks if his or her activities are the ones that involve the need for continuity of service, rather than the employer's.

WHAT DID THE COURT OF APPEAL DECIDE?

Continuity of service/ activities of workers or employer: The Court of Appeal agreed with the appeal tribunal that the activities of the worker must require continuity of service, and not those of the employer. It rejected the employer's argument that because other sections of the regulations refer to industries (such as agriculture), that the reference to the "dock or airport workers" should also be interpreted as a reference to their business.

Meaning of foreseeable surges: The Court said the tribunal had, however, been right that a "foreseeable surge" was something that involved an exceptional level of activity at work. This was beyond any normal fluctuations or variations in work that were experienced within the normal working day or week. As the evidence had not disclosed any such surge, the employer could not rely on this exception to the regulations.

Downtime: It also said that the tribunal was right to decide that an employee who is on call and may be summoned at any moment is not enjoying a rest break. Downtime could not therefore constitute a rest break for the purposes of the regulations. It stated that: *"a rest break is an uninterrupted period of at least 20 minutes which is neither a rest period nor working time and which the worker can use as he pleases."*

Photo: Jess Hurd (Report Digital)

Consult in time

Under the Collective Redundancies Directive, employers have to consult with workers' representatives in good time to try to find a way of avoiding the redundancies or reducing the number of workers affected.

In response to a reference by a German court – Junk -v- Wolfgang Kühnel (Case C-188/03) – about when that obligation kicks in, the European Court of Justice (ECJ) said it is when the employer tells workers of an intention to make some or all of them redundant, not once they have given notice to terminate the contracts.

WHAT WERE THE BASIC FACTS?

Ms Junk worked as a care assistant for AWO, which supplied domestic care services employing over 400 staff. The company announced it was in financial difficulties in January 2002 and liquidation proceedings started in May. After consultation with the works council, the liquidator agreed a compensation agreement in May 2002.

The liquidator informed the works council on 19 May that, as a consequence of the closure of the company, he intended to terminate all remaining contracts of employment (including that of Mrs Junk), in compliance with the maximum three-month notice period, and to carry out a collective redundancy. At the end of June, Ms Junk was duly given three months' notice of redundancy.

On 17 July, she challenged her redundancy, saying it was ineffective.

WHAT DOES THE LEGISLATION SAY?

Article 2 (1) of the Collective Redundancies Directive says, among other things, that "*where an employer is contemplating collective redundancies, he shall begin consultations with the workers' representatives in good time with a view to reaching an agreement.*"

Article 3 (1) requires employers to "notify the competent public authority in writing of any projected collective redundancies." And the redundancies notified to the authorities must then "take effect not earlier than 30 days after the notification referred to in Article 3(1)", according to Article 4.

The German court noted that although the directive says that these obligations should be complied with before the redundancies are implemented, it does not say what it means by "redundancy". So it was not clear to the court when the procedures laid down in Articles 2 and 3 should take effect and therefore turned to the ECJ for guidance.

WHAT WAS THE ECJ ASKED TO DECIDE?

The German court referred the following questions to the ECJ:

1. Does the reference to "redundancy" in the directive refer to the notice of dismissal, or does it mean the termination of the employment relationship when the period of notice expires?
2. If "redundancy" means the notice of dismissal, does the directive require that both the consultation procedure under Article 2, and the notification procedure under Articles 3 and 4 should be concluded before the notices of dismissal are announced?'

> *'As far as UK case law is concerned, consultation must begin as soon as the employer contemplates redundancies'*

First question: The ECJ said that the wording in the directive refers to an employer who is "contemplating" collective redundancies, which, by definition, corresponds to a situation in which no decision has yet been taken. The terms used in the legislation therefore indicate that the obligations to consult and to notify arise prior to any decision by the employer to terminate contracts of employment.

The event constituting redundancy is, therefore, the declaration by an employer of his or her intention to terminate the contract of employment.

