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

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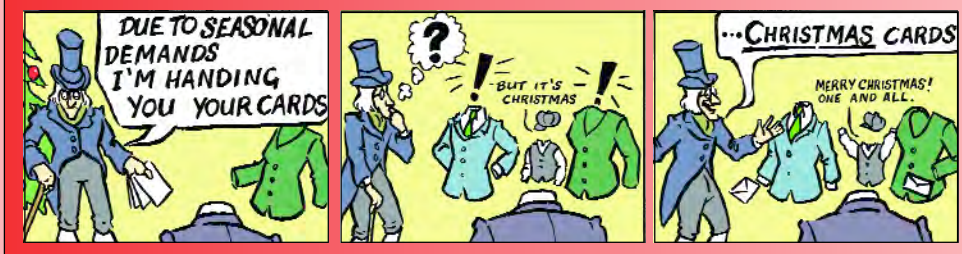


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THOMPSONS SOLICITORS

# Labour & European Law Review

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# STRESSED OUT?

**The Health and Safety Executive has published guidance for employers on how to deal with work-related stress. And not before time. Their own research shows that:**

- about half a million people in the UK experience work-related stress at a level they believe is making them ill
- up to five million people in the UK feel 'very' or 'extremely' stressed by their work
- work-related stress costs society about £3.7 billion every year (at 1995/6 prices).

For a copy of the guidance, go to: *www.hse.gov.uk/stress/index.htm*

The government is committed to achieving a 20 per cent reduction in the incidence of work-related stress by 2010. So ACAS (the government-backed conciliation service) has worked with the HSE to produce a booklet offering practical solutions for resolving stressful situations and preventing future work-related stress.

The booklet relates ACAS advice to the Health and Safety Executive's six management standards concerned with the main factors that cause stress at work.

Essentially, it is a more user-friendly version of the HSE advice.

For a copy of the booklet, go to: *www.acas.org.uk/publications/b18.html#f*

# GOVERNMENT RESPONSE TO CEHR CONSULTATION

**Following widespread consultation, the government has recently made some key changes to its plans for the Commission for Equality and Human Rights:**

- it will have the freedom to decide which equality cases to support
- It will have an explicit role to combat prejudice
- It will be able to bring proceedings in its own name
- Its legal duties on good relations will give priority to work with minority ethnic and faith communities
- It will have a new power to assess a public body's performance of its public duty to secure improvement in promoting equality as an alternative to the courts.

# GENDER SUMMIT

**At a gender summit at No 11 Downing Street recently, the Equal Opportunities Commission (EOC), published a report showing that British productivity is suffering because women's skills and talents are under-used.**

Entitled 'Britain's Competitive Edge: women, unlocking the potential', the report noted that many of the sectors that have a skills shortage (such as the building trade) employ very few women. These findings were backed up by a report from the DTI's Women and Equality Unit (WEU), which said that 60 per cent of working women are employed in just ten occupations.

You will find the EOC report at: *www.eoc.org.uk/cseng/policyandcampaigns/productivity_women.pdf*

You will find the WEU report at: *www.womenandequalityunit.gov.uk/research/tackling_occupational_segregation_oct04.doc*

The TUC has also produced a report entitled 'Young at Heart' which warns that traditional male dominated jobs such as manufacturing will remain the preserve of men, with women opting for jobs as care assistants and waitresses, unless the government acts to challenge these stereotypes.

The report, launched at the end of October, shows that 14 per cent of young men aged 16 and 17 work in manufacturing, compared to just six per cent of young women. Public service jobs account for 10 per cent of the employment of young women, compared to just four per cent of young men. And teenage girls earn 16 per cent less than their male counterparts.

For a copy of the TUC press release, go to: *www.tuc.org.uk/learning/tuc-8856-f0.cfm*

# OUT OF COURT SETTLEMENT

**A former firefighter who developed the asbestos-related condition of pleural plaques (scarring of the lung tissue) has settled his claim against West Midlands Fire Service for £14,000.**

The claim for compensation was taken by Thompsons on behalf of the Fire Brigades Union.

