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

THIS PUBLICATION IS **NOT** INTENDED AS LEGAL ADVICE ON PARTICULAR CASES

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CORRECTION: In the last issue of the LELR we incorrectly stated that one of the contributors was David Cromer. We would like to correct that and apologise to **DAVID ROMMER**

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ELECTRONIC GUIDANCE FROM ACAS

ACAS, the Advisory, Conciliation and Arbitration Service, has produced new guidance for the use of the internet and e-mail at work. It says that clearly formulated policies – drawn up in consultation with trade unions – help organisations to prevent unauthorised or careless use by workers.

It recommends that organisations have written policies to:

- help protect themselves against liability for the actions of their workers
- help educate system users about the legal risks they may inadvertently be taking
- make clear to users who they should contact about any particular aspect of the policy
- notify users of any privacy expectations in their communications
- prevent damage to systems
- avoid or reduce unnecessary time being spent on non-work related activities

You can access the guide by logging on to *www.acas.org.uk/publications/AL06.html*

OF EQUAL VALUE

The Department of Trade and Industry has just issued a consultation document on how to reform the way in which employment tribunals deal with equal value cases.

The main point of the consultation is to make the system work more efficiently and to cut down the time that the cases take to be processed. In future, cases should take just six to nine months, with straightforward ones resolved even quicker.

You can access a copy of the consultation document on: *www.womenandequalityunit.gov.uk*

DOCUMENT CHECKLIST FOR ILLEGAL WORKERS

The Home Office has made changes to the list of documents that employers have to request from prospective employees to verify their work status. Under the new system, employers can rely on one 'secure' document such as a UK or EEA passport, a national identity card or a UK residence permit.

In the absence of one of these, employers have to check two documents. These include an official document with the person's NI number, along with a birth certificate, a letter from the Home Office or an Immigration Status Document.

Alternatively, they can rely on a work permit along with a passport or letter from the Home Office. These must confirm that the person has permission to be in the UK and to work there.

Click here for guidance to the new rules: *www.homeoffice.gov.uk/filestore/new_a5_guidance.pdf*

PREGNANT AND PRODUCTIVE

The Equal Opportunities Commission has produced its first report into an investigation about discrimination faced by pregnant women at work. It has also produced a short summary with findings from the review, as well as anecdotal stories from women and employers about their experiences.

Just over 3% of women aged 16 to 49 in Britain are pregnant at any one time. Given that just over half of them are employees, that equates to about 250,000 women. Although women have rights under the Employment Rights Act, the Sex Discrimination Act and European law, the EOC says they still experience discrimination at work simply because they're pregnant (see LELR 87, March 2004).

But some employers still seem to think that pregnant women should have no rights. According to one: 'Everything is weighted in favour of the employee. Small employers should have the right to terminate pregnant women's employment.'

Clearly we still have a long way to go.

To view the report go to *www.eoc.org.uk*

Put it out

Under the Minimum Wage Act 1998, there are four different types of work – time work, salaried hours work, output work and unmeasured work.

The Department of Trade and Industry has just published draft regulations - the National Minimum Wage Regulations 1999 (Amendment) Regulations 2004 - dealing with the calculation of fair piece rates for output workers, such as homeworkers who do piecework. Most of these will become effective in October 2004.

Employers pay these workers according to the number of pieces they produce, but those figures then have to be converted to an hourly rate for the NMW. Up until now, this has been done by coming to a 'fair estimate' agreement of the number of hours someone is likely to work in a day, week or month.

Under the new regulations, a new system called 'rated output work' will operate. Employers will have to test their workers to determine the average speed at which they work to make the goods (or perform the task), or make a satisfactory estimate based on a sample of workers. This becomes the 'mean hourly output rate'.

The number of hours that the workers are paid for the pieces they produce (or tasks they perform) are then calculated on the basis of the 'mean hourly output rate.' In this way, the amount of work produced by the output workers is 'converted' into pay for the NMW.

The employer also has to provide these workers with a statement explaining all this, plus the telephone number of the NMW helpline.