Second question: The ECJ said that Article 2 imposes an obligation to negotiate. This, it said, would have no impact if the employer could terminate the contracts of employment at the beginning of, or during, the negotiation procedure. As such, a contract can only be terminated once the consultation procedure has been concluded.

An employer is only entitled, therefore, to carry out collective redundancies after the conclusion of the consultation procedure in Article 2 and after notification of the projected collective redundancies in Articles 3 and 4.

As far as UK case law is concerned, the ECJ has confirmed that it is correct to say that consultation must begin as soon as the employer contemplates redundancies.

Failure to consult

Section 188 of the Trade Union and Labour Relations (Consolidation) Act says that, if employers are proposing to make 20 or more employees redundant within 90 days, they have to consult the appropriate representatives of anyone who might be dismissed "in good time".

In Hardy -v- Tourism South East, the employment appeal tribunal (EAT) said that this obligation to consult applies even when the employer intends to offer alternative employment to most of the employees.

WHAT WERE THE BASIC FACTS?

In December 2003, Tourism South East (TSE) decided to restructure its business, and told its 26 staff in the Tunbridge Wells office that it was to be closed on 30 January.

The employer hoped that 14 of the affected staff would be redeployed, resulting in just 12 redundancies.

Those wanting redeployment, however, had to apply for the jobs, all of which had different job descriptions and would either be at the Eastleigh office 100 miles away, or at a new sub-office that had not yet been set up.

WHAT DID THE PARTIES ARGUE?

Mrs Hardy complained that TSE had failed to comply with section 188 of the Act because more than 20 staff were losing their jobs. For its part, TSE said the legislation was not applicable because it was only proposing to make 12 employees redundant at the same establishment.

Mrs Hardy responded that the legislation would be fundamentally undermined if her employer was able to argue that there was no obligation to consult because it hoped to bring the number of redundancies below 20 through redeployment.

On the contrary, she said that the legislation specifically contemplates that redeployment will be one of the issues discussed in the course of the consultation (see box).

The tribunal agreed with TSE. It said that, as the employer was proposing to dismiss less than 20 staff in its Tunbridge Wells office, the legislation did not apply.

WHAT DID THE EAT DECIDE?

The EAT disagreed with the employer's argument and decided in Mrs Hardy's favour. It said that the definition of "dismissal" in the case of *Hogg -v- Dover College [1990] ICR 39* was central to its decision.

In this case, the court said that there was still a dismissal if the employer brought one contract of employment to an end and re-engaged the employee on another. It said that it follows, therefore, that if

"...an employer only proposes to keep the employee in his employment on what is in reality a different contract of employment, he will be proposing to terminate the existing one."

The EAT said that it was clear in this case that everyone's contract would be terminated and employees would have to apply for available vacancies (with different job descriptions) which were at a different location. Therefore there was a dismissal for the purposes of section 188 (1) and the employer should have consulted.

The EAT decided that any other conclusion would undermine the legislation. One of the reasons for having collective consultation is so that both parties have a chance to discuss ways of avoiding dismissals and reducing the number of employees dismissed.

The question of an appropriate remedy was remitted back to the tribunal.

TRADE UNION AND LABOUR RELATIONS (CONSOLIDATION) ACT 1992

188 DUTY OF EMPLOYER TO CONSULT... REPRESENTATIVES

(1) Where an employer is proposing to dismiss as redundant 20 or more employees at one establishment within a period of 90 days or less, the employer shall consult about the dismissals all the persons who are appropriate representatives of any of the employees who may be so dismissed ...

(2) The consultation shall include consultation about ways of—
(a) avoiding the dismissals,
(b) reducing the numbers of employees to be dismissed, and
(c) mitigating the consequences of the dismissals,
and shall be undertaken by the employer with a view to reaching agreement with the appropriate representatives.

THOMPSONS IS THE LARGEST SPECIALISED PERSONAL INJURY AND EMPLOYMENT RIGHTS LAW FIRM IN THE UK WITH AN UNRIVALLED NETWORK OF OFFICES AND FORMIDABLE RESOURCES

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