Keith Dutton, who worked for the fire service from 1961 to 1990, was diagnosed with the condition in March 2000.

# Compare and contrast

**The European Court of Justice (ECJ) has just decided an interesting case concerning an Austrian casual worker who claimed a breach of the part-time workers directive, as well as indirect sex discrimination on the basis that her contract did not stipulate any working hours.**

She argued that she should be paid for the maximum hours that she could be asked to work, regardless of whether she actually did. She said that the vast majority of workers who accepted these casual contracts were women.

However, the ECJ decided – in Wippel -v- Peek & Cloppenburg GmbH & CO KG – that her contract differed too much from that of full-time workers to be able to make a valid comparison.

Ms Wipple was employed on a 'work on demand' contract. In other words, her employer offered her work when it became available, and paid her monthly for the work done.

The court noted that although she did not have a clause in her contract stipulating fixed hours or salary, she was free to refuse the work offered by the employer. By contrast, although full-time workers have the benefit of fixed hours and salary, they have no say in whether or not they work.

The court said, as there was no comparable full-time worker, there was no breach of the part-time workers directive, nor could the court compare the positions of full-time and casual workers in order to set up a claim for indirect sex discrimination.

The case is significant, however, in confirming that casual work falls within the ambit of the part-time workers directive, and therefore also our Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

# Ability to pay

**Tribunals are now able to take into account a party's ability to pay when awarding costs.**

In Walker -v- Heathrow Refuelling Services Co Ltd, the employment appeal tribunal judge said two factors were relevant:

- whether the claimant has recovered a sum of money as a result of the proceedings, and
- whether any legal fees the claimant is ordered to pay are likely to be met by the trade union funding the claim

# Give us a break

**The London Central Tribunal has found in favour of a railway worker who claimed that her right to statutory rest breaks under the 1998 Working Time Regulations was being breached by her employer. She was awarded £3360 in damages.**

Mrs Holland's employers failed to provide cover for her during her statutory 20 minute rest breaks to which she was entitled. Instead, she had to take her breaks whilst still on call and contactable via radio.

The tribunal dismissed the company's argument that because her duties included a small element of security and surveillance, this fell within the exceptions allowed by the regulations.

Following the outcome of Holland -v- Heathrow Express, Aslef acting general secretary, Keith Norman said that the union was determined to establish the rights of workers with stressful and responsible jobs to adequate rest breaks.

The case was brought on behalf of the union by Anita Vadgama of Thompsons Solicitors.

# A Christmas promise

**Whatever you do this Christmas, don't make the same mistake as in** Judge -v- Crown Leisure Ltd**.**

At the company's annual Christmas dinner dance in 2001, Mr Judge's manager repeated a promise made earlier in the year that Mr Judge would, within two years, be on the same scale as another manager (Mr Mills) who had been transferred over from a sister company.

Two years later, the promise had not materialised. Mr Judge resigned but was persuaded to return and subsequently received a large bonus which substantially increased his salary. However, it was still not as large as that of Mr Mills.

In June 2003 he resigned again and claimed constructive unfair dismissal. The appeal tribunal upheld the decision of the tribunal that the manager's 'promise' was not a legally binding commitment. The conversation at the dance did not constitute a contractual intention, but consisted merely of 'words of comfort.'

# DISCRIMINATING OVER PORN

**In an unusual sex discrimination case – Moonsar -v- Fiveways Express Transport Ltd – the EAT (employment appeal tribunal) has held that it was sex discrimination, in these circumstances, for a man to download porn at work.**

## WHAT WERE THE FACTS IN THIS CASE?

Ms Moonsar had been working as a part-time clerk in the evenings for Fiveways for less than three months when she was dismissed for redundancy. She brought a claim for race discrimination (on the ground that a white employee with less service was retained) which the tribunal upheld and awarded her £1,000 for injury to feelings.

Photo: John Harris (Report Digital)

She also brought a claim for sex discrimination on the grounds that male members of staff downloaded pornographic images onto screens in a room where she was working, on three different occasions.

