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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PHILLIPS IS NEW ERU HEAD

Victoria Phillips has been appointed national Head of the Employment Rights Unit (ERU) at Thompsons Solicitors, succeeding Stephen Cavalier who was appointed Client Director last year.

Victoria will lead the national team of over 80 employment rights lawyers and support staff. She takes on overall responsibility for the ERU, working with the firm's team of regional heads and the heads of equality, pensions and collective rights.

Victoria's recent cases have included *Inland Revenue -V- Ainsworth* which confirmed that workers on long-term sick leave are entitled to four weeks' paid holiday under the working time regulations, and the recent victory in the case of *Lee -V- ASLEF* over the right of trade unions to expel racists and fascists from membership.

A previous President of the National Union of Students and the Labour Party National Women's Officer from 1989 to 1993, Victoria qualified as a solicitor at Thompsons in 1996.

TALKING HEADS

Since the introduction of the EC European Works Councils Directive nearly 10 years ago, an estimated 11 million employees are now talking to their employers about key decisions that affect them.

The European Commission is consulting with the social partners on the future of European Works Councils (EWCs) and is seeking their opinions on:

- how to ensure the potential of EWCs to promote constructive social dialogue is fully realized
- whether the directive should be revised
- the role that the social partners can play in addressing issues that arise

To access the consultation paper, go to: *www.europa.eu.int/comm/employment_social/news/2004/apr/ewc_consultation_en.pdf*

DRAFT CRE CODE

The Commission for Racial Equality (CRE) is updating its code of practice on race equality in employment and has issued a draft code for consultation. The draft, which reflects a number of important changes to race equality legislation since the original was published 20 years ago, provides:

- detailed guidance on positive action, ethnic monitoring and race equality policies
- more case studies
- an up to date summary of current legislation and how it applies to the employment sphere

The consultation paper is available on the CRE website until 6 August 2004. Visit: *www.cre.gov.uk/gdpract/employment_code.html*

Thompsons will be preparing a submission to the consultation, which can be sent to any union that would like to receive it.

EQUALITY COMMISSIONED

Following the government's announcement last year that it would set up a Commission for Equality and Human Rights in 2006, the Department of Trade and Industry has just issued a white paper seeking views on the new commission.

It will combine the functions of the existing commissions in challenging discrimination for reasons of race, sex and disability, as well as promoting human rights. It will also be responsible for tackling discrimination on grounds of age, sexual orientation, religion and belief.

It can be downloaded at *www.dti.gov.uk/access/equalitywhitepaper.pdf*. The deadline for responses is 6 August 2004.

In addition, the Joint Committee on Human Rights – a body made up of six members from each House of Parliament – has published a report about the functions, powers and structure of the new body.

The new report – Commission for Equality and Human Rights: Structure, Functions and Powers – can be found on *www.publications.parliament.uk/pa/jt200304/jtselect/jtrights/78/78.pdf*

New equality rules ok

Although the High Court has rejected a challenge by a group of unions that new rules outlawing discrimination on the basis of sexual orientation were defective, it has helpfully said that the scope of the 'organised religion' exception is very limited.

The unions, backed by Thompsons, had argued that various exemptions in the Employment Equality (Sexual Orientation) Regulations 2003 were incompatible with the obligations imposed on the UK by the EC Equal Treatment Framework Directive 2000, and conflicted with provisions of the European Convention on Human Rights.

THE EXCEPTIONS CHALLENGED WERE:

- Regulation 7(2) – being of a particular sexual orientation is a genuine and determining occupational requirement.
- Regulation 7(3) – the employment is for the purposes of an organized religion and the employer applies a requirement related to sexual orientation to comply with the doctrines of that religion or would allow them to avoid coming into conflict with the strongly held convictions of a significant number of the religion's followers.
- Regulation 25 – benefits which depend on being married.

BUT THE HIGH COURT JUDGE SAID:

- That although regulation 7(2) does not state explicitly that a 'genuine occupational requirement' (GOR) must pursue a 'legitimate objective' as required by the directive, that concept is implicit and tribunals should interpret the regulation accordingly.
- That the GOR in regulation 7 (3) for 'organised religion' should be given a narrow interpretation. He thought, for instance, that it was unlikely to apply to a teacher in a faith school. This narrow approach will be persuasive for tribunals interpreting the application of the exemption.
- That regulation 25 is permitted by the directive.

