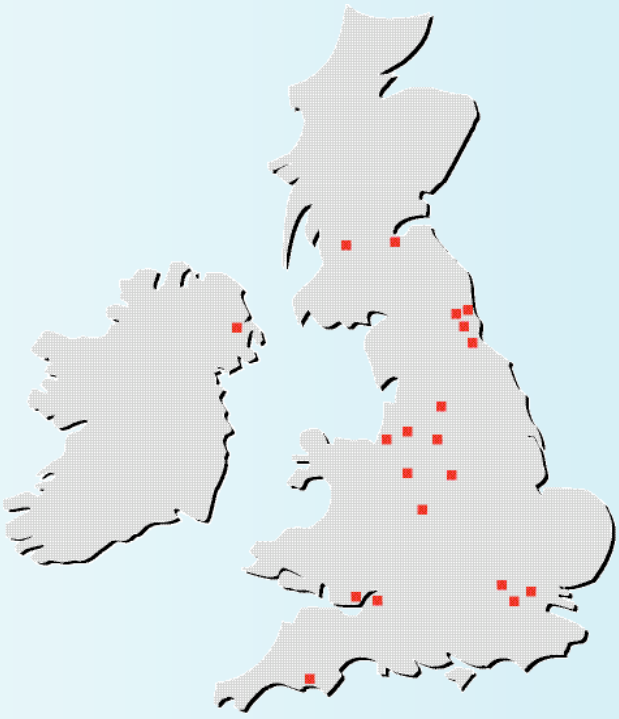

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THOMPSONS SOLICITORS

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DISCIPLINE AND GRIEVANCE

The Advisory, Conciliation and Arbitration Service (ACAS) has issued a user friendly code of practice on disciplinary and grievance procedures in the workplace.

It was laid before Parliament in June and, if approved, should come into effect on 1 October. The code has been revised to take account of the new statutory disciplinary and grievance procedures that come into operation on the same date.

As well as giving practical guidance on the procedures, the code also advises on:

- what is reasonable behaviour when dealing with disciplinary and grievance issues
- producing and using disciplinary and grievance procedures for the workplace
- a worker's right to bring a companion to grievance and disciplinary hearings

Though it does not have statutory force, employment tribunals will take the code into account when considering relevant cases. To access the code, go to *www.acas.org.uk/publications/pdf/CP01.2.pdf*

ACAS has also updated its booklet on redundancy, which can be accessed at: *www.acas.org.uk/publications/b08.html*

Thompsons' own guide to the new disciplinary and grievance procedures will be issued with the October edition of LELR.

TRIBUNAL APPLICATIONS

The Employment Tribunals Service (the admin arm of the tribunal service) has produced its 2003-04 Annual Report and Accounts, showing that:

- 115,042 applications were registered in 2003-04 compared to 98,617 for the year before
- 33% of claims were for unfair dismissal; 18% for unauthorised deductions; 17% for sex, race and disability; 10% for the working time directive; 7% for breach of contract; 4% for redundancy pay; 3% for equal pay; and 8% for other claims
- the maximum award for a race discrimination claim was £635,150; for sex discrimination £504,433; for disability £173,139; and for unfair dismissal £113,117

To access the full report, go to *www.ets.gov.uk/annualreport2004.pdf*

INFORMATION AND CONSULTATION

In July the DTI published draft regulations on the introduction of the Information and Consultation Directive, along with guidance for applying them.

The directive establishes a general framework for businesses for informing and consulting their employees, and must be in operation in the UK by March next year. The agreement allows the UK to restrict application of the directive in the first instance to businesses with 150 or more employees. After two years it will also apply to businesses with 100 or more employees, and a year later to those with 50 or more employees.

The directive will give employees new rights to information and consultation. Previously these were limited to consultation about collective redundancies, transfers of undertakings (TUPE), and health and safety, and in large multinational companies through European Works Councils.

In future, employees will have a right to be informed about the business's economic situation, informed and consulted about employment prospects, and about decisions likely to lead to substantial changes in work organisation or contractual relations, including redundancies and transfers.