Although not circulated directly to her, she knew what was going on, but made no complaint at the time because she wanted to keep her job. The last occasion was shortly before she was dismissed.

The tribunal decided that this could not amount to sex discrimination because she had not been shown the images and had not made any complaint about the men viewing them. Nor did it believe her story that she wanted to keep her job and so felt she had to 'keep her head down'.

## WHAT DID MS MOONSAR ARGUE?

Ms Moonsar argued that in claims of sex discrimination, the tribunal was legally obliged (under section 63 of the Sex Discrimination Act and the decision in *Barton -v- Investec*) to look for any evidence from which it could conclude that there had been sex discrimination. If they decided there was, then the burden of proof passed to the employer to prove that he or she did not discriminate.

In this case, Ms Moonsar said the facts of the case could easily have amounted to sexual harassment, whether or not the images were circulated to her. It was clear that the men's behaviour amounted to an affront to her dignity. The tribunal had even made a finding that she found their behaviour unacceptable. The logic of that finding meant that she had suffered a 'detriment' or disadvantage.

She also argued that her failure to complain was not relevant in assessing whether she had suffered a detriment. She relied on the EAT's decision in *Driskel -v- Peninsula Business Services Ltd* to support her point that the men's behaviour was so obviously detrimental to her that it was 'of no significance' that she had not complained.

And, finally, she argued that because the tribunal had not considered the issue of an appropriate male comparator, it had failed to consider the effect of the use of pornography on that comparator. Had it done so, it would have concluded that such behaviour amounted to less favourable treatment for a woman than a hypothetical male comparator.

## WHAT DID THE EAT DECIDE?

And the EAT agreed. It said that, viewed objectively, the men's behaviour could be regarded as degrading or offensive to a woman. It was, therefore, potentially less favourable treatment.

The burden should then have shifted to the employers (who did not turn up for the hearing) to show that there was not less favourable treatment, for instance that she was a party to or enjoyed what was going on.

Because the employers played no part in the hearing, the EAT said it had to substitute a finding that there was sexual discrimination in this case. It remitted the case to another hearing to decide on the level of compensation.

However, the EAT dismissed her appeal against the award for race discrimination. It agreed it was on the low side, but was not unreasonable.

# OPTING OUT

**Under the Working Time Regulations 1998, employees have the right to work a maximum 48-hour week. They can opt out of the provision to work longer hours if they want, but employers must not put them at a disadvantage if they chose not to.**

In a recent case – Clamp -v- Aerial Systems – the appeal tribunal decided that after deciding not to opt out, Mr Clamp did not suffer any disadvantage. The changes to his working conditions were a consequence of the variation to which he agreed, and not a detriment.

The case was supported by Mr Clamp's union who instructed Thompsons.

## WHAT WERE THE BASIC FACTS?

Having agreed to opt out of the 48-hour limit imposed by the Working Time Regulations 1998, Mr Clamp worked a 60-hour week as an aerial fitter over a wide geographical area, for which he was paid a basic salary and commission.

He subsequently decided, however, that he wanted to opt back in and agreed with his employer to reduce his hours to 48 per week. The hours were calculated by a tracker fitted in his vehicle, but excluded his travelling time to and from home.

However, the company then started treating him differently from other employees on odd occasions when jobs were not allocated the day before. Instead of being able to wait at home until he was told where to go, he was asked to wait at a designated spot on a motorway slip road so that he could get to the job quicker.

Mr Clamp argued that he had suffered a detriment within section 45A of the Employment Rights Act 1996 (see box), on the basis that his hours now excluded travelling time, whereas before they did not.

The tribunal disagreed and said that there had simply been a variation to his contract, to which Mr Clamp had consented. If he suffered a disadvantage from that change, it was balanced by the fact that he was being paid the same salary for fewer hours. The fact that he also had to wait, occasionally, on the motorway, did not amount to a significant detriment.

## WHAT DID THE EAT DECIDE?

And the EAT agreed. It said that it was as a consequence of the variation, and not a detriment, that his hours now excluded travelling time. Even if he had suffered a reduction in salary, that would also have been a consequence and not a detriment of the change to his contract.

