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THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

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Bend it like Beckmann

Beckmann v Dynamco Whicheloe Macfarlane Ltd [2002] IRLR 578 ECJ

The pernicious pensions exclusion from TUPE protection has long been an issue for trade unions. Until the law is changed employees who transfer their employment in a TUPE transfer do not have the right to continue accruing comparable pension benefits in their new employment, although their accrued rights are protected. So says the Acquired Rights Directive, our own TUPE regulations and the Court of Appeal.

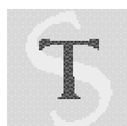
Article 3(3) of the Acquired Rights Directive excludes benefits relating to old age, invalidity or survivors' benefits under supplementary, company or inter-company pension schemes, from the general rule that in the event of a transfer of an undertaking the transferor's obligations arising from a contract of employment, employment relationship or collective agreement transfer to the transferee.

The **Beckmann** case tested the scope of the exclusion, in particular, section 46 of the General Whitley Council terms and conditions applicable in the NHS. In this UNISON test case Thompsons were instructed as the solicitors before the European Court of Justice. Section 46 provides for premature retirement with immediate payment of superannuation and compensation in three circumstances: dismissal for redundancy, retirement in the interests of efficiency of the service or premature retirement on organisational change. To qualify, staff must be between the age of 50 and retirement age. It is a valuable right to an immediate payment of pension based on actual years pensionable service from date of redundancy to normal retirement age plus early payment of a lump sum that would ordinarily be paid on retirement.

Katia Beckmann was transferred to Dynamco from a health authority under a TUPE transfer. When she was later made redundant by the Company she met the conditions under S.46, but her employer refused to make any S.46 payment. They claimed that her rights had not transferred under TUPE as they related to old age provision. Ms Beckmann challenged the decision, the case was referred to the European Court of Justice by the High Court and the ECJ has now ruled in her favour.

In a far reaching judgment the ECJ held that early retirement benefits and benefits intended to enhance the conditions of early retirement, paid in the event of dismissal to employees who have reached a certain age are not old-age, invalidity or survivors' benefits within Article 3(3) of the Acquired Rights Directive. Only benefits paid from the time when an employee reaches the end of his normal working life as laid down by the general structure of the pension scheme in question can be classified as "old-age benefits" falling within the exception allowed for by Article 3(3).

Given the general objective of the Acquired Rights Directive of safeguarding the rights of employees in the event of transfers of undertakings, the exception to Article 3(3), must be interpreted strictly. It can only apply to the benefits listed exhaustively in that provision and must be construed in a narrow sense. It does not apply to early retirement benefits such as S 46 Whitley Council, even though the benefits are calculated by reference to the rules for calculating normal pension benefits. Nor did it matter that the S. 46 obligations derived from statutory instruments, are implemented by statutory instruments and regardless of the practical arrangements for implementation. The obligation arose from a contract of employment, employment relationship or collective agreement and therefore bound the employer.



THOMPSONS SOLICITORS

Subsidising low pay

Nerva and others v United Kingdom [2002] IRLR 815

The High Court (as upheld by the Court of Appeal) ruled in 1995 that non-cash tips could be used by employers to count towards the National Minimum Wage (Nerva v R L & G Ltd [1995] IRLR 2000 and [1996] IRLR 461). There was, quite rightly, an outcry. The rationale of a tip is to thank the waiter and acknowledge the service and to give him or her a little extra. After all the cost of the meal and the restaurateur's overheads, including staff wages, is included in the bill itself.

Having had permission to appeal refused by the House of Lords, the waiters took their case to the European Court of Human Rights arguing that the High Court judgment deprived them of the peaceful enjoyment of their possessions in breach of Article 1 of Protocol 1 of the ECHR and amounted to discrimination against waiters in comparison to employees in other service industries.

The European Court of Human Rights has held there to be no breach. Ownership of tips through cheque and credit card first passes to the employer – simply because the voucher is made out in the establishment's name – and the waiting staff then receive a share of the tips, in the proportion agreed with them. The dispute was whether the share of credit card and cheque tips could be counted towards the statutory obligation to pay the minimum wage. The UK courts had ruled that the credit card tips amounted to "remuneration" under the minimum wage legislation and so were included. The European Court found that the matter was essentially a dispute between private litigants and the application of domestic legislation. The European Convention on Human Rights was not engaged in this case as the High Court's case could not be considered arbitrary and manifestly unreasonable. Nor could they establish discrimination. Moreover the waiters did not have a legitimate expectation that the tips would not count towards remuneration.It is a disappointing judgment for the waiters, but not entirely unexpected. The Minimum Wage Regulations themselves should be amended to take on board the waiters' concerns. Unless and until that happens, our tip is to pay your tips in cash. Then the money will be treated as additional pay, and cannot count towards the minimum wage that must, by law, be paid to the waiter.

