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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PRODUCTION **THOMPSONS SOLICITORS**
PRINT **TALISMAN PRINT SERVICES LTD**
ILLUSTRATIONS **BRIAN GALLAGHER**
INSIDE PHOTOS **REPORTDIGITAL.CO.UK**
FRONT COVER PHOTO **KEITH POTTS**

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19901/0204/1097

THOMPSONS SOLICITORS

Labour&European Law Review

ISSUE 86 FEBRUARY 2004

LATEST TUPE
Two new
see pgs 6 & 7

UNION WAS WRONG
s188
of the TU and Labour Relations (Consolidation) Act see pg 9

IN THE NEWS
What's the buzz?
see pgs 2 & 3

ORGANISING A BALLOT?
don't forget
to read the small print
see pg 4

DATA PROTECTION ACT
Are you confused?
see pg 5

VISA GUILTY
Pregnancy discrimination
£26k awarded see pg 9

European Works Councils

The European Court of Justice has just decided two important points in Gesamtbetriebsrat der Kuhne & Nagel AG & Co KG about setting up European Works Councils.

The first was to do with how to set one up for groups of community-wide undertakings where management is based outside the EU, and which don't have a central system to provide the information necessary for negotiations. The second was to do with the kind of information that is needed for setting one up.

The ECJ said it was the responsibility of the central management's representative within a member state to ensure the right conditions existed for setting up a Council. Other EU-based undertakings belonging to the group are also under an obligation to help provide the information.

As for the information needed, the following could be asked for:

- Average total number of employees and their distribution
- About the establishment of the group and its constituents
- About the structure of the group and its constituents
- Names and addresses of appropriate employee representatives

Dispute resolution regulations

The Government has now published its conclusions on resolving disputes in the workplace, following a consultation on draft regulations. These were based on the framework set out in the Employment Act 2002.

The final regulations will come into effect in October this year and we'll look at them in more detail then. For now, the main conclusions to note are:

- They will only apply to employees, as opposed to workers
- Grievance will be defined as 'a complaint by an employee about action which his employer has taken or is contemplating taking'
- The statutory grievance procedure will apply even after the employment has ended
- If the employee's grievance could be heard in a tribunal, then the time limit goes up to six months once the grievance procedure has been initiated
- The time limit for presenting a claim to do with dismissal or disciplinary action can be extended, if it looks as though disciplinary procedure would still be going on when the normal time limit expires

You can find details of the Government's response at: http://www.dti.gov.uk/er/individual/disputeregs_govresp.pdf (You have to press the control button while you click to access this link)

DISPUTE RESOLUTION DRAFT ACAS CODE

ACAS has published a draft code of practice on disciplinary and grievance procedures. This will replace the existing code and incorporates the statutory and disciplinary procedures set out in the Employment Act 2002.

If you would like to comment on the draft, you should do so by 14th April 2004.

You can access the draft code by pressing the control button whilst clicking on this address: http://www.acas.org.uk/publications/pdf/CP01.2.pdf

EC consultation on working time

The European Commission has announced a consultation on the working time directive, particularly looking at the 'opt out' clause which has proved so controversial.

It has also asked for responses on extending the reference period for calculating average weekly working time; the definition of working time; and measures to improve the balance between work and family life.

The deadline for comments is 31 March 2004.

You can find the consultation paper at:

http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.getfile=gf&doc=MEMO/04/1|0|RAPID&lg=EN&type=PDF.

(NB: you have to press the control button while you click to access this link)

NEW EDITOR – AND NEW LOOK REVIEW

The Labour and European Law Review has a new editor. Alison Clarke is a freelance journalist who has written for the law pages of the Times, Guardian and Independent, as well as a number of specialist journals such as the Law Society Gazette.

She is a qualified lawyer and has worked as a legal officer for MSF (now Amicus) as well as an employment lawyer for a private firm of solicitors. She has also worked for MSF as a regional official, having started off as a shop steward many years ago for Unison.

She is the author of Women's Rights At Work – a handbook of employment law; and Community Nurses and the Law.