The draft regulations can be found at: *www.hmso.gov.uk/si/si2004/draft/20048731.htm*

Sick leave during holidays

The EAT has decided in Inland Revenue -V- Ainsworth **that the case of *Kigass Aero Components -V- Brown (2002, IRLR 312)* was correct to conclude that workers on long-term sick leave are entitled to four weeks' paid holiday under the working time regulations, even if all their contractual entitlement has been exhausted.**

The decision has been appealed to the Court of Appeal. The Inland Revenue say they are pursuing this matter as a test case. PCS, the employees' trade union, has instructed Thompsons to represent them.

Employment tribunal jurisdiction

The EAT in Taylor Gordon & Co Ltd -V- Timmons (2004, IRLR 180) **has said that statutory sick pay as well as statutory maternity, paternity and adoption pay do not come within the jurisdiction of the employment tribunal. Instead, the board of the Inland Revenue (and on appeal, the Commissioners) is responsible.**

The only jurisdiction for the tribunal is when an employer admits an employee is entitled to a payment, but withholds all or part of it. This may prove to be inconvenient for employees who have to go to tribunal to enforce some rights, but to the Inland Revenue for others.

No money for loss of opportunity

The Court of Appeal has decided in Harper -V- Virgin Net Ltd **(see Issue 84 for EAT decision) that if an employee is summarily dismissed, she isn't entitled to compensation for missing out on a claim for unfair dismissal.**

Ms Harper had claimed that had she been given the notice to which she was entitled under her contract, she would have had enough service to bring a claim of unfair dismissal. The employment tribunal agreed and gave her what she would have received if she'd been able to claim unfair dismissal.

But the EAT and Court of Appeal said that the decision in *Johnson -V- Unisys Ltd* (2001, ICR 480) is clear that employees cannot recover damages that arise from the manner of their dismissal.

BALLOT BEFORE ACTION

Taking industrial action without a valid ballot is unlawful, and leaves unions open to possible legal action and a loss of immunity. This is what happened in the case of British Telecommunications plc -V- Communications Workers Union (IDS Brief 753).

WHAT LED TO THE DISPUTE?

BT had negotiated a framework agreement with the union, the CWU, to introduce a voluntary productivity scheme affecting certain sections of its operations. The problem was that the members overwhelmingly rejected the agreement when it was put to them. As a result, the company decided to introduce the changes on a voluntary basis only.

The union objected to that idea and decided to ballot its members about possible industrial action. It gave notice to BT in March 2003 that members would be asked whether they wanted to take strike action or not in response to the company's proposals. This was the only form of industrial action on the ballot paper.

The ballot came out in favour of strike action and in April the union gave notice to BT of a series of one-day strikes.

WHAT WAS THE RESPONSE FROM THE EMPLOYER?

Although the two sides continued to negotiate, they failed to reach agreement and the company subsequently applied to the court for an injunction arguing that the strike action was unlawful on three main grounds:

- that the strike was not 'in contemplation or furtherance of a trade dispute', contrary to section 244(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A). This was because some of those being balloted were not affected by the new scheme and so had no dispute with the company about their terms and conditions
- that the ballot was made invalid by the information fed to members by the union about the need to take strike action. BT argued that they should have been offered the chance to take action short of a strike, but because there was only one option open to them, that was what members had to vote for
- that the notice of ballot and notice of industrial action were defective in that they only gave the total number of members affected, and did not give a description of those to be balloted or those who might take strike action

WHAT WAS THE VIEW OF THE HIGH COURT?

The High Court ruled:

- that a strike by some workers in relation to 'the physical conditions' of other workers was within the definition of a trade dispute as defined in s244(1) TULR(C)A. It specifically stated that if employees were unable to take strike action when they wanted to change the terms and conditions of employment of just some of them, then the whole representative function of trade unions would be undermined
- that some of the information fed by the union to its members was misleading, but that was not the same as saying that the strike action did not have the support of members. Although they might well have thought it was possible they could be called to take action short of a strike, they also realised that a strike was very likely
- that the union had information which would be helpful to BT in making plans to mitigate the effects of the strike action. For instance, it would have been useful for BT to know which employees would not be out on strike so that they could carry out priority work

WHAT WAS THE END RESULT?

The Court therefore decided that BT would be likely to succeed on this last point if the issue went to trial. And as BT would suffer substantial losses if the strike went ahead (compared to the slight inconvenience to the union to reorganise the ballot), it granted an injunction to BT restraining the strike until the whole matter came to trial, or some other order was granted.

STAFF FORUM OR TRADE UNION?