To access the regulations and draft guidance, go to: *www.dti.gov.uk/er/consultation/proposal.htm*

ANNUAL REPORTS

A number of organisations produced their annual reports at the end of July:

- To access the annual report from the Commission for Racial Equality, go to *http://www.cre.gov.uk/publs/cat_annrep.html*
- To access the annual report from the Equal Opportunities Commission, go to *www.eoc.org.uk/cseng/abouteoc/annualreport2004.pdf*
- To access the annual report from the Disability Rights Commission, go to *www.drc-gb.org/newsroom/newsdetails.asp?id=697&section=4*
- To access the annual report from the Advisory, Conciliation and Arbitration Service, go to *www.acas.gov.uk/publications/pdf/Acas_04_AR.pdf*
- To access the annual report from the Central Arbitration Committee, go to *www.cac.gov.uk/cac_2_annual_report/annual_report.htm*

Disability decision

In Nottingham County Council -V- Meikle (IDS Brief 762) **the Court of Appeal has answered two questions in relation to disability discrimination claims:**

- whether a claim of constructive dismissal can be lodged under the Disability Discrimination Act (DDA)
- if the duty to make reasonable adjustments extends to making adjustments to a contractual sick pay policy.

As a result of a degenerative condition, Ms Meikle became visually impaired. Her employers failed to make suitable adjustments, so she went on long term sick leave. After six months her pay was reduced by half, in accordance with the contractual sick pay policy.

CONSTRUCTIVE DISMISSAL

Ms Meikle claimed constructive dismissal and said that the reduction in her pay amounted to less favourable treatment under the DDA on the grounds of her disability. She also said that the Council had failed to make reasonable adjustments to the pay policy in the light of her disability.

The Court of Appeal said that the definition of dismissal in the DDA does cover constructive dismissal (overturning the previous decision of an appeal tribunal).

TIME LIMIT ADJUSTMENT

This is useful in terms of time limits in that it means that the three-month time limit for lodging tribunal applications will run from the date of dismissal, not the date of the prior incidents that led to the resignation.

APPLICATION OF THE SICK PAY POLICY

The court then considered whether the application of the sick pay policy breached the DDA. It said that the duty to make reasonable adjustments could include a duty to consider paying employees during sick absence periods (even if they are only contractually entitled to reduced pay or SSP), where their failure to carry out reasonable adjustments caused the sick leave in the first place.

No injury to feelings

The House of Lords has confirmed in the case of Dunnachie -V- Kingston upon Hull City Council (IDS Brief 762)**, that the compensatory award for unfair dismissal cannot include an element for injury to feelings.**

This overturns the decision of the Court of Appeal (see LELR 87) which had said that non-pecuniary losses such as injury to feelings, aggravated and exemplary damages can be included as part of the compensatory award.

Their Lordships have thereby returned to the position that had survived for more than 30 years since the decision of the National Industrial Relations Court in *Norton Tool Co Ltd -V- Tewson*.

Tribunal chair could be biased says EAT

The employment appeal tribunal (EAT) has held in Breeze Benton Solicitors -V- Weddell **that the chair of a tribunal, who was alleged to have been critical of a litigant in earlier proceedings, could be seen as biased if he sat in another case involving the same litigant**

The solicitors said that the tribunal chair had criticised the firm fifteen months earlier when one of two partners defended an unlawful deductions claim. The firm made a complaint to the Lord Chancellor at the time. When the firm appeared again before the tribunal, it was allocated the same chair.

The solicitors formally asked for the chair to be excused on grounds of apparent bias. The tribunal unanimously refused, arguing, among other things, that the two wing members could outvote the chair.

The EAT held that it is not appropriate to argue that the chair is only one of three members with an equal vote, given that he or she is the legally qualified and presiding member of a tribunal of three members. It also held that because the solicitors had complained to the Lord Chancellor's Department about the chair's conduct, it was inappropriate that he should sit in this case.