Along with our new editor, we also have a new look for the review. The front cover shows the newly commissioned Thompsons' banner.

We'd also like to say many thanks to Mary Stacey for her excellent work as editor. Mary has now taken up a post as a full time employment tribunal chair. Congratulations.

STEPHEN CAVALIER
Head of the Employment Rights Unit

New compensation limits

From February 2004, a number of new compensation limits came into force:

	Previously	From 1/2/04
Limit on guarantee payments	£17.30 per day	£17.80 per day
Limit on a week's pay	£260	£270
Maximum basic award for unfair dismissal (30 weeks' pay)	£7,800	£8,100
Minimum basic award for dismissal on trade union, health and safety, occupational pension scheme trustee, employee representative and on working time grounds only	£3,500	£3,600
Maximum compensatory award for unfair dismissal	£53,500*	£55,000*
Minimum award for employees excluded or expelled from a trade union	£5,700	£5,900
Maximum award in breach of contract cases	£25,000	

* There is no limit where the employee is dismissed unfairly or selected for redundancy for reasons connected with health and safety matters or public interest disclosure ('whistleblowing').

THE FUTURE OF EMPLOYMENT LAW WHICH WAY FOR THE NEXT MANIFESTO?

Now that the Government has completed its review of the Employment Relations Act 1999, what's the next step? Will the Employment Relations Bill go far enough to improve the law? What do unions want to see in the next manifesto?

A conference organised by the Institute of Employment Rights and sponsored by Thompsons will take a critical look at these and other questions.

This conference will allow you the opportunity to listen to MPs, trade unionists and lawyers debate the issues on March 2 from 9.15am until 4.30pm at the NATFHE Centre, Britannia Street, London WC1. (The nearest stations are King Cross and St Pancras.)

The conference will be of great interest to trade unionists, employment lawyers, academics and students, and anyone concerned with the development of employment law.

Cost of a booking is:

IER subscribers and members - £75, Trade Union - £90 and Commercial - £220

To book your place, just phone IER on 020 7498 6919 or email office@ier.org.uk

CALCULATING PENSION LOSS – WRONG NUMBER

Apologies to readers who tried to access the web address for the Stationery Office that we gave in January's issue of LELR to buy a copy of the Compensation for Loss of Pension Rights booklet (3rd edition).

The correct address is www.tso.co.uk/bookshop and the telephone number is 0870 600 5522.

"...remember to read the small print"

ACTION ON BALLOTS

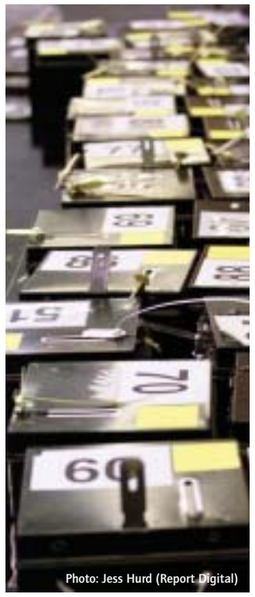
Photo: Jess Hurd (Report Digital)

If you're ever involved in organising a ballot for industrial action, remember to read the small print. In Willerby Holiday Homes Ltd -V- Union of Construction, Allied Trades and Technicians (IDS Brief 749) **UCATT was fined over £130,000 for failing to comply with the statutory requirements for pre-strike ballots.**

WHO WAS ENTITLED TO VOTE?

On 13 February 2001, UCATT informed Willerby Holiday Homes that it was going to conduct an industrial ballot of 397 members on 20 February. It wrote again the following day, saying that 457 members would be balloted.

On 15 February the company wrote to the union, saying their pre-ballot notice didn't comply with the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992. The union checked its membership record again and found that it only had 451 members.

The ballot started as planned on 20 February. On 1 March (with the ballot already in progress) the union faxed the names of its 451 members to the company. Willerbys complained of a number of inconsistencies, and when the union wrote again on 2 March, it agreed that 38 of the names on their list were no longer working for the company.

WHAT WAS THE RESULT?

The ballot closed on 5 March, and the next day the union told the company the result – out of 249 valid votes 203 members voted in favour of industrial action.