EOC on-line advice

The EOC has launched a new service providing on-line information for legal and trade union advisors on sex discrimination, human rights and equal pay law. The first section of the site to go live focuses on sexual harassment. Sections on maternity and parental rights, family friendly hours, equal pay, and recruitment and selection will be added over the coming year. There is also background information on the relevant legislation, interpretation of UK law in conjunction with human rights and EC law, and more general advice on conducting litigation.

It contains a basic summary of discrimination and human rights law and it also contains summaries and comments on all the main SDA and EPA cases, some quite good styles and precedents, and downloadable IT1s, SDA Questionnaires and IT3s.

■ www.eoc-law.org.uk

Robin Thompson

We are sorry to report that Robin Thompson died on 31 October 2002. He had been unwell for some time. He was 78.

Robin, and his late brother, Brian, took responsibility for the firm after the death of their father, W H Thompson, in 1947. They shared a vigorous commitment to the interests of trade unions and their members, and continued to work closely together after the firm was split into two separate practices in 1974. Both welcomed the merger in 1996 to create Thompsons and became consultants to the new firm.

Robin will be missed very much

Employment Rights Unit

Thompsons' has the largest nationwide team of lawyers specialising purely in employment law for trade unions. The team covers the full range of employment law, with lawyers who focus on key specialist areas.

In this issue of Thompsons' Labour and European Law Review we report three landmark cases in which Thompsons were involved for the successful employee.

Thompsons' Employment Rights Unit (ERU) continues to expand to meet the dramatic increase in the range and volume of employment work and the demand for for specialist expertise in the field. To ensure delivery of consistently high standards across the whole spectrum of Thompsons' employment work across the country the ERU is structured with both regional and functional heads. They are as follows:

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Law must be changed to protect union rights

Wilson v UK[2002] IRLR 568.

Thompsons represented Dave Wilson and the National Union of Journalists (NUJ) in their landmark case before the European Court of Human Rights (ECHR). Their case, together with the joined cases for Terence Palmer, his fellow RMT members and their union, was the first case where trade unionists had ever succeeded before the ECHR. After a twelve year legal battle, the outcome rights a legal wrong against trade unions and their members: a wrong which must now be rectified by changing current legislation.

THE CASES

Dave Wilson was employed by Associated Newspapers at the *Daily Mail*. The Editor wrote to all journalists derecognising the NUJ and offering a 4.5% pay rise to all staff who signed new contracts giving up the right to have terms and conditions set by collective bargaining. Dave Wilson refused to sign. He was denied the pay increase.

The RMT applicants were employed by Associated British Ports. They were also "offered" personal contracts, with a 10% pay rise if they agreed to give up collective bargaining rights. They refused to sign and received a lower pay rise. The union was later derecognised.

The cases were successful in the Court of Appeal but the Conservative government immediately responded by changing the law – the "Ullswater amendment" (named after the Peer who introduced it) – to overturn the Court of Appeal judgment.

Not content with this, the employers appealed to the House of Lords, which found against the trade unionists. Their Lordships decided that the legislation protecting trade unionists against "action short of dismissal" applied only to "acts" and not to the "omission" of not offering a pay rise. They also found that taking action against trade unionists with the object of ending collective bargaining was not action on grounds of trade union membership or activities: they said that collective bargaining over employment terms and conditions was not a defining characteristic of trade union membership.

ECHR JUDGMENT

The trade unionists appealed to the ECHR on the basis that their right to freedom of association protected by Article 11 had been infringed, and won.

Although the Court would not go so far as to say that the Convention imposes an obligation on employers to enter into collective bargaining with a trade union representing workers, the Court said that unions must be free to organise industrial action to persuade an employer to enter into collective bargaining. Employees must be free to instruct their union to make representations to their employer or take action in support of their interests. This is fundamental. In the ECHR's words:-

"If workers are prevented from so doing, their freedom to belong to a trade union, for the protection of their interests, becomes illusory. It is the role of the State to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with their employers".