BLOWING THE WHISTLE

The Court of Appeal has just decided in Street -V- Derbyshire Unemployed Workers Centre **that whistleblowers will only be protected if their main aim is to right a wrong that has occurred. The case essentially turned on the meaning of the requirement of 'good faith' in making disclosures in the public interest so that they are 'protected' disclosures under the legislation.**

WHAT WERE THE FACTS OF THE CASE?

Mrs Street had worked as an administrator for the Derbyshire Unemployed Workers Centre from 1989 until January 2001, when she was dismissed after making a series of allegations of corruption against the manager, Mr Hampton.

In particular, she alleged that Mr Hampton had committed fraud by setting up a secret account, that he had made trips abroad during his working time for the centre for the benefit of other organisations, and that he frequently instructed her to do work for other organisations during her normal working hours.

The centre ordered an independent investigation, with which Mrs Street refused to co-operate. The subsequent report exonerated Mr Hampton, but criticised her failure to contribute to it.

The investigator described her as being 'at best misguided and at worst malicious' in her motivation. He stated that her allegations were unfounded and possibly required serious disciplinary proceedings to be taken against her. She was suspended and then dismissed, following a disciplinary interview.

Mrs Street claimed that she had been unlawfully dismissed under the Public Interest Disclosure Act 1998. The tribunal dismissed her claim, holding that in making the disclosure, she had lacked the good faith required under the Act. Instead, it said she had been motivated by personal antagonism towards Mr Hampton.

In coming to this view, the tribunal said that one of her disclosures contained a passing reference to something that she knew to be untrue; that many of the matters about which she had complained had happened years ago; and that she had known about the secret fund allegation for months before doing anything about it.

The employment appeal tribunal upheld the tribunal's ruling and remitted the case back to the same tribunal for it to consider a claim of ordinary unfair dismissal.

WHAT DID THE COURT OF APPEAL DECIDE?

The Court of Appeal agreed with the tribunals. It said that the primary purpose for the disclosure of information by an employee must be:

- to remedy the wrong which is occurring or has occurred
- or, at the very least, to bring the information to the attention of a third party in an attempt to ensure that steps are taken to remedy the wrong

In its view, the words 'in good faith' have a core meaning of honesty. But it said that even if the statement made is true or the employee reasonably believes it is true, the issue of honesty is still relevant. In other words, it matters whether the statement is made with sincerity of intention which is protected by the Act, or for an

ulterior (perhaps malicious) purpose which is not.

In this case, the Court of Appeal said that it was reasonable for the tribunal and the EAT to decide that Mrs Street was motivated by personal antagonism, despite the fact that she believed that the disclosures she had made were substantially true.

The Court therefore concluded that it should be open to tribunals when looking at the question of good faith to conclude that an applicant was not acting in good faith if his or her predominant motivation was not to achieve the primary objective of righting a wrong, but was for some other ulterior motive.

ADJUSTING FOR DISABILITY

The House of Lords has made an important decision in the case of Archibald -V- Fife Council (2004, IRLR 651) **about the definition and scope of an employer's duty to make reasonable adjustments under the Disability Discrimin-ation Act 1995. In particular, it said that the duty arises even if an employee becomes totally incapable of doing the job for which she is employed if she could do another job for that employer.**

WHAT WERE THE FACTS IN THE CASE?

Ms Archibald was employed by Fife Council as a road sweeper, but as a result of a complication during minor surgery, she became virtually unable to walk. All the parties agreed that she was a disabled person under the Act.

The medical advice was that, although she could no longer carry out the job of road sweeper, she could do sedentary work. She retrained and applied for over 100 posts within the council, all of which were on a higher grade. Because the council operated a policy that required employees applying for posts at higher grades to undergo an interview process, she had to be interviewed for them all. She was not offered any of the jobs she applied for.

Ms Archibald complained that she should not have been made to compete for alternative employment if she could show that she was able to perfo rm the duties and responsibilities of the job she was applying for. As a result, she said her employers had failed to comp ly with a duty of reasonable adjustment under section 6 of the Disability Discrimination Act.

Her claim was dismissed by the tribunal, the employment appeal tribunal and the Court of Session in Scotland (the equivalent of the Court of Appeal in England and Wales).