It said that although there is no need for claimants to establish any physical or economic consequence to show they had suffered a detriment, there still had to be 'firm evidence of the existence of an actual detriment.' It had to be 'material and substantial'.

There was no evidence that waiting on the motorway disadvantaged Mr Clamp in any way. If anything, the contrary was true because his 48 hours started to tick from that point and his travelling time to the first job was also included in the calculation. Mr Clamp did not, therefore, suffer a material and substantial detriment and the appeal tribunal dismissed his claim.

This case will no doubt be exploited by employers seeking to justify worse terms for workers exercising their rights to opt out. This decision does not seem to accord with the purpose of the directive - which is to protect workers.

### EMPLOYMENT RIGHTS ACT 1996, SECTION 45A

## Working time cases

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the grounds that the worker -

(a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,

(b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations.

a brief overview of

# AN UPDATE OF

**Following a review of the 1999 Employment Relations Act, a new and updated version of the legislation has just received royal assent.**

A few of the measures of the 2004 Act – which is mainly concerned with collective labour law and trade union rights – came into force on 1 October, but the rest will take effect by April 2005.

*Richard Arthur*, a solicitor from Thompsons' Employment Rights Unit in London, takes a brief look at the new Act.

## PART 1
## UNION RECOGNITION

### Appropriate bargaining unit

The Central Arbitration Committee (CAC) now has 10 days to decide whether the union's bargaining unit is appropriate before coming to its own decision. If it does, it has to consider whether the proposed unit is 'compatible with effective management' and also take the views of the employer into account.

The parties have 20 days to try to reach agreement, but the CAC can now shorten – or extend – that period.

Employers must give the union and the CAC a list of the categories of workers in that unit, a list of their workplaces and an estimate of the numbers employed. If the employer fails to do that, the union can ask the CAC to make a decision before the end of the 20-day period.

The CAC can now require the employer, the union and applicant workers to provide information about the union membership of workers in a specified bargaining unit and the likelihood of them voting for recognition (or de-recognition).

### Union communication

Unions can now communicate with workers in the bargaining unit once the CAC accepts their application via a 'suitable, independent person'.

The employer then has to provide the names and home addresses of all the relevant workers in that unit.

### CAC-arranged ballot

The CAC now has greater discretion to assess the evidence (which has to be credible) from a significant number of union members saying that they do not want the union to bargain collectively for them before arranging a ballot.

The CAC can now give the two parties more time to reach a voluntary agreement on recognition by extending the notification period.

The CAC can now allow workers to vote by post if they cannot get to work on the day of the ballot.

Employers are not allowed to induce a worker not to go to a meeting, nor to threaten action against anyone who attends.

Both employers and unions must refrain from using unfair practices (such as offering money or threatening to dismiss a worker) to influence the outcome of the vote.

### Admissability of application

The Act clarifies that the CAC can proceed with an application for recognition, even if there is an existing agreement that covers one or two of the three 'core bargaining' topics of pay, hours or holidays.

The Secretary of State, however, now has the power to amend the legislation to include pensions within the 'core bargaining' topics.

## AN OVERVIEW

- Measures to tackle the intimidation of workers during recognition and de-recognition ballots
- Measures to improve the operation of the statutory recognition procedure
- Improved provisions to protect employees who are taking official strike action from being dismissed
- Improved measures for unions to expel or exclude racist members
- A power for the Secretary of State to make

### Notice to end bargaining

A union can now challenge an employer's application to end bargaining arrangements, even if it did so successfully within the last three years.

## PART 2
## INDUSTRIAL ACTION

Unions now have to provide a list of the categories of employees who they reasonably believe will be entitled to vote, and their workplaces. They also have to provide the total number of employees concerned, the number in each category and the number in each workplace

Unions must provide an explanation of how the figures were calculated and should be as accurate as possible, based on information held by a union officer or employee (but not a

# TRADE UNION LAW

## THE NEW ACT

- funds available for trade unions to modernise their operations
- Measures to implement the judgement in the case of *Wilson -v- Palmer*
- Measures to improve the operation of certain individual employment rights
- New protection for employees dismissed for being on jury service
- A power to implement the EC directive on information and consultation
- Measures to improve trade union regulation

branch official).