There are some employers who will do virtually anything to thwart a trade union's legitimate efforts to represent its members. The case of BECTU -V- City Screen Ltd (IDS Brief 753) **is a good example.**

WHAT PROMPTED THE DISPUTE?

In April 2003, City Screen Ltd bought three cinemas. Although it took on the existing staff, it refused to honour a voluntary recognition agreement that the previous owner had entered into with BECTU. This had given the union collective bargaining rights for staff up to managerial level.

BECTU applied to the Central Arbitration Committee (CAC) on 6 October 2003 for recognition. The company responded by claiming that it already had a recognised staff organisation – The City Screen Staff Forum – for collective bargaining purposes.

As such, it said that BECTU's application could not go ahead because under para 35(1) of Schedule 1 to the Trade Union and Labour Relations (Consolidation) Act 1992 (TUL(C)RA), an application for recognition is not admissible if a collective agreement with a union is already in force for that particular bargaining unit.

Strangely enough, the purported recognition agreement had not come into force until 10 October – four days after BECTU's application to the CAC. It looked very much like the company had manufactured the staff forum to avoid its application.

WHAT DID THE UNION ARGUE?

At a hearing on 25 November the union argued that as the company's agreement with the City Screen Staff Forum did not exist when it applied for recognition, BECTU's application could continue.

Alternatively, it argued that Forum was not a trade union and that the agreement between the company and Forum was not a collective agreement.

WHAT DID THE CAC SAY?

The CAC accepted that the employer might well have set up Forum to thwart the union's application, but that there was no law against it.

It also said that the date for determining when a collective agreement came into force was the date of the CAC decision at the hearing, not when the union made its application.

BUT WAS FORUM A TRADE UNION?

According to section 1(a) TUL(C)RA, a trade union is defined as 'an organisation ... which consists wholly or mainly of workers ... and whose principal purposes include the regulation of relations between workers ... and employers ...'.

BECTU argued that Forum was not a negotiating body, had little support from workers and had no workers sitting on its executive committee. It could not therefore satisfy the definition of a trade union.

The company responded that Forum consisted of four workers – the managing director (also its General Secretary), the finance director, the director of booking services and the head of operations. It was open to all employees and the company intended it to become a negotiating body by the next annual salary review in October 2004.

The CAC agreed with the union. Although the recognition agreement covered all non-managerial jobs, Forum had no members among any of those workers. It could not therefore satisfy the definition in section 1(a) of the legislation.

WAS THERE A COLLECTIVE AGREEMENT?

Again, the CAC agreed with the union. It said there was no agreement in force that determined the terms and conditions of the relevant employees.

The recognition agreement of 10 October was not a collective agreement because it had been signed only by senior management, as opposed to two separate parties. And it had been reached without any involvement of the staff concerned.

As none of the relevant staff were members, the executive committee could not consult them, nor could it reach an agreement on their behalf, as required under para 35(1).

As there was no collective agreement in force, BECTU's application for recognition could go ahead.

a brief overview of sickness absence

SICK NOTE

There aren't many of us who can say we've never had a day off work because of sickness. Most people fall ill at some point, yet there is no obligation on employers to provide anything other than statutory sick pay.

In this article, **Victoria Phillips**, head of Thompsons' Employment Rights Unit in London and the South East, looks at the protection the law provides in this complex area.

WHAT INFORMATION ARE EMPLOYEES ENTITLED TO RECEIVE?

Every employee is entitled to receive written particulars of their employment (sometimes called a section 1 statement from the requirements set out in Section 1 of the Employment Rights Act 1996). These 'particulars' must detail any terms and conditions relating to 'incapacity for work due to sickness and injury, including any provisions for sick pay'.

WHERE SHOULD EMPLOYEES MAKE A CLAIM ABOUT SICK PAY?

The recent case of *Taylor Gordon & Co Ltd -V- Timmons* (see the news section for more details) has said that if there is a dispute about statutory sick pay, claimants have to make a claim to the Inland Revenue as employment tribunals do not have jurisdiction.

WHAT ABOUT PHI SCHEMES?

Some employers offer private health insurance schemes which can be quite generous and have led to litigation. In one case (*Aspden -V- Webbs Poultry & Meat Group Holdings Limited 1996, IRLR 521*), an employee was entitled to benefits during a period of ill health, but only as long as he remained on the books.