The unions were given leave to appeal.

Without prejudice

It's not uncommon for employers to put a 'without prejudice' offer to an employee in a meeting. It gives them the chance to find out if the employee would be willing to accept a payment in exchange for forfeiting certain rights. But what happens if the employee then needs to refer to that 'without prejudice' meeting in order to pursue a legitimate grievance.

The employment appeal tribunal has just decided in BNP Paribas -V- Mezzotero that:

- There has to be a genuine dispute between the parties for the 'without prejudice' statement to retain its status.
- Just because an employee has lodged a grievance does not, in itself, mean that there is a dispute between the parties.
- It was unrealistic in this case to say that both parties had agreed to speak 'without prejudice', given the unequal relationship between them, the vulnerable position of the applicant and the fact that the suggestion was only made by her employers once the meeting had begun.
- Even if there was a dispute, the logic of the argument put by the employers was unacceptable. The judge gave the example of an employer in dispute with a black employee who says in a without prejudice meeting: 'we do not want you here because you are black.' The employer could then argue that the discussions should be excluded from consideration by a tribunal hearing a claim of race discrimination. The judge said that such a remark would be an exception to the without prejudice rule because it reveals impropriety.

The final straw

Constructive dismissal cases are notoriously hard to win. But in the case of Omilaju -V- London Borough of Waltham Forest**, the employment appeal tribunal (EAT) has just made them a bit easier.**

In this case, the EAT decided that there can still be a constructive dismissal for breach of trust and confidence, even when the 'final straw' is not in itself an unreasonable act.

Barber -V- Somerset County Council

STRESSED OUT

In its first – and very significant – ruling on workplace stress, the House of Lords has put the onus back on employers to take responsibility for the health and well-being of their staff. In Barber -V- Somerset County Council (IDS Brief 756) **and see LELR 89 for a summary), their Lordships said that the council was in breach of its duty of care to Mr Barber by failing to make inquiries about his health.**

WHAT WAS THE HISTORY TO THE CASE?

Following a restructuring because of falling pupil numbers at the school where he had been head of maths, Mr Barber took on extra responsibilities which made his job very stressful. He had a mental breakdown and took early retirement at the end of March 1997. He was 52. He successfully sued his employer in the county court, and was awarded general and special damages of just over £101,000.

However, the county council appealed to the Court of Appeal which heard the case together with three other similar cases in a composite judgment reported as *Hatton -V- Sutherland*. It decided that the county council had not been in breach of its duty of care.

WHAT HAPPENED TO MR BARBER?

Their Lordships agreed that it was crucial to ascertain what the school knew about Mr Barber's state of health in order to decide its liability. They noted that he had begun to 'feel the strain' towards the end of 1995, which got worse during the spring term of 1996.

In May 1996, he was signed off work, suffering from stress and depression. When he returned to work, nothing much had changed. No one approached him to talk about his illness, so he arranged a meeting with the headteacher. She was very unsympathetic, however, telling him that all the staff were under stress.

Mr Barber subsequently had separate meetings with the two deputy heads towards the end of the summer term, but neither of them took any steps to resolve the situation, although he had said he could not remain in post if the work pressures did not improve.

By the beginning of the autumn term, Mr Barber found himself with the same or possibly even heavier workload. He wrote to his doctor asking for counselling, but before that could be arranged Mr Barber had a crisis at school and started shaking a pupil. He left that day and never returned. He was subsequently diagnosed as suffering from moderate or severe depression.

WHAT DID THE HOUSE OF LORDS DECIDE?

Basically, the House of Lords thought that although the school was not guilty of a flagrant breach of its duty of care to Mr Barber, there was not enough evidence to set aside the decision of the county court judge. Their Lordships decided that the employer's duty to take action arose in June and July 1996, when Mr Barber saw each member of the school's senior management team separately.

They said the team should have made inquiries about his problems and seen what they could do to ease them, in consultation with officials at the county council's education department. Instead the school just brushed off his concerns, or told him to prioritise his work.

The House of Lords did not accept that there was nothing the senior management team could do for Mr Barber, despite the severity of the problems it was facing as a whole. Had they reduced his workload and made him feel that they were on his side, it might have made a real difference. In any event Mr Barber's condition should have been monitored and, if there was no improvement more drastic action taken.