Unions no longer have to supply employers with a list of names of the employees they believe are entitled to vote.

**Ballots and notices**

The members entitled to vote are those that the union reasonably believes it will induce to take part in the action.

Unions no longer lose their protection against legal liability if they fail to ballot a few members whom they subsequently try to induce to take part.

The notice must contain figures showing the total number of affected employees, the number of them in each category and the number of them at each workplace.

**Protection for strikers**

The length of the protected period against dismissal for taking strike action is increased from 8 to 12 weeks. Locked-out days will extend the period.

The date of dismissal is clarified as the date on which notice is given or, if no notice was given, the effective date of termination.

Conciliation or mediation meetings should be attended by an 'appropriate person' representing each party who should co-operate with the proceedings and put in place any actions agreed.

## PART 3 INDIVIDUAL RIGHTS

**Inducements, detriments and dismissals**

Subsequent to the decision of the European Court of Human Rights in *Wilson -v- Palmer*, workers now have protection against being offered inducements not to join (or leave) a union, not to take part in its activities and not to make use of its services. They also have protection against being induced to opt out of a collective agreement.

The right not to suffer a detriment due to union membership or activities is extended from employees to workers.

It is now automatically unfair to dismiss an employee for making use of trade union services 'at an appropriate time' or because the employee failed to accept one of the inducements outlined above.

These sections all came into effect on 1 October 2004.

**Exclusion and expulsion**

Trade unions are now entitled to exclude or expel individuals for political behaviour which is incompatible with membership of a union, including membership of a political party.

**Other rights**

The burden of proof now lies with the employer in cases of employees dismissed or selected for redundancy on TU grounds.

Workers must be allowed to choose the person accompanying them to a disciplinary or grievance hearing. The companion is now allowed to address the hearing on more than one occasion and respond to points put forward. This section is now in force.

The employment appeal tribunal now has jurisdiction to hear appeals against tribunal decisions relating to the right to be accompanied. This section is now in force.

Employees now have a qualified right not to be subjected to a detriment as a result of doing jury service.

Employees dismissed for a reason connected with a flexible working application can complain of unfair dismissal despite being involved in industrial action. They do not need 1 year's qualifying service.

## PARTS 4, 5 AND 6

Part 4 introduces measures to improve the enforcement regime of the national minimum wage.

Part 5 introduces measures to give the Certification Officer greater powers to strike out weak or vexatious claims.

Part 6 exempts the position of union president from the need for a vote if that person already holds that post (or any union post) in accordance with the union's rules and it is less than 5 years since they were elected.

Part six also gives the Secretary of State the power to include non-postal methods of voting in statutory union elections and ballots, as well as make funds available to independent trade unions to modernise their operations.

# HOPE FADES FOR RECOGNITION


**Under the Employment Relations Act 1999 (updated in October 2004), trade unions can apply to the Central Arbitration Committee (CAC) for recognition if they cannot reach a voluntary agreement with the employer.**

In Transport and General Workers Union -v- Asda (2004, IRLR 836) the CAC said that as another union was already recognised for collective bargaining, the TGWU's claim could not succeed.

## WHAT WERE THE FACTS?

The TGWU applied to the CAC on 10 May 2004 for recognition within a bargaining unit consisting of 'warehouse operatives and drivers' at an Asda depot in Falkirk, Scotland. The CAC gave both parties notice of receipt of the application on 13 May 2004. The company submitted an interim response on 17 May and its reply to the CAC's questionnaire on 20 May.

The union stated in its application that the employer had an understanding with the GMB union that was purely consultative and limited to representation rights in disciplinary and grievance matters. It did not provide for collective bargaining on any topic and was not a recognition agreement.

Asda, on the other hand, said that, although the partnership agreement (reached on 8 April 2004) did not cover pay, it made the TGWU's claim inadmissible because it covered other aspects of collective bargaining.