It also enclosed a list of the 38 members which it thought had left the company, asking how many were still on the check-off list for paying union dues. The company said at least half of them were still employees.

DID THE STRIKE GO AHEAD?

Despite these inconsistencies (which didn't make any difference to the outcome of the ballot), the union told the company on 9 March that its members would be on strike from 19 March.

The company promptly complained that the notice of ballot was invalid. The union amended the result to 158 in favour of strike action, and the strike went ahead.

The company brought a claim for damages, saying there were three defects in the way the union had conducted the ballot.

WHAT DID THE COURT DECIDE?

The High Court agreed, saying that the pre-ballot notice didn't comply with the legislation because not only did the union get its numbers wrong, but it served the revised notice with less than seven days to go.

It also said, in response to the union's complaint that the company did not co-operate with it, that there was no obligation on the employer to provide information to the union that it already had.

The Court then dealt with the second complaint – that the ballot wasn't conducted properly because of all the inconsistencies with names. It held that the union could have done more, and the official who had organised the ballot could have easily referred to the lists held at the union's regional office.

The Court also agreed with the company's third complaint – that the strike action notice given by the union on 9 March was defective.

The union's argument – that making it pay for its failure to comply with the legislation was in violation of its members' rights to freedom of association – was rejected.

The union was fined £130,458 - £15,485 for missing delivery dates; £40,000 for the loss of eight working days; £75,000 for loss of production.

"...confused? ...you're not the only one."

PROTECTION RACKET?

If you're confused by the scope of the Data Protection Act, you're not the only one. But in a new case – Durant -V- Financial Services Authority (IDS Brief 749) **- the Court of Appeal has clarified what information comes within the meaning of 'personal data', and also when manual records can be deemed to be held in a filing system that come within the scope of the Act.**

WHAT WAS MR DURANT'S COMPLAINT?

Mr Durant asked the Financial Services Authority (FSA) to investigate a complaint against a high street bank about documents that it disclosed in the course of litigation.


Photo: John Harris (Report Digital)

The FSA did as asked, but failed to tell Mr Durant the outcome. He requested disclosure of the documents that the Authority held about his complaint. The Authority disclosed all the computerised files that mentioned him, but refused to hand over any manual files.

Mr Durant asked the county court to order the FSA to hand them over, but it refused. He then appealed to the Court of Appeal.

DID THE MATERIAL AMOUNT TO PERSONAL DATA?

The Court said that for information held on computer or hard copy to amount to personal data, it had to be relevant to Mr Durant (the data subject in this case) or relate closely to him.

For instance, something that was biographical that had Mr Durant as its focus; or something that affected his privacy, whether personally or professionally. Using that definition, the court decided, the information held on him by the FSA did not amount to personal data.

In other words, just because someone's name is mentioned in a document does not mean it has to be disclosed.

WHEN IS A FILING SYSTEM RELEVANT?

The court then looked at whether the manual records held by the FSA had been held in a 'relevant filing system', bringing them under the scope of the Act.

It decided that to fulfil that definition, the manual filing system would have to operate in such a way that allowed files to be identified without having to make a manual search of them, as such.

The court specified that any file found by using a 'relevant filing system' had to be indexed in such a way so that the specific information that Mr Durant wanted could be easily pinpointed in the file, or sub-file.

In the end, the court said, that meant that a 'relevant filing system' was limited to one in which files are structured in such a way that you could easily ascertain at the start of the search whether specific information amounting to personal data about the individual requesting it, was held within the system.

It also has to have a reasonably sophisticated index or reference system to indicate where you would find information about the applicant in an individual file or files.

That being the case, the court decided that none of the information requested by Mr Durant was held in a 'relevant filing system'. Having files that were organised chronologically was not enough.

SO WHAT'S THE RELEVANCE FOR EMPLOYEES?

This decision makes clear that this definition of 'personal data' can be applied to personnel files, whether they are held manually or in computerised format.

It also means that most manual personnel records are held within a 'relevant filing system'. However, equally, it probably also means that information not held in structured files does not fall within the scope of the Act.