Supply teachers cost money, but not as much as the cost of the permanent loss through psychiatric illness of a valued member of the school staff. Mr Barber's appeal was therefore allowed.

Photo: Stefano Cagnoni (Report Digital)

Mingeley -V- Pennock And Ivory t/a Amber Cars

DRIVEN BY RACE


Photo: Stefano Cagnoni (Report Digital)

In an unusual case – Mingeley -V- Pennock And Ivory t/a Amber Cars (2004, IRLR 373) **– the Court of Appeal has decided that race discrimination legislation may not apply to private car hire drivers.**

WHAT PROMPTED THE COMPLAINT?

John Mingeley, who is black, worked as a private hire taxi driver in Leeds. He had a contract with Mr Pennock and Mr Ivory, the owners of Amber Cars, whereby Amber Cars allocated calls to him through a radio and computer system that they made available to him. In return, Mr Mingeley paid them £75 per week.

It was up to him what hours he worked or whether he worked at all. He did not have to pay anything to Amber Cars from the fares he collected - their income came from the weekly payments from Mr Mingeley and a substantial fleet of other drivers. However, if Mr Mingeley worked, he was required to wear the firm's uniform and to adhere to a scale of charges that they set. He could not let anyone else drive his car (without paying another £75) and he was subject to a complaints procedure regulated by Amber Cars.

In November 2001, following the termination of his contract with Amber Cars, Mr Mingeley complained that the owners had racially discriminated against him in allocating work.

WAS HE AN EMPLOYEE?

The first issue to resolve was whether he was an employee. In other words, whether the relationship fell within s78(1) of the Race Relations Act 1976 (RRA), which defines 'employment' as 'employment under a contract of service or of apprenticeship or a contract personally to execute any work or labour'.

Mr Mingeley claimed that the relationship was pursuant to a contract to execute any work or labour. If he could convince a tribunal that he was an employee, then the firm would have to defend itself against his claim of race discrimination.

WHAT DID THE TRIBUNAL THINK?

The employment tribunal dismissed the application. It said that 'it is inconsistent with an obligation to execute work or labour that a party is free to work or not work as he wishes, free to take holidays as and when he wishes without notification to any other party, free to decide that he is sick on any particular day without notification and free to work whatever hours he wishes on any particular day that he does work, without sanction of any sort on the part of the 'employer'.'

The tribunal went on to say that, even if he was under an obligation personally to 'execute work', his claim would still fail because that obligation was not the dominant purpose of the contract. Instead, it was to provide an efficient car hire service to customers of Amber Cars.

The appeal tribunal dismissed his appeal against that decision on the basis that there was no mutuality of obligation between the parties.

WHAT DID THE COURT OF APPEAL DECIDE?

The Court of Appeal upheld this approach, and dismissed Mr. Mingeley's appeal. In doing so, the Court missed a chance to extend the protection available under the RRA to a vulnerable class of workers by saying that it was up to Parliament to sort out the exclusion of people like Mr Mingeley.

The Court said that it was obvious from the wording in s78 and from previous judgments that the applicant had to establish that his contract placed him under an obligation 'personally to execute any work or labour'. There was no evidence that he was ever under such an obligation. He was free to work or not to work at his own whim or fancy. His obligation was to pay the taxi firm £75 per week and he could then decide whether to work or not. The fact that there was no obligation placed him beyond the reach of s78.

a brief overview of flexible working

IS YOUR EMPLOYER FRIENDLY TO FAMILIES?

It's just over a year since new rights were introduced for working parents to ask to work flexibly. The mechanisms for making an application are laborious, so it's important for unions to make sure that members know what they have to do.

In this article, Nicola Dandridge, Head of Equal Rights, summarises the law and answers some commonly asked questions.

THE LAW

In April 2003, the Government introduced a new right for working parents. Anyone with a child under 6 (or 18 if disabled) and who has worked for the same employer for 26 weeks can now ask for a change in their terms and conditions of service in order to care for that child.

The change can relate to the hours they have to work, the times they work, or the location in which they work. According to the explanatory notes that accompany the legislation, the requests can cover 'work patterns such as compressed hours; flexitime; homework; jobsharing; teleworking; term-time working; shift working; staggered hours; annualised hours; and self-rostering.'