The union then said that at the time its recognition request was submitted to the employer, on 1 April 2004, there was no partnership agreement even in place. Asda said this was irrelevant and that, in any event, the partnership agreement had been clarified (on 28 May) to confirm that it provided for negotiation with the GMB on facilities relating to shop stewards.

## WHAT DID THE PARTIES ARGUE?

The union said that it had requested recognition on 8 March, 25 March and 1 April, and presented its application to the CAC on 10 May when there was no collective agreement in force. The union pointed out that although the partnership agreement mentioned collective representation, this was not the same as collective bargaining. The fact that the employer had amended the agreement after the union's application strengthened its argument that there was no collective agreement in force when it made its application to the CAC.

This was therefore the key date. To decide otherwise, it said, would allow *'unscrupulous employers to enter meaningless agreements and adopt tactics designed simply to circumvent a union's application'.*

Asda, on the other hand, submitted that the relevant date could not be the date of the union's application as it had not submitted a response to the CAC at that point, which constituted a key part of the evidence it had to consider.

If the CAC did not agree with it on that point, it argued that at the time the union made its application, there was already a collective agreement in force. It included time off for trade union officials, the provision of relevant quality training for shop stewards, the selection and number of shop stewards, and issues relating to disciplinary and grievance procedures.

## WHAT DID THE CAC DECIDE?

The CAC had to decide two things. First, did the partnership agreement between Asda and the GMB constitute a collective agreement? And, second, when did it come into force?

It decided that there was a collective agreement in force for two reasons. Firstly, that the 8 April partnership agreement referred to facilities for shop stewards and procedures for grievance and discipline. Secondly, it was part of a pre-existing stores agreement with the GMB covering 270 stores and 22 distribution depots in the UK.

Having decided that the 8 April agreement did constitute a collective agreement, it did not need to consider the issue of a relevant date.

# JURISDICTIONAL DEDUCTIONS

**In two appeals about unlawful deductions of wages – Gill & ors -v- Ford Motor Co and Mr Wong & ors -v- BAE Systems Operations Ltd (2004, IRLR 840) – the employment appeal tribunal has decided that tribunals have to make findings of fact before looking at whether they have jurisdiction to hear the claims.**

## WHAT DOES THE LAW SAY?

Under section 13 of the Employment Rights Act, employers do not have the right to make deductions from a worker's wages without that person's written permission (which should be given in advance), unless there is a term in the contract that says they can.

However, there are at least two circumstances in which those provisions do not apply. Section 14(5) says the employer can make a deduction if the worker has taken part in a strike or other industrial action; and section 14(1)(a) if it is to recoup an overpayment of wages.

## WHAT WERE THE BASIC FACTS?

**Gill & ors:** After a night shift in May 2002, when some assembly line workers took unofficial industrial action, they were all given letters saying their pay would be stopped and they would lose their attendance supplement.

Mr Gill (and a number of others) denied they had taken part in the action, but said they could not work because the assembly line had stopped. The tribunal decided it could not hear their claim because section 14(5) meant that it was outside its jurisdiction, and that it would have to be heard in the county court.

**Wong & ors:** Mr Wong and 83 other workers brought claims because their employer made deductions for an overpayment of bonus made in March 2003. The employment tribunal stated that it could not hear their claim because of section 14(1)(a).

## WHAT DID THE PARTIES ARGUE?

Mr Gill appealed on the basis that the tribunal should have decided, as fact, whether he had taken part in the industrial action before deciding that it could not hear his claim.

Similarly, Mr Wong said the tribunal should have decided whether an overpayment had, in fact, been made. To do so, it should have investigated what bonus was payable to the appellants.

Both argued that if tribunals do not make findings of fact where they are disputed, employers would, in effect, have the power to decide if the county court or the tribunal has jurisdiction.

The employers, on the other hand, argued that tribunals were only required by law to establish the facts as far as their jurisdiction allowed. That meant they were not required to look into whether the deductions were contractually authorised in deciding whether section 14 applied.