WHAT DID THE HOUSE OF LORDS DECIDE?

The question for the House of Lords was whether the duty under the Act to make reasonable adjustments is triggered when an employee becomes incapable of doing the job for which she was employed, but is still able to do a different job for that employer. The answer to that question is clearly yes.

In this case, it was an implied condition of Ms Archibald's job description that she be physically fit. This exposed her to another implied 'condition' or 'arrangement' of her employment, which was that if she was physically unable to do the job she was employed to do she was liable to be dismissed.

As a result, she was placed at a substantial disadvantage in comparison with people who are not disabled. The steps that the employer might have to take to prevent the arrangements placing her at a substantial disadvantage in comparison with non-disabled persons include transferring her to another job.

The House of Lords held that the tribunal was wrong to say that transferring Ms Archibald without requiring her to undertake a competitive interview could not be a reasonable adjustment. The duty of reasonable adjustments could apply to any aspect of a person's job, and that could include situations where they could no longer do the job that they were employed to do.

The Disability Discrimination Act is different from other anti-discrimination legislation, in that it requires employers to take positive steps to help disabled people which they are not required to take for others.

The case was remitted to the employment tribunal to consider whether the emp loyers f u l filled their duty to ta ke such steps as it was reasonable in all the circ u m s tances for them to take.

COMMENT

This case is important because it illustrates the breadth of the potential application of the duty to adjust. Although Ms Archibald has not won her case, the point is that the council should have considered promoting her without putting her through a competitive interview as a possible adjustment.

THE EU CONSTITUTION

On 18 June 2004, the member states of the EU adopted a draft treaty establishing a Constitution for Europe. Although this may not seem to have much to do with trade unions, it will have important implications for the labour movement.

Brian Bercusson, Professor of Law at King's College, London and Director of Thompsons European Law Unit, explains.

PART I: THE EUROPEAN SOCIAL MODEL

Despite the resistance of successive UK governments to the concept of 'social partnership', the EU has developed a 'social model' as a way of operating. This involves both employers and employees in the processes of decision-making.

Key elements of this model have now been enshrined in the EU Constitution. Part I, in Article I-47, states that 'The European Union recognises and promotes the role of the social partners at Union level' and 'shall facilitate dialogue between the social partners, respecting their autonomy.'

This is significant because of the three levels at which the EU model of industrial relations operates – workplace, sectoral and national. It is the existence of all three levels of social partner interaction and their inter-relationship that define the specific character of the European model.

Critical to its success is the collective organisation of workers and employers, the central actors in a 'social partnership' model. This defining feature of the European model implies substantial trade union membership, a pre-condition for the emergence of social partnership.

Even more than with directives, which have already obliged the UK to introduce labour law rights for workers (see box), the EU Constitution will prevent future UK governments from violating the values, objectives and policies of the EU social model.

PART II: THE CHARTER

Just as important as these institutional safeguards are the rights enshrined in Part II of the Constitution, the EU Charter of Fundamental Rights. There is a general consensus that it breaks new ground by including not just traditional civil and political rights, but also a long list of social and economic rights.

The Charter includes provisions that are at the heart of labour law in Europe:

- freedom of association (Article 12)
- right of collective bargaining and collective action (Art. 28)
- workers' right to information and consultation within the undertaking (Art. 27)
- freedom to choose an occupation and right to engage in work (Art. 15)
- prohibition of child labour and protection of young people at work (Art. 32)
- fair and just working conditions (Art. 31)
- protection of personal data (Art. 8)
- non-discrimination (Art. 21)
- equality between men and women (Art. 23)
- protection in the event of unjustified dismissal (Art. 30).

THE POTENTIAL

If ratified, the charter will be part of a constitution with the potential to deliver significant rights at work. The meaning of those rights will become clear when someone makes a complaint that trade union rights (or labour standards) are being violated and the matter is referred to the European Court of Justice.