FREQUENTLY ASKED QUESTIONS

■ *Who qualifies?*

Apart from the qualifying period of 26 weeks, the employee has to be the mother, father, adopter, guardian or foster parent of the child (or be married to or be the partner of that person) to have the legal right to ask their employer to work flexibly. Partners of same-sex couples are included, but agency workers are specifically excluded, as are members of the armed forces.

■ *How should the application be made?*

The application must be made in writing. It must specify the change applied for and the date from which it is requested. The applicant must also 'explain what effect, if any, [he or she] thinks making the change applied for would have on the employer and how, in his [sic] opinion, any such effect might be dealt with.' It is not clear why the employee has to work this out, and not the employer. But it's crucial to do so, because failure to satisfy this requirement invalidates the application.

There is a flexible working application form available on the DTI website – www.dti.gov.uk/er

■ *What should happen next?*

If the employer agrees to the application, he or she must do so in writing and specify the date from which the proposed change will apply. There is no need for a meeting in these circumstances.

If he or she does not agree, the employer has to call a meeting within 28 days of the date of the application to discuss it. If the employee is off sick or on holiday, then the time limit can be extended to 28 days of his or her return to work. The employee has the right to be represented at this meeting, but only by a fellow worker. The employer then has to notify the employee of the decision within 14 days of that meeting, either agreeing to it or setting out the grounds for refusal in writing and explaining, in a couple of paragraphs (according to the Government's guide), why those grounds apply.

The employee has the right of appeal by giving notice within 14 days of the date of the refusal. Again, there is an appeal form on the DTI website. That hearing must be held within 14 days of the date on which the notice of appeal is lodged. The employer must notify the employee of his or her decision within 14 days of the date of the appeal hearing.

Once the change is agreed, it will be permanent unless both parties expressly agree that the change is for a fixed period of time.


Photo: John Harris (Report Digital)

■ *What are the grounds on which an employer can reject the application?*

Employers have a wide number of reasons that they can rely on to reject the application:

- the burden of additional costs
- a detrimental impact on their ability to meet customer demand
- an inability to reorganise the work amongst existing staff, or recruit additional staff
- a detrimental impact on quality or performance
- insufficient work during the hours when the employee intends to work
- planned structural changes

■ *What can an employee do if the application is rejected?*

Very little, is the honest answer. An employee can complain to a tribunal on just three grounds (within three months of the decision) that there was:

- a failure to follow procedure
- a failure to provide 'a sound business reason'
- a decision based on 'incorrect facts'

What cannot be challenged is the employer's decision itself. However much an employee disagrees with the decision, and however blinkered or ill judged it might be, the tribunal has no power to question the employer's business reasons.

■ *How much compensation is an employee entitled to?*

Again very little. For those few employees who find that they are in a position to take their employers to tribunal, compensation is limited to a maximum of eight weeks' pay, currently capped at £270 per week. The maximum compensatory award is therefore £2160. Hardly a disincentive for employers.

■ *Is the SDA more effective?*

The new legislation overlaps to some extent with the existing provisions of the Sex Discrimination Act 1975, which allows a worker to claim indirect discrimination on the ground of sex. This means that where an employer requires, say, full time work, the worker can argue that this has more of an impact on women than men and so indirectly discriminates against them. If the employer cannot objectively justify the policy, he or she will be in breach of the Act.

A man may be able to claim direct discrimination in the same circumstances, using the argument that if he were female then he would also have been allowed to work part time. The advantage of the flexible work regulations, of course, is that they expressly apply to both men and women.

And there are other advantages to making a claim under the SDA. Compensation is unlimited; it applies to workers and not just employees; there is no need for a 26 week service requirement; and the employer has to objectively justify their decision not to allow part time or flexible working failing which the tribunal may make a finding of unlawful discrimination.

■ *Does the applicant have to use the regulations?*

There is an expectation that employees should follow through the procedure set out in the regulations before launching a sex discrimination claim. The question is whether a failure to do that will affect the attitude of a tribunal, in terms of its ultimate decision and its award of compensation.

Whether or not employees use the regulations (and we recommend that they do), they must ensure not to overlook the three month time limit for pursuing a sex discrimination application.