Unusually, the court was prepared to imply a term into the contract that the employer should not dismiss the employee during the period of his illness, so as not to deprive him of those benefits.

The High Court has said (*Marlow -V- East Thames Housing Group 2020, IRLR 798*) that where an employer provides the benefit of a PHI scheme and the insurer fails to pay, there is an implied obligation on the employer to pursue the insurer for payment, up to and including litigation.

HOW DO EMPLOYERS MONITOR SICKNESS ABSENCE?

Some employers have introduced policies that set out the steps to be taken in the event of sickness. For instance, they often state who an employee should report to and when; whether there is a requirement to provide medical certificates; the maximum periods of absence in a fixed period; return to work interviews; and systems of warnings and penalties in the event of non compliance.

CAN SICKNESS POLICIES BE DISCRIMINATORY?

The danger is that although the policy may seem neutral, it can be discriminatory. For instance, pregnancy related absences should not be included in these policies as that would amount to sex discrimination.

Equally whilst many disabled people have sickness records which are no worse than other employees, employers should be careful not to include, say, disability related absences for rehabilitation in the policy.

Photo: Paul Box (Report Digital)

ARE THE POLICIES CONTRACTUAL?

Some will be contractual, but others won't. It is important therefore to consider whether the policy is incorporated into someone's contract before deciding whether the employer is bound by its terms and whether they can unilaterally change it.

In *Wandsworth London Borough Council -V- D'Silva 1998, IRLR 193*, an employer tried to unilaterally change the terms of a sickness policy. Mr D'Silva said this was a breach of his contract. The Court of Appeal held that because the policy was only a statement of good practice, the employer could alter the terms without the agreement of the employees.

DOES THE EMPLOYER HAVE TO OBTAIN A MEDICAL REPORT?

Capability (or rather the lack of it), is one of the potentially fair reasons for dismissing an employee under unfair dismissal law. Unfortunately, a lot of people are dismissed because of ill health.

But before the employer can dismiss someone on that basis, they have to find out their true state of health. This often involves getting a medical report from the employee's doctor or consultant, to which the employee has to consent.

CAN EMPLOYEES SEE THEIR OWN MEDICAL RECORDS AND REPORTS?

Under the Access to Medical Reports Act 1988, employees are entitled to see the report before it goes to the employer and to withhold consent if they want. The employee can also correct any errors.

The legislation says that the medical report has to be by a medical practitioner who is or has been responsible for the clinical care of that individual. Reports obtained from company doctors are unlikely to be covered by the Act.

The Access to Health Records Act 1990 applies to health records made after 1 November 1991. Individuals have a right to apply for access to records held by a health professional. These rights also apply to company doctors.

WHAT HAPPENS IF THE EMPLOYEE DOES NOT CONSENT?

If an employee refuses to give consent then the employer can only proceed on the basis of information already available.

In the case of extended sickness absence, this means that a medical practitioner cannot give an opinion about a return to work date, light duties or any reasonable adjustments which may need to be made for someone who is disabled for the purposes of the Disability Discrimination Act 1995.

WHAT ELSE SHOULD THE EMPLOYER DO BEFORE DISMISSING SOMEONE?

Once the employer has found out the current condition and any prognosis for the future, they must then consider the past sickness record, the requirements of the business and whether there are any alternative positions available.

In *Spencer -V- Paragon Wallpapers Ltd 1977, ICR 301* the court said 'the basic question that has to be determined when looking at the fairness of the dismissal is whether, in all the circumstances, the employer can be expected to wait any longer and, if so, how much longer?'

The employer should also consult the employee and their representative before dismissal (*East Lindsay District Council -V- Daubney 1977, ICR 566*).

As far as alternative employment is concerned courts have held that it is not unreasonable to offer alternative employment at a reduced rate of pay where this is the only suitable alternative employment available (*British Gas Services Ltd -V- McCaull 2001, IRLR 60*).

It might be unfair to dismiss if the employee is likely to return to work imminently. There is, however, no obligation on the employee to volunteer information about their prospects of recovery (*Mitchell -V- Arkwood Plastics (Engineering) Ltd 1993, ICR 471*).

WHAT ABOUT SHORT TERM ILLNESS?

If an employee has a series of short absences caused by unconnected minor ailments, there is little point in the employer requesting a medical examination.