UK law therefore breached the Convention because it allowed employers to treat less favourably employees who were not prepared to renounce a freedom that was an essential feature of union membership: namely collective bargaining. UK law permitted an employer to act in this way with the aim of bringing an end to collective bargaining. This allowed UK employers to undermine or frustrate a union's ability to strive for the protection of its members' interests. By permitting employers to use financial incentives to induce employees to surrender important union rights, the UK violated Article 11 of the Convention and breached the rights of the trade unions and their members.

IMPLICATIONS

The government will need to make changes to UK legislation in order to comply with the judgment.

The ECHR judgment considered the law at the time of the

original actions against Mr Wilson, Mr Palmer, their unions and colleagues. This pre-dated the Ullswater amendment in 1993, the subsequent amendments made by the Employment Relations Act 1999 and the introduction of statutory recognition procedures.

It is clear from the judgment that the introduction of statutory recognition procedures does not bring the UK into compliance with the Convention. The Court did not consider that the absence in UK law of an obligation on employers to enter into collective bargaining gave rise, in itself, to a violation of the Convention. It follows that the introduction of a statutory recognition procedure does not deal with the issue.

The current protection against both dismissal and action short of dismissal on grounds related to union membership or activities provides a remedy where an employer acts with the purpose of preventing or deterring an employee from being a member of a trade union or taking part in its activities, or penalising him for doing so. This must now go further. The protection must not be confined merely to membership or activities, but also to employees instructing or permitting the union to make representations to their employer or to take action in support of their interests on their behalf (see paragraph 46 of the judgment). This is "an essential feature of union membership (paragraph 47). This overturns the judgment of the House of Lords in the **Wilson and Palmer** case, re-asserts the view of the Employment Appeal Tribunal in **Discount Tobacco v Armitage** [1990] IRLR 15.

The legislative protection must specifically include protection against detriment where the employer acts with the purpose or effect of bringing an end to collective bargaining (see paragraph 47 of the judgment). This will necessarily involve the deletion of the Ullswater amendment which permits employers to take action against trade unionists where their purpose is to introduce individual contracts or end collective bargaining.

This will involve amendments to primary legislation. It will not be enough for the government to utilise section 17 of the Employment Relations Act 1999 to make regulations. That section does not go far enough. It only gives the power to make regulations in relation to employees who suffer detriment because they refuse to enter into a contract which differs from existing collective agreements. The application of the regulation-making power is also constrained by the Conservative amendment introduced as section 17(4) which seeks to allow employers to pay higher wages or other payments to those who chose to give up bargaining rights, provided those higher wages relate to services provided by the worker under the contract. This would contradict paragraph 47 of the judgment which outlaws provisions which treat less favourably employees who were not prepared to give up collective bargaining rights, whatever the employer's purpose in doing so.

These are essentially "anti-discrimination" provisions which protect trade unionists against detriment for exercising their rights of membership. The extension of these rights which must follow from the decision is welcome, but is not the end of the story.

The judgment stresses that the role of the state in these matters is not a passive one: it is not confined to introducing measures which provide a remedy for less favourable treatment of trade unionists. It is expressly the role of the state to ensure that trade union members are not prevented or restrained from using their union to represent them in attempts to regulate their relations with employers (paragraph 46). The union and its members must be free to seek to persuade the employer to listen to what it has to say on behalf of its members (paragraph 44). The failure to protect this right violates not just the right of the employee, but the right of the trade union (paragraph 48).

This points to a requirement for a statutory entitlement to be represented by one's union in relation to matters affecting the employee's interests at work. This arises separately from the current statutory recognition procedures. It is not adequately dealt with by the provisions of section 10 - 15 of the Employment Relations Act which provide only the right to be accompanied (not represented) by a trade union and are confined to hearings under disciplinary and grievance procedures. The right will need to go much further: to enable union members to be heard via their union on all issues affecting their interests at work. This will have far-reaching implications, particularly for employees and employers where unions are not currently recognised. Employers will have to listen and respond to representations on pay, conditions and other issues from unions representing employees when employees wish to be represented in that way.

The **Wilson and Palmer** judgment will have profound implications for UK employment law and for representation at work.

Time for European action

**Council Proposal of Procedures for Public Procurement,
9270/02 of 28 May 2002
Case C-513/99 on 17 September 2002, Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v Helsingin Kaup Unki, HKL-Bussiliikenne
Case 225/98, Commission of the European Communities v French Republic, 26 September 2000
Posting Directive 96/71/EC**

For several years there has been controversy over the Commission's proposals for revision of the EC directives on procurement by public authorities through contract of the supplies, services and works they need, and similarly on the procurement contracts of undertakings in a number of sectors (energy, water, transport).