The court has already rejected the view that the EU standard reflects 'the lowest common denominator'. This holds out the promise of greater freedom

RIGHTS FROM EUI

Directives adopted by the Counc

1975 collective redundancies, updated 1992, codified 1998
1975 application of the principle of equal pay
1976 implementation of the principle of equal treatme for men and women as regards access to employment, vocational training and promotion working conditions, updated 2002; in 1979 to s security; in 1986 to occupational social security
1977 transfers of undertakings (TUPE), updated 1998, codified 2001
1980 protection of employees in the event of insolvenc updated 2002
1986 protection of self-employed women during pregnancy and motherhood
1989 framework health and safety directive (37 health and safety directives since 1978)
1991 safety and health provisions for workers on fixed- term contracts and temporary agency workers
1991 employer's obligation to inform employees of the conditions applicable to the contract of employn
1992 improvements in the safety and health at work o pregnant workers
1993 organisation of working time
1994 protection of young people at work

A TRADE UNION ISSUE

of association, collective bargaining and collective action in member states where these are currently denied or restricted.

The court will also draw upon international labour standards and Council of Europe measures. The incorporation of the EU Charter into the constitutional law of the EU will have an impact on the member states, bound by the charter through the doctrine of supremacy of EU law.

THE RESISTANCE

During the process of drafting the constitution by the Convention on the Future of Europe, some member states made strenuous attempts to downgrade the legal effects of the charter. Explanations prepared by the Presidency of the Convention were seized upon in an attempt to narrow down the rights provided by it.

In the final negotiations over the constitution in Brussels in June 2004, another Article 52(7) was added to the charter. This said that 'the explanations drawn up as a way of providing guidance in the interpretation of the Charter of Fundamental Rights shall be given due regard by the courts of the Union and of the Member States'. This new paragraph reinforces the potential role of national courts in using the charter, and is unlikely to prevent the European Court from exploiting the charter.

In an interview in the *Financial Times* on 18 June this year, the President of the European Court of Justice, Vassilios Skouris, was quoted as saying that the draft constitution, including the charter, 'will bring new areas and new subjects under the court's jurisdiction'.

He, in turn, called for the charter to be made legally binding within the constitution, something that the UK government in particular has argued against. The *Financial Times* article noted that 'many lawyers doubt if the legal impact of the charter can be ring-fenced in this way. Mr Skouris could not give assurances that the charter would not have an impact on UK law'.

If that turns out to be the case, there will be no more 'protection' of UK labour laws, frequently condemned by the supervisory bodies of the International Labour Organisation and the Council of Europe for violations of international labour standards, from the impact of labour rights guaranteed by the charter.

PART III: THE SOCIAL CHAPTER

Part III of the constitution mostly replicates the 'social provisions' of the EC Treaty. But there is one significant change that illustrates the (perhaps) unintended consequences of constitutional amendment.

That is, that social dialogue agreements are characterised by the constitution as 'non-legislative' measures, so the social partners and their agreements may now be protected from judicial (and other) review. Court challenges, like that to the Parental Leave Agreement, may not be allowed.

FUNDAMENTAL STRATEGIC ISSUE

The fundamental strategic issue posed in the new constitution is the future role of the social partners and social dialogue in the constitutional and legal order of the European Union.

Will the role of the social partners be confined to an industrial relations sub-system subordinate to the internal market regulated by the EU institutions? Or will it have a role of autonomous regulation of social policy by constitutionally recognised social partners?

As ever, the European and national trade union movements must struggle to ensure that, through its active constitutional practice, the EU realises the promises of the EU Charter and the Constitutional Treaty.

AN LABOUR LAW

nisters and European Parliament

- informing and consulting workers via European works councils
- working conditions of workers posted to other EU countries
- burden of proof on employer in cases of sex discrimination
- organisation of working time for sectors excluded from the 1993 directive
- prohibition of discrimination on the ground of race or ethnic origin
- involvement of employees in European (multinational) companies
- general framework for informing and consulting employees
- prohibition of discrimination on the ground of religion or belief, disability, age or sexual orientation

RAMEWORK SOCIAL DIALOGUE AGREEMENTS

- regulation of part-time work
- regulation of fixed-term work
- organisation of working time for seafarers
- organisation of working time for mobile workers in civil aviation
- regulation of telework

APPEALING DISMISSAL FOR AN UNWANTED JOB

Unfortunately for applicants, tribunals can reduce the amount of an unfair dismissal award if they fail to appeal against a decision to dismiss them. The problem then is that, as a result of the appeal, applicants can end up being reinstated in a job that they no longer want. This is exactly what happened in the case of Roberts -V- West Coast Trains Ltd**.**

WHAT HAPPENED TO MR ROBERTS?