"...the EC ARD applies to a 2nd generation contractor"

SECOND GENERATION TUPE

The European Court of Justice (ECJ) has decided in Abler -V- Sodexho MM Catering Gesellschaft (IDS Brief 749) **that the EC Acquired Rights Directive applies to a second generation contractor, where they take over substantial chunks of the premises and equipment used by the outgoing contractor. This applies even if the assets belong to the contracting authority.**

WHO LOST WHAT?

In November 1990, an orthopaedic hospital contracted out its catering services to a company called Sanrest. It prepared and served meals, using equipment and premises provided by the hospital.

Several years later, the contract was transferred to Sodexho, following a re-tender, on the same basis as Sanrest. In other words, providing the service using the hospital's premises and equipment.

Sanrest argued that this constituted a transfer of an undertaking, although Sodexho had refused to take on any of their employees and did not inherit any of their stock or materials, with the exception of the menus for the kindergarten.


Photo: Roy Peters (Report Digital)

Sanrest terminated all its employees' contracts in November 1999, but supported their arguments that their employment had transferred to Sodexho.

WHAT WAS THE VIEW OF THE COURTS?

The Austrian labour court dismissed their claims. It said there was no transfer of staff, work organisation or even customers. The regional court overturned that decision on the basis that an identifiable economic entity had been transferred to the second generation contractor.

The Supreme Court referred the matter to the ECJ. After reviewing its decisions in Spijkers and Suzen, the court confirmed that the decisive criterion in ascertaining if there has been a transfer is whether the entity retains its identity following the transfer.

It also pointed out that the directive covers transfers of people or assets that facilitate a specific economic activity.

The court emphasised the importance of looking at all the factors that characterise a transfer – the type of undertaking, whether the tangible assets have transferred; the value of intangible assets; whether most of the employees have been taken on; whether customers have transferred; and whether the entity has retained its identity. The importance to be attached to each factor will vary in different circumstances.

SO WHAT DID THE ECJ DECIDE?

The court observed that catering isn't an activity that relies essentially on manpower, as it requires a lot of equipment.

In this case, Sodexho had taken over the tangible assets needed to do the job. In other words, the customers, premises and equipment, but not staff.

Sodexho tried to argue that the directive could not therefore apply, but the court said that the transfer of the premises and the equipment from the hospital – in particular the obligation to prepare meals in the hospital kitchen – was enough to make this a transfer of an economic entity.

It was irrelevant, according to the court, that the assets taken over by Sodexho did not belong to the outgoing contractor, but by the hospital itself. The directive applies where there is a change in the person responsible for carrying on the business 'regardless of whether ownership of the tangible assets is transferred'.

Nor did there have to be a direct contractual relationship between Sodexho and Sanrest. The court said that a protected transfer could take place through a third party – in this case the hospital management.

"...important addition ...deals with pensions"

GETTING OLD WITH TUPE

The following is an important addition to the case law on TUPE because it deals with the issue of pensions – which historically have been excluded from its scope.

In Martin and Ors -V- South Bank University (IDS 747; IRLR 2004, 74) the European Court of Justice decided that certain early retirement benefits can be included on a TUPE transfer. Only benefits paid from the end of the normal working life count as old-age benefits and therefore don't transfer.


Photo: Geoff Crawford (Report Digital)

WHAT WERE THE ORIGINAL TERMS AND CONDITIONS?

The applicants were all lecturers at an NHS nursing college, and employed under conditions of service agreed by the General Whitley Council (GWC), made up of representatives of employers and employees.

One of the conditions stated that employees aged 50 or over, with five years' service, were entitled to retire early with their pension. In addition, they were entitled to compensation if they were made redundant, if they retired early because of organisational change or because it was in the interests of the service.

WHAT HAPPENED AFTER THE TRANSFER?

In late 1994, the college became part of South Bank University and the applicants became university employees. They held onto their existing terms and conditions, but joined the teachers' superannuation scheme because they could not stay with the NHS. Two of the applicants transferred all their pension rights into the scheme.