## WHAT DID THE EAT DECIDE?

The EAT allowed both appeals, saying that the tribunal in each case was wrong to decide that the men's claims of unauthorised deductions from wages fell within one of the excluded categories set out in section 14 of the Employment Rights Act.

Instead, it said they should have established the facts before concluding that they had no jurisdiction. Once the facts are established, it said that tribunals can then look at the employer's motivation for the deduction.

That, however, does not involve looking at the lawfulness of the deductions. In these cases, it meant looking at *'the purpose of the deduction'* as reimbursement for an overpayment of wages; and looking at whether the deduction was made *'on account of that worker having taken part in that strike or other industrial action'*.

Otherwise, as Mr Gill and Mr Wong had argued, the employer would be the one able to choose whether the employment tribunal or the county court had jurisdiction, without having to prove that the facts were true.

# Unequal pay

**Because women have more breaks in service during their working lives than men (usually to have children and raise a family), they often work for shorter periods. But is it then discriminatory for an employer to use length of service as a criterion for say, extra holidays or even pay?**

In Cadman -v- the Health & Safety Executive, the Court of Appeal decided to ask the European Court of Justice (ECJ) to make a ruling on whether length of service can be used as a justification for different pay for men and women.

## WHAT WAS THE HISTORY TO THIS CASE?

Mrs Cadman brought a claim for equal pay against her employer, relying on four male comparators (H, I, J and K) who were all on the same grade as her, but paid substantially more. They had all worked for the HSE for longer than she had.

As the proportion of men with longer service was greater than that of women, however, Mrs Cadman claimed that the use of length of service as a determinant of pay was indirectly discriminatory against her and that her employer should be required to justify it objectively.

The tribunal agreed with Mrs Cadman, but its decision was overturned by the employment appeal tribunal. It said that the ECJ had decided in *Danfoss* that using length of service as a criterion in a pay system did not need to be justified. But even if it did, it said that the tribunal had made a legal error when considering justification.

> *'Cases such as Nimz, Hill and Gerster are probably not just exceptional and confined to the context of part-time work. They are more illustrative of a difference in approach'*

## WHAT DID THE PARTIES ARGUE?

Not surprisingly the HSE argued that *Danfoss* provided the authority to support its claim that length of service did not need justification, with the exception of subsequent cases decided by the ECJ that had concerned part-time workers.

Mrs Cadman, on the other hand, argued that those subsequent cases did not just modify *Danfoss* in relation to part-time workers, but amounted to a significant departure from it.

In the cases of *Nimz -v- Freie und Hansestadt Hamburg*; *Hill -v- Revenue Commissioners*; *Gerster Freistaat -v- Bayern*, the Court of Justice had indicated that the use of length of service as a criterion did seem to require justification. Although the court had not expressly overruled *Danfoss* in these judgements, it had, in essence, ignored it.

The conundrum for the Court of Appeal, therefore, was to figure out the relationship between *Danfoss* and *Nimz, Hill, Gerster* concerning part-time workers. Had the Court of Justice had second thoughts in *Nimz* and *Hill*? Or were they part of a sub-plot referable only to part-time workers?

To help it decide, the Court of Appeal looked at the opinions of the Advocate General in *Nimz* which could, it said, be construed as an invitation to at least reconsider *Danfoss*. It felt this change of approach was even more obvious in *Hill*.

On balance, the court felt that it could not escape the conclusion that *'cases such as* Nimz, Hill *and* Gerster *are probably not just exceptional and confined to the context of part-time work. They are more illustrative of a difference in approach.'*

However, because of the element of uncertainty thrown up by the different cases, the Court of Appeal decided to remit the issue to the ECJ for a definitive judgement.

It also said that, if Mrs Cadman succeeded in her claim in Europe, her case should be heard by a different tribunal to reconsider the issue of justification, which had been wrongly decided by the tribunal.

## COMMENT

This case follows in the footsteps of the successful PCS backed case of *Crossley -v- ACAS*, in which the tribunal found that service related increments indirectly discriminated against women and could not be justified.