Mr Roberts had been employed since 1975 as a chef by West Coast Trains (and their predecessors). Following a disciplinary hearing for alleged misconduct, he was dismissed on 6 November 2001. Mr Roberts appealed against that decision, but before he knew the outcome of the appeal, he started proceedings in the employment tribunal for unfair dismissal.

The internal appeal hearing took place in February 2002, at which it was decided not to dismiss Mr Roberts, but to demote him. The company said it would treat the period from November 2001 to February 2002 as a period of suspension without pay.

However, Mr Roberts refused to accept the offer of reinstatement and was deemed by the company to have resigned with effect from 10 August 2002 when he failed to return to work after a period of sickness absence. He continued to pursue his claim for unfair dismissal.

When the case was heard at the employment tribunal, West Coast Trains argued that, as Mr Roberts' appeal had been successful and resulted in his reinstatement, his contract of employment had not been terminated.

If he had not been dismissed, then he could not claim unfair dismissal. The tribunal agreed, and the employment appeal tribunal found nothing wrong with that decision.

WHAT DID THE PARTIES ARGUE AT THE COURT OF APPEAL?

Mr Roberts argued that he had been dismissed by the company, as was clear from the letter of notification following the disciplinary hearing. At the time he started his claim in the employment tribunal, he was still dismissed. That, he argued, was determinative of his right to claim unfair dismissal.

West Coast Trains, however, argued that although its initial decision was to dismiss him, Mr Roberts had launched an appeal in accordance with his rights under his contract.

The effect of that decision was to resurrect his contract, so that even though it had been terminated when he made the claim, it had been revived by the time the proceedings had come to a hearing. He had, therefore, continued to be employed.

WHAT WAS THE DECISION OF THE COURT OF APPEAL?

Unfortunately for Mr Roberts, the Court of Appeal agreed with the decision of the lower courts. It said that the documents containing the disciplinary procedures were clearly part of his contract of employment.

These allowed for a range of sanctions to be imposed at the first hearing and on appeal. They also clearly allowed an appeal decision to act as a substitute for the decision at the original hearing. The decision to reinstate did not, therefore, create a new contract for a new position.

It also said that the fact that Mr Roberts had lodged his employment tribunal claim between the initial dismissal and his subsequent demotion at appeal was irrelevant.

COMMENT ON THIS CASE

Although Mr Roberts appealed against his dismissal, it was clear he no longer wanted his job back. The problem for him was that he had lodged an unfair dismissal claim in order to win an award of compensation for the loss of his job, which might have been reduced if he had failed to appeal internally.

The key to understanding this case lies in the fact that the disciplinary procedure formed part of Mr Roberts' contract. This is unusual.

Because of that, the House of Lords held that his contractual appeal process survived the dismissal and so the contract did not end until the appeal decision was given.

A TAXING MATTER

When employees receive a lump sum to compensate them for loss of a benefit at work, they don't expect to pay tax on it. So it's good news for employees that the High Court has just confirmed – in the case of Wilson (HM Inspector of Taxes) -V- Clayton (2004, IRLR 611) **– that they don't have to.**

The employees in this case were backed by Thompsons.

WHAT WERE THE FACTS?

Stephen Clayton was an employee of Birmingham City Council. Under his contract, he was entitled to receive an essential car user allowance. In order to make savings, however, the council decided in 1997 to withdraw the allowance from anyone doing less than 3,000 miles a year.

They wrote to all the relevant employees (including Mr Clayton) asking them to give up their right to the allowance. The letter made clear that if they did not, their contracts would be terminated and they would be offered a new contract identical to the old one, but without the car user allowance.