Merino Gómez -V- Continental Industrias Del Caucho Sa

A PREGNANT PAUSE

The European Court of Justice (ECJ) has clarified an important point of EU law in Merino Gómez -V- Continental Industrias Del Caucho Sa (2004, IRLR 407 **and LELR 89 for a summary). It has ruled that a pregnant worker does not have to take her annual leave during her maternity leave period, even if it coincides with a general shutdown of the entire factory.**

WHAT HOLIDAY DID MS MERINO GÓMEZ WANT TO TAKE?

Ms Merino Gómez had been employed as a factory worker by Continental Industrias since 1994. She took maternity leave from 5 May to 24 August 2001, after which she applied to take annual leave from 25 August to 21 September 2001, or alternatively from 1 September to 27 September 2001.

WHAT WAS THE RELEVANT LEGISLATION?

The collective agreement for the chemicals sector that regulated relations between Continental Industrias and its staff says that holiday entitlement is 30 days, with the requirement that a continuous period of at least 15 days be taken between June and September.

Under a collective agreement reached in 2001 between Continental and its employees, two general periods were established when all staff could take leave. The first was from 16 July to 12 August 2001 and the second from 6 August to 2 September 2001. As these periods coincided with her maternity leave, Ms Merino Gómez applied to take her annual leave after that.

That agreement also provided, by way of exception, that six workers could take holiday in September. Priority for the exceptional leave period was given to those who had been unable to choose their holiday period the previous year. As Ms Merino Gómez had chosen her holiday in 2000, she was not entitled to take her annual leave in September 2001 during the exceptional period.

Continental therefore refused her request on the grounds that it breached the collective agreement and Ms Merino Gómez brought proceedings in her national court.

WHAT QUESTIONS WERE REFERRED TO THE ECJ?

The Spanish court asked two questions:

1. Where collective agreements fix annual leave periods for the entire workforce which coincide with a worker's maternity leave, is that worker entitled to take her annual leave at a different time under the Working Time Directive (WTD), the Pregnant Workers Directive (PWD) and the Equal Treatment Directive (ETW)?
2. If the answer is yes, is her entitlement to four weeks' annual leave as per the WTD or the 30 calendar days stipulated by Spanish national legislation?

WHAT DID THE ECJ DECIDE?

The ECJ said that:

1. EU law means that a worker must be able to take the paid annual leave to which she is entitled under the WTD at a time other than her maternity leave. This includes a case where the dates of annual holiday fixed in advance by a collective agreement coincide with the worker's maternity leave.
   This is because the purpose of the WTD to paid annual leave is different from maternity leave. Where the dates of a worker's maternity leave coincide with those of an annual shutdown, the requirements of the WTD cannot be met.
   On top of that, the PWD provides that rights connected with the employment contract of a worker must be ensured in a case of maternity leave. The determination of when paid annual leave is to be taken also falls within the scope of the ETD, which must be interpreted as meaning that a worker must be able to take her annual leave during a period other than her maternity leave period.
2. The answer to the second question must therefore be that where national law provides for a longer annual leave entitlement than the minimum laid down by the WTD, then her entitlement is to the longer period.

Crossley -V- Faithful & Gould Holdings Ltd

EXPRESS IS BEST

It is well established in law that employers have to observe a number of implied, contractual terms – for instance, the duty to maintain a relationship of mutual trust and confidence – with their employees.

These are not set in stone, however, and courts add new duties to reflect changing circumstances. In the case of *Scally & Ors -V- Southern Health and Social Services Board & Anor (1991)*, the House of Lords said that employers had an obligation to bring a contractual term to the attention of employees if it conferred a valuable right and had not been negotiated with the employee directly.

This did not apply however in the case of Crossley -V- Faithful and Gould Holdings Ltd (IDS Brief 755). The Court of Appeal ruled that employers do not have a general duty to take reasonable care for the economic well-being of their employees. Specifically, they do not have to warn employees of the effect that their resignation will have on their rights under a disability insurance scheme.

WHAT HAPPENED TO MR CROSSLEY?

Mr Crossley was a senior employee and director of the company. He was entitled, as long as he remained an employee, to benefits under the disability insurance scheme. If he left his job, the insurers had a discretion as to whether to pay him or not.