Instead, the employer should tell the employee what level of attendance they now expect, the period within which it should be achieved and that dismissal may follow if there is no sufficient improvement (*International Sports Co Ltd -V- Thomson 1980, IRLR 340*; and *Lynock -V- Cereal Packaging Ltd 1988, ICR 670*).

The situation should be monitored to see whether absence is reduced to a reasonable level. Further warnings might be appropriate in borderline cases.

THE TERMINATOR

Unfair dismissal claims can only be heard if they're brought within three months of the effective date of termination (EDT) of the applicant's contract of employment.

In Fitzgerald -V- University of Kent at Canterbury (IDS Brief 753), the Court of Appeal decided that the EDT has to be decided objectively, and cannot be changed to suit the needs of the employer or employee. Or both of them.

WAS THE EMPLOYEE'S CLAIM OUT OF TIME?

Ms Fitzgerald, who had been employed by the University since 1 July 1995 and suffered from a depressive illness, applied for early retirement on the grounds of ill health in late 2000.

The University approved her request on 22 February and on 2 March 2001 Ms Fitzgerald accepted the offer, which the two parties agreed should be effective from 28 February. On 1 June she brought a claim of unfair dismissal – within three months of 2 March, but more than three months from 28 February.

At a preliminary hearing, a tribunal decided that she had presented her claim out of time, because the EDT was 28 February. The employment appeal tribunal (EAT) agreed and so Ms Fitzgerald appealed to the Court of Appeal.

WHAT DID THE UNIVERSITY ARGUE?

Not surprisingly, the University argued that the termination date was the one that it had expressly agreed with Ms Fitzgerald. It said there was no principle of law that prevented two parties to a contract from agreeing a mutually acceptable termination date.

It relied on the case of *Crank -V- Her Majesty's Stationery Office (1985, ICR 1)* in which the EAT held that the EDT was 2 September 1983 – the date agreed by the two parties – although the contract continued till 13 September.

WHAT DID MS FITZGERALD ARGUE?

Ms Fitzgerald, on the other hand, argued that the EAT in Crank was wrong. She submitted that it ran contrary to section 203 of the Act, which prevents individuals from reaching agreements that subvert the legislation, by making them void.

On top of that, she said that such an approach would also mean that employers could agree with employees to extend – or curtail – certain dates. In some cases, this would give employees statutory rights to which they were not entitled, and in other cases deny employees those rights, such as the right to claim unfair dismissal.

WHAT DID THE COURT MAKE OF IT ALL?

The Court accepted that there may well be good reasons why employers might propose and employees might agree to such re-dating. The danger, however, is that by doing so, one party secures an agreement under the legislation to which they are not entitled and which the other party may not have meant to concede.

It therefore concluded that the EDT is a 'statutory construct which depends on what has happened between the parties over time and not on what they may agree to treat as having happened'.

This was similar to the approach adopted by the EAT in *Caines -V- Hamon-Lummus Ltd (IDS Brief 565)* when it had to identify an employee's start date in order to calculate the period of continuous employment.

And, in any event, the Court said that the applicant's case would succeed on the basis of section 203, as the agreement between the parties purported to limit the operation of the provision of the legislation, and was therefore void.

The Court allowed Ms Fitzgerald's appeal, concluding that the EDT of her employment was not before 2 March 2001, with the result that her complaint was presented in time.

A TEMPORARY ARRANGEMENT?

The confusion about whether agency workers are employees may finally have been resolved. In Dacas -V- Brook Street Bureau**, the Court of Appeal ruled that Mrs Dacas was not employed by the agency, and gave a very strong indication that she was employed by the Council.**

Unfortunately, she hadn't appealed against the tribunal finding that she wasn't a Council employee, and so the Court could not overturn that decision.

WHO WAS RESPONSIBLE FOR WHAT?

Mrs Dacas worked exclusively at a mental health hostel as a cleaner from early 1996 to 2000 for the Council. The Council supplied the cleaning materials, equipment and an overall and she worked prescribed hours on a two week set rota.

Brook Street was responsible for discipline, for payments to Mrs Dacas, for the deduction of PAYE and national insurance contributions and for holiday and sick pay.

In April 2001 Mrs Dacas was allegedly rude to a visitor at the hostel, and the Council asked that she be withdrawn from the contract. Brook Street told her that it could not find any other work for her.