Not surprisingly, Mr Clayton, along with a number of other employees, refused. As a result, his contract of employment was terminated and he was immediately re-employed under the new terms and conditions. He brought a claim for unfair dismissal.

WHAT DID THE TRIBUNAL AND THE COMMISSIONERS DECIDE?

The tribunal found in favour of Mr Clayton and his colleagues and set another date to decide on what to award them. However, in the interim, the council and the employees reached an agreement that their right to the allowance would be reinstated and that they would also receive a basic award to compensate them. The tribunal drew up a consent order to that effect.

Mr Clayton was duly awarded £5,060, but he then faced a problem with the Inland Revenue who said he had to pay tax on it. He appealed against that decision to the General Commissioners who agreed with him. They said that the payment was not chargeable to tax under section 19 of the Income and Corporation Taxes Act 1988 as an emolument (a profit on earnings) or under section 154 as a benefit in kind.

Instead, the Commissioners decided that it fell within section 148 as a payment received 'in connection with the termination' of his employment. Since the payment was less than the £30,000 threshold set by the legislation, it was not taxable.

WHAT DID THE INLAND REVENUE ARGUE?

The Inland Revenue appealed to the High Court. It argued that the tribunal had no jurisdiction to order the payment of a basic award, and that the order for reinstatement meant that Mr Clayton had to be treated as though he had not been dismissed. The payment he received referred to his past and continuing employment, and as a result it was either an emolument or a benefit in kind.

WHAT DID THE HIGH COURT SAY?

The High Court disagreed. It said that the payment was not taxable under section 19 as an emolument because that applies to something paid as a reward for past services or as an inducement to perform services in the future. This payment resulted simply from the negotiated settlement of a dispute between the parties.

Although everyone agreed that the tribunal would not have had the power to order the payment as well as reinstatement at a contested hearing, the court did not accept that rendered the payment taxable as an emolument.

The fact that the tribunal had no jurisdiction to order the payment did not alter the fact that it had been agreed between the employer and Mr Clayton.

And nor was it taxable as a benefit in kind under section 154, which requires the benefit to be provided for a reason connected to Mr Clayton's employment. This payment resulted from the contract between the parties to settle a dispute and not because they were employer and employee.

The General Commissioners were therefore correct to decide that the payment fell within section 148.

Fighting fire with... the law

Under the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, part-timers have to be treated the same as full-timers, if they do similar work. In Mathews & Ors -V- Kent and Medway Towns Fire Authority a& Ors (IDS Brief 761)**, however, the Court of Appeal has decided that part-time firefighters don't do the same work as full-timers, although they are employed on the same sort of contracts.**

The employees' case was backed by Thompsons.

WHAT WAS THE COMPLAINT OF THE PART-TIMERS?

The part-time (or 'retained' firefighters) claimed that they were being treated less favourably than full-timers in a number of ways:

- by being denied access to statutory pension arrangements
- by being denied increased pay for additional responsibilities
- in the way their sick pay arrangements were calculated

To succeed in their claim, they had to show that they were employed on the 'same type of contract' as their full-time comparators. And that they were engaged in the 'same or broadly similar work'

On the face of it, this might not seem too difficult to prove because retained firefighters respond to a call-out system to fight fires in much the same way as full-timers. Not so.

WHAT DID THE TRIBUNALS DECIDE?

The employment tribunal decided that the retained firefighters were employed under different types of contract from the full-timers – group (f) rather than group (a) (see box).

In addition, they said they were not engaged in the same or even broadly similar work because of the additional responsibilities of the full-timers.

The employment appeal tribunal agreed, stating that 'there was clearly ample material upon which the employment tribunal could find that the retained firefighters and full-time firefighters were employed under different types of contract of employment and that it was reasonable for the employer to treat them differently'.

WHAT DID THE COURT OF APPEAL DECIDE?

The first issue for the Court of Appeal to unravel was the issue of comparability. In other words, were the full-time and retained firefighters employed under the same type of contract?

The Court of Appeal said that both groups were employed under contracts that were not fixed-term, nor were they contracts of apprenticeship. That meant they fell into the same category under the regulations – group (a).