Then in January 1997, the University offered early retirement in the interests of the efficiency of the service to everyone over 50. Two of the applicants accepted. But the terms were not as good as the NHS ones and the applicants claimed they were entitled to the more favourable terms.

WHAT DID THE EMPLOYMENT TRIBUNAL DECIDE?

The employment tribunal decided to refer a number of questions to the European Court of Justice (ECJ).

WHAT DID THE ECJ DECIDE?

The ECJ decided that there was no need to treat benefits made available on early retirement any differently from, say, those that applied in the event of redundancy (as in *Beckmann -V- Dynamco Whicheloe Macfarlane Ltd*). On the basis of that logic, those terms therefore also transferred over to the transferee under the TUPE regulations.

But the trouble was that two of the applicants had already accepted the less favourable terms. Did that matter?

The ECJ was quite clear – the rights that employees have under the regulations cannot be waived, even with their consent. That isn't to say that the transferee can't try to amend terms and conditions – as long as the transfer isn't the reason for the amendment.

Unfortunately the court didn't explain the circumstances under which employers can negotiate changes following a transfer, but harmonisation of terms and conditions will generally be a transfer-connected reason.

In this case, the ECJ decided that the reason for the change in terms was the transfer and was therefore precluded. The fact that two of the applicants had joined the superannuation scheme did not mean they had consented to the different terms.

Equally, the fact that two of them had accepted early retirement on less favourable terms was neither here nor there – they were entitled to the terms on which they had transferred.

Securicor Omega Express Ltd -V- GMB

Advance notice?

Most trade union officials are all too familiar with the provisions of s188 of the Trade Union and Labour Relations (Consolidation) Act.

Basically it says that if employers are going to make 20 or more employees redundant within 90 days, they have to consult the appropriate representatives of anyone who might be dismissed 'in good time', and provide them with certain bits of information.

WHAT HAPPENED IN THIS CASE?

In Securicor Omega Express Ltd -V- GMB (IRLR 2004, 9), Securicor decided to close two of its branches towards the end of November 2001. Union representatives attended a meeting on 10 December at which they were told that there would be about 55 job losses.

The agreement with the union stated that employees would be selected for redundancy on the basis of last in, first out.

Representatives at the meeting also discussed the issue of voluntary redundancy, the possibility of relocation for others and help with finding alternative employment. The minutes of the meeting were circulated to all the union reps.

The announcement about the redundancies was made on 11 December and the individual employees affected were consulted. The job losses were limited in the end to 32 and took effect on 18 January 2002.

WHAT CLAIM DID THE UNION BRING?

But the union claimed that Securicor had not complied with the provisions of the legislation in that it had not consulted with the union under s188(2) about ways of:

- Avoiding the dismissals
- Reducing the numbers to be dismissed
- Mitigating the consequences of the dismissals

The union also claimed the company had not given them the written information that was required of them under s188(4). That is, to provide information about the redundancies in writing, including the reasons for them and the numbers and descriptions of the employees whom they propose to dismiss.

WHAT DID THE COURTS SAY?

And the tribunal agreed. It said there'd been no consultation to consider ways of avoiding dismissals and reducing the number of redundancies.

There had effectively been no consultation at all because the decision to make redundancies had been made

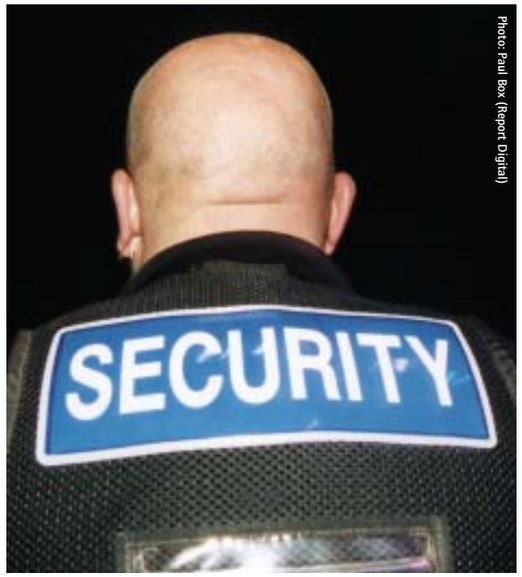

Photo: Paul Box (Report Digital)

before the meeting on 10 December.