Formally, the principal concern of the EC in regulating public procurement is only to secure the proper functioning of the single European market. This means ensuring that public authorities do not abuse their contracting power to favour their own national economic operators in obtaining these valuable contracts by direct or indirect discrimination against economic operators from other Member States. Obviously, blatant exclusion of other nationals from access to the public procurement market would violate EC law, but experience shows that many indirect means of exclusion have been used to keep these valuable contracts within the Member State concerned.

One aspect of the revision process concerns whether labour standards, as well as social and environmental criteria, should be included in the form of "social clauses" in such contracts. This issue has been at the heart of a prolonged struggle. On the one side are those who wish to exclude labour standards (and other social and environmental conditions), either in principle or because they believe that such policies are not the business of the European Union. On the other side are those who regard such social clauses as not only desirable, but necessary in the case of those EU Member States who have ratified ILO Convention No. 94 of 1949 on Labour Clauses (Public Contracts). The UK was the first ILO member state to ratify the Convention, but the Thatcher government denounced it. Although eight other EU Member States have ratified it, the UK is still holding out. The struggle is not only about sectional interests of those who support labour, social or environmental standards. More fundamentally, it is about the nature of the European Union itself: whether it is to be solely concerned with promoting a competitive European market, or also engaged in promoting social policies of concern to European citizens.

Over the years, the issue of social clauses and public procurement has been the subject of endless documents and innumerable private meetings and public hearings involving the Commission, the European Parliament, national authorities, trade unions at national and EU level, in particular, the European Public Services Union, and many other activists and lobbyists. There have been proposals and Communications by the Commission, by the European Parliament and its various committees, as well as briefing papers from many of those engaged.

One important player has been the European Court of Justice, which has made crucial decisions concerning the use of labour, social and environmental standards in public procurement. The meaning of these decisions has also been the subject of dispute between the various players, often claiming support by the Court for different, and sometimes opposing positions. The most recent example has again inflamed the debate: the Commission claims that the Court's decision in Case C-513/99 on 17 September 2002, the "Helsinki bus" case, is consistent with its position, when environmental groups claim it requires an important change.

On 28 May 2002, the Council of Ministers adopted a proposal as the Member States' formal position. The text reveals some of the tensions which have emerged in the debate. It reflects the conflicting positions, appearing to make concessions to one side, while qualifying these concessions in order to please others. This text will be the subject of tough negotiations with the European Parliament and Commission over the coming months. Three examples illustrate how the new text reflects conflicting and contradictory positions.

This month's article is by guest author Brian Bercusson, Professor of Law at King's College, London and Director of the

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

1 "Contract performance conditions" and labour standards

The Preamble to the Council proposal, Recital 22, and Article 26A, appear to allow "contract performance conditions" related to labour standards. However, it has been argued that "contract performance conditions" are not the same as "contract conditions". For example, the Commission interprets the European Court's decision in Case 225/98, **Commission of the European Communities v French Republic**, 26 September 2000 (the Pas de Calais case) as permitting contract conditions relating to labour, but denies these are conditions in the contract or criteria for the award of the contract. This argument has been criticised as both not consistent with the Court's judgement, and absurd in practice. If contracting authorities can control labour standards by imposing contract performance conditions, then these seem no different from other contractual conditions. Again, on the one hand, the proposal accepts that "contract performance conditions" include "basic ILO Conventions", but does not specify which Conventions, so the scope of the labour standards that could be specified as contract performance conditions is not clear.

2 Mandatory labour standards

On the one hand, the Preamble, in Recital 22a, specifies that collective agreements apply during performance of a public contract. But, again, it is not clear which collective agreements and what is their permitted scope. Reference is made to the Posting Directive 96/71/EC, which applies in cross-border public contracts, and also allows for collectively agreed standards to apply, but with important limitations. However, the Preamble's promise of mandatory labour standards is not kept in the Articles of the directive. Instead, the closest thing is the option allowed for contracting authorities or Member States to provide information on mandatory labour standards (Article 27). On the other hand, non-compliance with collective agreements may constitute grave misconduct allowing for exclusion of a contractor (Article 46(2)(d)).