The Court then moved onto the second issue – were the two groups engaged in the same or similar work? The employment tribunal found, as a matter of fact, that fighting fires was 'the central and most important job function of the retained firefighter', but was no more than 'a major part of the job role of the whole time firefighter', who had a range of other functions to perform. It also said there were material differences in the levels of qualifications and skills between the two groups.

And the Court of Appeal agreed. It said that full-time firefighters do have a 'fuller, wider job' than retained firefighters, and have 'measurable, additional job functions', which account for the differences in qualifications and skills.

In addition, it found differences in relation to entry standards, probationary standards, probationary training and subsequent training.

As a result, the appeal was dismissed.

CONTRACTS UNDER THE REGULATIONS

(since amended to remove the distinction between fixed-term and non fixed-term contracts)

(a) employees employed under a contract that is neither for a fixed term nor a contract of apprenticeship
(b) employees employed under a contract for a fixed term that is not a contract of apprenticeship
(c) employees employed under a contract of apprenticeship
(d) workers who are neither employees nor employed under a contract for a fixed term
(e) workers who are not employees but are employed under a contract for a fixed term
(f) any other description of worker that it is reasonable for the employer to treat differently from other workers on the ground that workers of that description have a different type of contract.

Excessive part-timers

The European Court of Justice (ECJ) has decided in Elsner-Lakeberg -V- Land Nordrhein-Westfalen (IDS Brief 760) **that having the same threshold for triggering additional pay for both part-time and full-time teachers could amount to indirect sex discrimination.**

WHAT WAS THE BASIS OF THE CLAIM?

The German legislation governing Ms Elsner's employment stated that civil servants have to work additional hours when the job requires it.

When teachers work more than three additional hours per month, but only if they work more than three, they are entitled to an additional payment for the work.

Ms Elsner was employed as a civil servant working part-time as a secondary school teacher. Full-time teachers at the school worked for 98 hours per month, whereas Ms Elsner worked only 60 hours.

In December 1999 she was told she had to work an extra two and a half hours, which she did. The trouble was that when she asked for payment for the work, she was told she was not eligible because the threshold for triggering an additional payment was an extra three hours per month.

WHAT QUESTION WAS REFERRED TO THE ECJ?

Not surprisingly, Ms Elsner did not accept this apparent difference in treatment. Her employers, on the other hand, said that she was being treated exactly the same way as a full-timer because everyone had to work the same additional hours to get the extra pay.

She therefore brought an equal pay claim in her national court, which referred the matter to the ECJ. The court was asked the following question:

Is national legislation which states that part-time and full-time teachers are only paid for additional hours when they work more than three per month compatible with Article 141 of the EC Treaty (which says that men and women should be paid the same) and the equal pay directive?

WHAT DID THE ECJ DECIDE?

The ECJ said that, although the payment system appeared to be equal in that both full-timers and part-timers had to work three extra hours per month, this threshold represented a proportionately bigger burden for part-timers than for full-time teachers.

It calculated that three additional hours on the regular monthly schedule of a full-time teacher meant that he or she only had to work about three per cent more every month to trigger the payment. Part-timers, on the other hand, had to work about five per cent more.

The court concluded, therefore, that since the number of additional teaching hours was not reduced for part-time teachers in a manner proportionate to their working hours, they were being treated differently compared to full-time teachers.

It would therefore be for the national court to work out whether this difference in treatment affected more women than men and, if it did, whether it could be justified by the employer and was necessary to achieve a particular objective.

COMMENT

It is well established law that employers can pay part-timers at normal basic rates (and not overtime rates) when they work hours over and above their normal part-time hours. This is the case even if a full-timer working over her normal hours would benefit from a higher overtime rate.

The situation facing Ms Elsner was different, however. She was not offered any pay for her additional hours of work, unlike the full-timers.

The Elsner decision will not therefore affect the common practice of paying part-timers at basic rates for hours worked over and above their norm. It will however be likely to affect any pay system which does not offer pay to people working below a certain limit of hours, unless that limit is adjusted proportionately for part-timers.