Mrs Dacas claimed unfair dismissal against both the Council and Brook Street.

WHAT DID THE TRIBUNAL AND THE EAT DECIDE?

The tribunal decided that Mrs Dacas was not a Council employee as there was no contract between them and therefore no employment relationship. But neither was she an employee of the agency as there was no contract of service between them.

Mrs Dacas appealed only against the finding that she was not an employee of the agency. The EAT agreed with her that she was an employee of the agency, and Brook Street appealed to the Court of Appeal.

WHAT DID THE COURT OF APPEAL SAY?

It agreed with the tribunal that there was no contract of service between Brook Street and Mrs Dacas. Brook Street was under no obligation to provide her with work, and she was under no obligation to accept it. Nor did it exercise any relevant day to day control over her or her work.

The fact that Brook Street paid her did not make it the employer. The role of Brook Street was that of an agency finding suitable work assignments for her.

Instead, it was the Council that exercised control over her day to day work, and which supplied her with the clothing and materials she needed for her work. It was under an obligation to pay for the work that she did, and she was under an obligation to do what she was told and to attend punctually at stated times. And it was the Council that brought the arrangement to an end.

Although the obligations and the power to dismiss were not contained in an express contract between Mrs Dacas and the Council, it said that did not prevent them from being read across the triangular arrangements into an implied contract and taking effect as implied mutual obligations as between Mrs Dacas and the Council.

The Court could not, however, substitute a finding that Wandsworth was the employer because Mrs Dacas had not appealed that aspect of the tribunal's decision.

ARE THINGS CLEARER NOW?

However, the court has given a clear steer that there has to be an employer – Sedley L J commented that to conclude otherwise is 'simply not credible' and 'defies common sense.' In this case, it was the Council. Mummery LJ also accepted that, in general, it would be surprising if the end user did not have the powers of control that would make it the employer.

The third judge, however, dissented, saying that a crucial element of the contract of employment was missing – mutuality of obligation – between the applicant and the Council.

So although things may not exactly be crystal clear, the Court is certainly indicating that there may well be an implied contract between the agency worker and the end user, making the end user the employer in a 'temp' scenario.

The variation game

After two TUPE transfers, several redundancy exercises and a number of compromise agreements, the employees in this case must wonder where it's going to end.

In the latest instalment, the employment appeal tribunal (EAT) has decided in Solectron Scotland Ltd -V- Roper and Ors (IDS Brief 752) that their enhanced redundancy terms had not been varied, and the compromise agreements were enforceable.

HOW DID IT ALL GET SO COMPLICATED?

In October 1990, STC/Nortel took over a BT factory in Wales. Under the TUPE (Transfer of Undertakings) regulations that governed the transfer, STC was bound to honour the enhanced redundancy terms which formed part of the employees' contracts with BT.

There were a number of redundancy exercises between 1992 and 1999, during which time the union agreed different redundancy terms to those which their members had enjoyed under BT. Each time, the terms varied slightly.

Then in 2000, Solectron Scotland Ltd took over the undertaking and a year later made 110 employees redundant. The employees argued they were still entitled to the BT redundancy terms; Solectron said those had been altered following the agreements in the 1990s or due to custom and practice.

In addition, Solectron pointed to the fact that a number of employees had signed compromise agreements and had thereby forfeited any enhanced redundancy rights that they might have had.

HAD THE TERMS BEEN VARIED?

The employer appealed against the tribunal's finding that the BT terms had not been varied. They argued custom and practice – firstly in the 1992 to 1994 redundancy exercise and then by the three subsequent ones.

But the EAT agreed with the tribunal. It said that since the case of *Devonald -V- Rosser and Sons (1906, 2KB 728)*, the practice had to be 'reasonable, notorious and certain' to satisfy the definition.

In this case, there were different terms at each redundancy exercise, so no certainty. The practice wasn't reasonable since it seemed to depend on the whim of the employer as to the terms offered. And nor was it notorious since the terms were not consistently applied.

The EAT doubted if a custom could ever vary an existing contractual right. In the event that it could, the practice would have to be established for a very long time, before an employee could be said to have accepted a contractual right that was less favourable than the original one.

The EAT also disagreed with the employer's argument that the new terms had been accepted because the employees had continued to work under them without protesting. In *Jones -V- Associated Tunnelling Co Ltd (1981, IRLR 477)* it was established that if the changes don't immediately impinge on the employees, they cannot be said to have accepted them.