3 Award criteria

On the one hand, Recital 31 of the Preamble asserts that "it is appropriate to allow the application of two award criteria only", but offers protection of labour standards as one possible relevant criterion where the contract is awarded on the basis of "the most economically advantageous tender". Despite the Preamble's qualified reference to labour standards as a possible criterion for award of a contract, again, Article 53 does not refer at all to labour or social requirements. This despite the European Court's holding in the Pas de Calais case that such additional criteria are not excluded. Yet, on the other hand, the legitimacy of labour standards as award criteria for public contracts may be inferred from Article 54, which allows for rejection of abnormally low tenders after checking "compliance with the provisions relating to employment protection and working conditions in force at the place where the work or service is to be performed".

In sum, the Council's proposal is a recipe for future conflict. A commitment to labour standards on public contracts is just about visible, but it is hidden away in options which Member States and contracting authorities can choose. These include (i) observance of labour standards as contract performance conditions, (ii) information on labour standards for tenderers, (iii) exclusion of tenderers for violations of labour standards (grave misconduct), and (iv) labour standards as secondary award criteria. All these are couched in ambiguous language.

It would have been simple to formulate a commitment in unambiguous language to mandatory labour standards. There are a number of provisions in the Council proposal which clearly accept environmental standards (Preamble Recital 2a, Recital 17 and Articles 24(3)(b) and (5a) and Annex VI, paragraph 1, Recital 30b and Articles 49(2)(5A) and 50a)). Perhaps most frustrating is the explicit inclusion of "environmental characteristics" among possible contract award criteria in Article 53(1)(a), while labour standards and social criteria are not mentioned, although both environmental and social requirements are specified in Recital 31.

The Council's proposed directive could easily be adapted to labour standards. Instead, contracting authorities, tenderers and contractors are left in doubt and the European Court will have to tidy up the mess on a case-by-case basis. This may be better than nothing, but it does no credit to the Council.

A second proposal covering procurement contracts by entities in the fields of energy and transport is also under consideration. The debate will continue into the final months of 2002, when the European Parliament will give these proposals a second reading. This will highlight major differences between the European Parliament and the Council, which will have to be resolved in a Conciliation Committee. The struggle goes on…

Sex and the City

Julie Bower v Cheapside (SSL) Ltd (formerly Schroder Securities Ltd) ET (unreported)

In this widely publicised case, Thompsons acted for Julie Bower, funded by the EOC, in her claim for sex discrimination, equal pay and unfair dismissal against her former employer – a large city institution. It was one of the first cases to expose city employment practices to the light of an Employment Tribunal and resulted in the largest award for sex discrimination compensation of close to one and a half million pounds.

The case is also significant for all discrimination claims for its review of all aspects of case law on compensation and extrapolation of the present position. The Respondent withdrew their appeal to the EAT shortly before the scheduled hearing and so the principles set out in this decision remain unchallenged.

We speculated in an earlier LELR (April 2002 Issue 69) that the House of Lords judgment in **Kuddus v Chief Constable of Leicestershire** could open the door to exemplary damages in discrimination claims. The **Bower** decision confirms this. It is now clear that tribunals can award compensation to an Applicant in order to punish the Respondent in two situations.

- Firstly where there have been oppressive, arbitrary or unconstitutional actions by servants of the government (including eg. local authorities and the police).
- Secondly where the Respondent's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the Applicant (in order to teach the Respondent that wrongdoing does not pay).

The significance of such an approach is that an award is in addition to the compensation designed to compensate the Applicant for his or her losses. Until the **Kuddus** case, Tribunals were bound by earlier cases, that had ruled that exemplary damages could not be awarded for torts (such as sex, race and disability discrimination which are statutory torts) for which exemplary damages had not been awarded prior to 1964. As none of the anti-discrimination legislation was in force in 1964, exemplary damages could not be awarded against discriminators, the argument ran.

Bower sets out in clear and detailed reasoning, that exemplary damages are now available and considers the definition of the second category when they might be awarded. It extends to circumstances where the Respondent commits a tort (legal wrong) deliberately in contumelious disregard of another's rights in order to obtain an advantage which would outweigh any compensatory damages likely to be obtained by the victim. It would apply where a defendant calculates with cynical disregard that the money to be made out of his wrongdoing will probably exceed the damages to be awarded. It is not intended to be limited to precise mathematical calculations - the necessary element of the second category is that the defendant did direct his mind to the material advantage to be gained by committing the tort and came to the conclusion that it was worth the risk of having to compensate the plaintiff if he or she should bring an action. Profit includes a material advantage in a broad sense.

Although in the **Bower** case the Tribunal ultimately decide that the bank's conduct did not quite fall into the second category as they were not calculating to make a profit by their conduct, there will be many other cases where exemplary damages are now likely to be awarded.

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