He subsequently had a nervous breakdown and went on sick leave in December 1996. The following April he applied for early retirement on health grounds and in March contacted the insurance broker to make a claim under the scheme. He agreed with his employers that he would be paid until 6 September 1997. The insurer made payments to him until June 1998, and then stopped them, which it was entitled to do under the terms of the scheme.

WHAT DID MR CROSSLEY CLAIM?

Mr Crossley claimed damages against his employers for breach of an implied contractual term to take reasonable care for his economic well-being. In particular, he argued that they should have warned him of the effect that resignation would have on his entitlement to benefits under the scheme.

WHAT DID THE HIGH COURT DECIDE?

The High Court dismissed the claim. The judge concluded that there is no implied obligation on an employer to exercise reasonable care for the employee's economic well-being. Mr Crossley had decided to retire on his own initiative and the employers did not contribute to that decision. As a senior employee, he could reasonably have been expected to be familiar with the terms of the scheme.

DID THE COURT OF APPEAL AGREE?

The Court of Appeal agreed with the High Court judge and dismissed the appeal. It said that there is no standardised implied term in all contracts of employment that the employer will take reasonable care of employees' economic well-being. This would impose an unfair and unreasonable burden on employers. It is not the function of the employer to act as the employee's financial adviser. The employee can obtain his or her own advice, whether from a union or otherwise.

The imposition of a general duty on an employer to protect an employee's economic well-being is also wholly inconsistent with the approach adopted by the House of Lords in *Scally -V- Southern Health and Social Services Board*. It was not for the Court of Appeal to take a big leap to introduce a major extension of the law in this area when, comparatively recently, the House of Lords had declined to do so.

As a result, the Court said it was not prepared to introduce a major extension of the law in this area. It decided that the duty only applied in 'carefully circumscribed circumstances.'

Photo: John Harris (Report Digital)

Overly protective

The Court of Appeal has just decided in Susie Radin Ltd -V- GMB & Ors (2004 IRLR 400)**, in a case backed by Thompsons, that the purpose of the protective award is to ensure that employers comply with the legislation and consult with their employees. If they fail to do that, they can expect to be penalised.**

WHAT WERE THE FACTS OF THE CASE?

The company owned a clothing factory, employing 108 workers. It had a recognition agreement with the GMB although not everyone was a member.

The first indication that the union had that the factory might close was on 20 March 2000, when the official received a letter from one of the company directors rejecting its pay claim, and saying that the factory might not even remain open.

On 6 April 2000, the employers notified the GMB of impending redundancies, which they indicated would take effect on 14 July. Following an acrimonious meeting with the union on 19 April, the company sent dismissal letters to everyone. On 13 June, the GMB official and a shop steward met with the employers to try to save the factory, but the factory closed on 14 July without any further contact between the two parties.

WHAT CLAIMS DID THE UNION LODGE?

The union applied for protective awards for its members, and the employees also claimed for unfair dismissal. The employment tribunal found that the employers had failed to comply with the consultation requirements set out in s.188 of the Trade Union and Labour Relations (Consolidation) Act (TULR(C)A) and awarded a protective award of 90 days (the maximum).

But it rejected the unfair dismissal complaints. The tribunal concluded that since a decision had been made to close the factory and make all the employees redundant, there would have been no point in consulting individually with them, because the end result would have been the same.

The appeal tribunal dismissed the employers' appeal against the protective award.

WHAT DID THE COURT OF APPEAL DECIDE?

The employers took their case to the Court of Appeal, arguing that the purpose of the protective award is to compensate employees, not to penalise employers. They said that the tribunal should, therefore, have taken into account its finding (in terms of the unfair dismissal claims) that consultation would have been pointless.

The Court of Appeal disagreed. It said the issue of whether there was a point to consultation was not relevant when making a protective award. The purpose of the award was to ensure that consultation takes place in accordance with the requirements of TULR(C)A.

Although the sanction meted out to employers results in money being paid to the employees, there is nothing in the legislation that says that the length of the protected period has to be linked to any loss on the part of the employees.

The only guidance, subject to the maximum of 90 days, is that the award should be what the employment tribunal determines to be 'just and equitable in all the circumstances having regard to the seriousness of the employer's default in complying with any requirement of s.188'.