As a result, ACAS payscales were overhauled, leading to increased pay and shorter pay scales. It is likely that the European Court in *Cadman* will take the same view.

# Time of transfer

**The Court of Appeal has decided yet another case arising out of the equal pay claims made by thousands of women (some more than a decade ago) that they had been unlawfully excluded from membership of their occupational pension scheme, because they worked part-time.**

In Powerhouse Retail Ltd & ors -v- Burroughs & ors, the Court of Appeal has said that when employees are transferred from one employer to another under the TUPE regulations, their pension rights are removed from the contract that the transferee inherits. Time therefore runs from the date of the transfer.

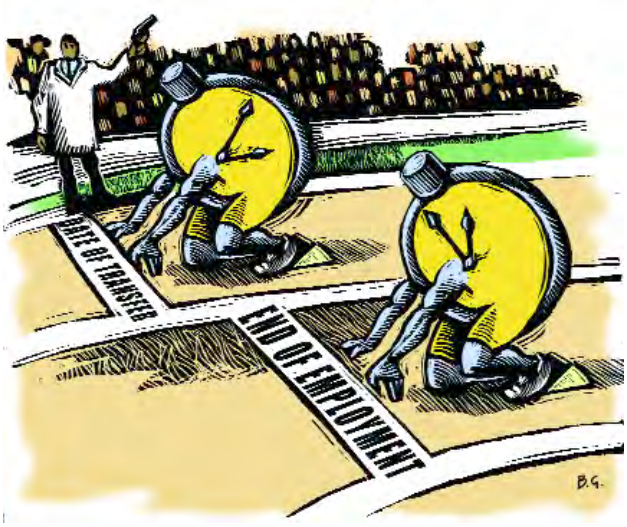
## WHAT IS THE HISTORY TO THIS APPEAL?

The women concerned with this appeal had originally been employed part-time in the nationalised electricity industry. They were allowed to join the pension scheme in 1988 and subsequently accrued pension benefits.

Following privatisation in 1992, there were two successive transfers under the TUPE regulations (see box) and the women were transferred to a new employer.

During the course of this protracted litigation, the European Court of Justice said that the six-month limitation period under the Equal Pay Act 1970 for bringing proceedings was not incompatible with EC law.

This specific case dealt with one aspect of that decision – in a TUPE transfer, does time begin to run against the transferor from the date of transfer? Or from the end of the employee's employment with the transferee?




The effect of regulation 5 of the TUPE Regulations is to transfer the employees' terms and conditions to the transferee, as though the contract had originally been made between them. Regulation 7, however, says that this principle does not apply to occupational pension schemes.

## WHAT WAS THE VIEW OF THE COURTS?

The employment tribunal had held that time starts running against the TUPE transferor from the date of the TUPE transfer. The EAT, on the other hand, said that the six month time limit for bringing a claim against the transferor did not start running until the worker left the employment of the transferee or, if there was more than one TUPE transfer, from the termination of the employee's employment with the last transferee.

The Court of Appeal, however, has now reversed that decision and said that although the contract of employment is deemed always to have been with the transferee, the pension rights have been removed from it. The women's claim, it said, was therefore based on the previous contract and terminated when the transfer took place. This is when time began to run.

## COMMENT

This is a very harsh interpretation of the time limits in the Equal Pay Act. It will mean that many part-timers' pension claims will now fail. However, the decision will only apply to pension-related claims and not to other equal pay claims after a TUPE transfer.

The position is also different for public sector reorganisations where the transfer from one employer to another takes place under sector-specific legislation. Pension rights may be transferred, and time may not start to run until the employment comes to an end.

### TRANSFER OF UNDERTAKINGS (PROTECTION OF EMPLOYMENT) REGULATIONS 1981

Regulation 5(1) provides: *'... a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor in the undertaking or part transferred but any such contract which would otherwise have been terminated by the transfer shall have effect after the transfer as if originally made between the person so employed and the transferee'.*

Regulation 7 provides: *'(1) Regulation 5 ... shall not apply to so much of a contract of employment ... as relates to an occupational pension scheme ...'*