WHAT DO EMPLOYERS HAVE TO CONSULT ABOUT?

But the employment appeal tribunal (EAT) disagreed. It said that although consultation has to be meaningful, that did not include consulting about 'the economic background or context in which the proposal for redundancies arises'.

The view of the EAT, therefore, was that the union did not have to be consulted on the branch closures per se. The obligation on the company to consult was limited to the question of redundancies that arose as a consequence of that decision. In other words, trying to reduce or possibly even avoid them.

And that was what the employers did both at and after the meeting on 10 December. They consulted about ways of avoiding the dismissals, reducing the numbers to be dismissed and mitigating the consequences of those dismissals.

In addition, the EAT said the employer had fulfilled the requirement under s188(4) to disclose specified information in writing. The union was wrong to suggest that information had to be disclosed prior to the meeting.

However, it did agree that since the minutes of the meeting didn't fully comply with s188(4) - nothing was mentioned about the total number affected by the redundancies or how their redundancy pay would be calculated – it made a nominal protective award of one day's pay to everyone made redundant.

Visa International Service Association -V- Paul

BABY BOOM

It's been a bit of a battle over the years, but women on maternity leave are now protected by the law in a number of ways. That does not mean that employers, even large employers, do not still make serious mistakes in the way they treat women who take time off work to have children.

WHAT HAPPENED TO MRS PAUL?

Take the case of Visa International Service Association -V- Paul (IRLR 2004, 42). Mrs Paul had been employed as an administrator for Visa since 1989 in the card design section, and had expressed an interest in moving to the dispute resolution section.

In July 2000 she went on maternity leave, during which time the company reorganised the department and created two new posts. Mrs Paul said she wasn't told of the changes and should have been given the chance to apply.

The company said she had been told about it by a work colleague and that, anyway, she didn't have the right experience. In December she was told that it had been filled.

Mrs Paul lodged a grievance which was not dealt with to her satisfaction and she resigned on January 2001.

WHAT DID SHE CLAIM?

She brought claims for unfair dismissal, wrongful dismissal, sex discrimination, pregnancy-related detriment and pregnancy-related dismissal. Visa promptly counter-claimed that because she had resigned, she owed the company her enhanced maternity benefit.

WHAT WAS THE VIEW OF THE TRIBUNAL?

The tribunal agreed with her. It said she hadn't been notified of the developments in the company, and that because Visa was in breach of the term of trust and confidence by failing to keep her informed, she was entitled to claim constructive dismissal.

And because it was related to maternity leave, the dismissal was automatically unfair (ss98(4) and 99 of the Employment Rights Act). The fact that the employers had failed to notify her was deliberate and amounted to a pregnancy-related detriment.

It dismissed the counterclaim because Mrs Paul had not left of her own free will. Even worse for Visa, it said that lodging the counterclaim amounted to an act of victimisation given that two other women had left and had not been asked to pay it back.

And it upheld her claim of direct sex discrimination on the basis that she had not been kept informed of changes, simply because she was on maternity leave.

Mrs Paul received almost £26,000 – nearly £13,000 for her loss because of sex discrimination, £8000 for injury to feelings and £5000 for victimisation.

DID THE APPEAL TRIBUNAL AGREE?

The EAT agreed with the tribunal on the following grounds:

- That Visa had breached the implied term of mutual trust and confidence, entitling her to claim constructive dismissal, by failing to notify her of the vacancy which undermined her trust and confidence in Visa
- That Visa had victimised her by making a counterclaim to recoup her enhanced maternity benefit, when two other women who had not brought proceedings, had been treated differently

The EAT also said that the tribunal should have made a basic award for unfair dismissal, despite the fact that she hadn't made that claim at the remedies hearing. It had also made the mistake of calculating her loss of earnings on gross, instead of net, income; and in including the deductible childcare costs for which she had had to give credit.