WHAT ABOUT THE COMPROMISE AGREEMENTS?

The employer tried to argue that Regulation 12 did not affect these agreements because they allowed the employees to retain their rights. It was just that they couldn't enforce them. The EAT didn't buy that, saying that rights that cannot be enforced are rights that have been limited or excluded.

The case of *Foreningen af Arbejdsledere i Danmark -V- Daddy's Dance Hall A/S (1988, IRLR 315)* made clear that employers cannot vary a contract after a transfer, if the variation is solely because of that transfer.

The tribunal decided that the compromise agreements arose 'solely out of the transfer', because they were drawn up as a result of the redundancies following the transfer to Solectron.

But according to the EAT, the employer was not trying to vary the employees' contracts with the compromise agreements, but to compromise a dispute that was bound to arise about their value.

And this would have happened in any event, not just as a result of the transfer. The compromise agreements had not varied the terms of the contract 'solely by reason of the transfer'. They were therefore enforceable.

Union expels BNP member

Under section 174 of the Trade Union and Labour Relations (Consolidation) Act 1992, trade unions are allowed to expel a member in only one of two circumstances.

The first is that the member no longer satisfies a membership requirement (such as being employed in a specific industry); and the second that the expulsion is because of the member's conduct. The legislation specifically precludes trade unions from expelling members for membership of a political party.

In ASLEF -V- Lee, the employment appeal tribunal (EAT) overturned a tribunal's decision that Mr Lee had been expelled from the union purely because of his membership of the British National Party (BNP).

Members of the British National Party demonstrating outside the headquarters of the National Union of Journalists as part of what appears to be a targeted campaign against trade unions.

WHAT WERE THE ALLEGATIONS AGAINST MR LEE?

On 17 April 2002, an official of the union wrote to Mr Rix, the General Secretary, saying that Mr Lee, a union member, was standing for the BNP in council elections in Bexley.

Attached to the report was a fax from Bexley Council for Racial Equality which made a number of allegations against Mr Lee about his conduct. He was also said to have been a regular columnist for an extreme right-wing publication called Spearhead.

WHAT DID THE UNION DO?

The president of the executive committee, Mr Samways, put a motion to the committee to expel Mr Lee from the union. He emphasised the fact that he was proposing the motion, not because of Mr Lee's membership of the BNP, but because his conduct had brought the union into disrepute.

The executive agreed and the General Secretary then wrote to Mr Lee on 24 April 2002, expelling him. Mr Lee complained to the tribunal that his expulsion was due to his membership of the BNP.

WHAT WAS THE DECISION OF THE TRIBUNAL?

The tribunal decided that the union expelled Mr Lee because of his BNP membership and that it was therefore unlawful.

WHAT DID THE EAT DECIDE?

The EAT said that the tribunal had not been clear in its reasoning and had not addressed the central question – namely, who had been responsible for deciding to expel Mr Lee.

According to the EAT, it was the executive committee, with Mr Samways as the proposer of the resolution, who were responsible. Although it thought that Mr Rix's letter was ambiguous in the way it was worded, it needed to be considered in the overall context of the clear evidence put forward by Mr Samways.

The appeal tribunal said that it was crucial to distinguish between mere membership of a political party and someone's conduct as a member of that party, for which they can be expelled. It relied on the House of Lords' decision in *Associated Newspapers Ltd -V- Wilson (1995, ICR 406)*.

It therefore decided that the case should be sent back to the employment tribunal to determine the reasons for the expulsion.

ANOTHER UNION, ANOTHER BNP MEMBER

Potter -V- UNISON was also recently heard by the EAT, Mr Potter being another active member of the BNP.

He had been expelled by UNISON because of his conduct, but failed to apply in time to the employment tribunal to complain about his original expulsion. He then reapplied to join UNISON, but his application was refused on the grounds that he had previously been expelled.

This time he complained to an employment tribunal that his application for membership was refused because of his BNP membership. The employment tribunal disagreed, as did the EAT.

COMMENT

It is clear that members of the BNP are deliberately joining trade unions and then seeking to be expelled. If the expulsion is found to be unlawful, the minimum compensation that the union has to pay is £5,900. Trade unions, therefore, should take care and advice before proceeding with an expulsion.