WHAT SHOULD DETERMINE THE PROTECTIVE AWARD?

When determining a protective award, the Court said that tribunals should keep the following in mind:

- that the purpose of the award is to penalise employers for breaching s188; it is not to compensate employees for any loss they may have suffered
- that tribunals should focus on the seriousness of the employer's default
- the default may vary in seriousness - from a technical breach to a complete failure to provide any information
- the 'deliberateness' of the failure may be relevant, as may the availability to the employer of legal advice about his or her obligations under s188
- if there has been no consultation, tribunals should start with the maximum period and reduce it only if there are mitigating circumstances

Failure to reverse

The Trade Union and Labour Relations (Consolidation) Act (TULR(C)A) makes it unlawful for unions to discipline a member for a number of specific reasons. And that includes expulsion.

In Beaumont -V- Amicus MSF (IDS Brief 755), the employment appeal tribunal (EAT) said that the union had failed to do everything it could to reverse Mr Beaumont's expulsion. As a result, it had jurisdiction to hear his claim for compensation.

WHAT HAD HAPPENED?

Mr Beaumont had been expelled from the union in February 2002, following which he lodged a claim with an employment tribunal in May that he had been 'unjustifiably disciplined' by the union.

The national executive committee subsequently decided (in September that year) that his expulsion should be rescinded, and conceded his case at a tribunal hearing in October. The tribunal made a declaration that he had been unjustifiably disciplined, along with an order for costs.

SO WHY WAS HE AT THE EAT?

Mr Beaumont now claimed that he had the right to go to the EAT to claim compensation for the union's failure to do everything it could to restore the 'status quo ante'. In particular, he said that:

- he was deprived of the benefits of membership for the period of his expulsion
- he would be precluded from standing for various union positions for a number of years because of a loss of continuous membership
- the union had failed to rescind a letter to his branch saying he should not be sent mailings
- the union had failed to rescind a similar letter to the regional council
- he should have been billed for subscriptions to ensure continuous membership

WHAT DID THE EAT DECIDE?

The employment appeal tribunal said that although Mr Beaumont was deprived of union membership from February to October 2002, he had not made a claim during that time and there were therefore no steps that the union needed to take.

It also found that once the union had reinstated Mr Beaumont, he had been credited with subscriptions for the period of his expulsion, so that his second claim also failed. The fact that the union originally intended to charge him for that period and subsequently changed its mind was irrelevant.

This also dealt with his fifth complaint.

However, the EAT agreed with his allegations that the union had failed to rescind a number of letters to his branch and regional council. The first was dated 25 February from the General Secretary, instructing Mr Beaumont's branch not to address any material distributed on behalf of the union to him (except information about his right of appeal), and that he should be excluded from all future meetings at national, regional and branch level.

It also said he was not entitled to hold office or represent the union in any capacity.

The EAT said that the union made no attempt to revoke that letter until a branch representative wrote on 20 December to the General Secretary, who then confirmed that Mr Beaumont had been reinstated as a member of the union. Unfortunately, the branch remained confused until the General Secretary wrote again on 3 April, clarifying the situation. Mr Beaumont made the same complaint in respect of communications to the London Regional Council.

Because the letters rescinding his expulsion were not as clear as the original letters, the EAT decided that the union had not taken all the steps that were necessary to rescind Mr Beaumont's expulsion from the union, and he was entitled to compensation.

WHAT ARE THE PARAMETERS FOR COMPENSATION?

The date for the compensation hearing has now to be fixed, limited to the two grounds on which the EAT found in his favour. The appeal tribunal made clear that its power to award compensation is limited by the principle of what it 'considers just and equitable in all the circumstances'.

But it rejected the union's argument that it was limited to considering compensation for the union's failure to take all the steps necessary to comply with the declaration by the tribunal. It said that it could not have been the intention of Parliament to prevent an applicant from recovering the compensation he would have got in the tribunal, just because the respondent fails to reverse the effects of the unjustifiable expulsion.

Equally, however, it did not accept Mr Beaumont's argument that he had the right to argue the merits of his expulsion and the rights and wrongs of his allegations against officials of the union at the compensation hearing. It said that the compensation that it can award is compensation for the expulsion and its effects upon Mr Beaumont.