Published by Thompsons Solicitors

CONTENTS

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 78 March 2003

Schools out

P -v- NASUWT [2003] UKHL 8 (House of Lords)

This case concerns two aspects of the convoluted legislation on industrial action: the definition of a trade dispute and the extent to which small accidental failures are permitted in the balloting process.

The case concerned industrial action by teachers who refused to teach a disruptive pupil who was excluded from school but reinstated on appeal.

The employers argued that this was not a trade dispute. The definition of trade dispute in section 244(1) of the Trade Union and Labour Relations (Consolidation) Act 1992 includes disputes relating wholly or mainly to terms and conditions of employment or the physical conditions in which workers are required to work and the allocation of work or duties of employment between workers.

The employers argued this was confined to disputes about rules governing employment rather than the application of those rules to particular facts. In other words, that the definition would cover a dispute on whether there should be a rule that teachers should comply with the directions of the head teacher, but not a dispute about whether they should comply with a particular direction of the head teacher.

The House of Lords rightly rejected this narrow and technical approach.

Lord Hoffman said that *"a dispute about what the workers are obliged to do or how the employer is obliged to remunerate them …is about terms and conditions of employment".*

Lord Bingham observed that the definition covered disputes "relating wholly or mainly to the job the employees are employed to do or the terms and conditions on which they are employed to do it" and that it was plain that the dispute in this case related directly to the job the teachers were employed to do.

The second issue concerned two union members who were accidentally left out of the ballot but were then called upon to take part in the action. It is worth mentioning that the ballot result was 26 in favour of action and none against.

In the Employment Relations Act 1999 the Labour government made changes to the law so that small accidental failures did not mean that an industrial action ballot lost statutory protection. But a mistake was made in the legislation. The cross-referencing was wrong and, on the face of it, calling on someone to take part in action when they had not been balloted was not covered by the new provisions, even if the failure to include them in the ballot was small and accidental. (The error in the statute will be amended in the government's review of the Employment Relations Act which we will report fully in next month's edition of LELR.)

The House of Lords decided that the error in the legislation did not matter. The union was protected anyway because the two members concerned were not *"denied entitlement to vote"* in the sense of being deliberately excluded from the vote, which would have been unlawful. Instead an accidental error meant they were omitted from the list of voters and this was not unlawful in the circumstances.

The decision also reinforces that it is lawful to call upon someone to take action if the reason they were not balloted is that they were not a member of the union or an employee of the particular employer at the time of the ballot. In those circumstances, it would not have been reasonable for the union to have believed at the time of the ballot that they would have been called upon to take part in the action.

THOMPSONS SOLICITORS

What's in a "week's pay"?

Evans -v- Malley Organisation LTD t/a First Business Support [2003] IRLR 156 (Court of Appeal)

The Working Time Regulations continue to produce a rich seam of cases. In Evans the Court of Appeal considered the meaning of a "week's pay" in the context of an employee who earned regular commission on top of his basic pay.

Mr Evans worked for First Business Support a firm of Employment Consultants (one who often appear in Employment Tribunals representing small employers. Mr Evans was a sales rep. He was paid a basic annual salary of £10,000 and on top he received commission on contracts he successfully obtained for his employers. His entitlement to commission was earned with a successful sale he did not see any commission until the new client had paid a percentage of the contractual sum to First Business usually up to nine months later. Mr Evans contract provided for holiday pay to be paid at his basic rate.

Mr Evans was suspended from work for allegedly being involved in a conspiracy with other colleagues to leave at the same time and work for a competitor. While on suspension he was paid at his basic rate of pay. Shortly afterwards he was dismissed. He complained to an Employment Tribunal that he was unfairly dismissed but also that his holiday pay during his employment had been calculated on the wrong basis as had his pay during his period of suspension. Both payments had been calculated on his basic pay of £10,000 rather than his pay including commission.

The Employment Tribunal rejected his claims but the EAT however allowed his appeal and found that his was entitled to be paid his working time holiday on a basis that included his commission. They did not determine whether he had been properly paid in respect of the period of disciplinary suspension but referred that matter back to the Employment Tribunal to hear what "suspension" with pay meant.

The Court of Appeal has now overturned this decision. They took as their starting point the provisions of the Employment Rights Act 1996, sections 221 -224 which are incorporated into Regulation 16 of the Working Time Regulations to determine the amount of a "week's pay". Section 221 applies where there are normal working hours and the employee's remuneration does not vary with the amount of work done in the period. Section 221 (2) provides that where the remuneration does not vary with the amount of work done in the period then a week's pay is the amount payable under the contract of employment in force. Section 221(3) provides for an averaging formula over 12 weeks where remuneration does vary with the amount of work done, and section 221(4) states "… references to remuneration varying with the amount of work done includes remuneration which may include any commission or similar payment which varies in amount".

The Court of Appeal found that section 221(2) applied, not section 221(4). The question is whether remuneration varies with work done in normal working hours. Here the amount of work was the same (the commission just reflected that work and was paid much later) and so Mr Evans came within section 221(2) and therefore could not include his commission payment. This means that just because a contract includes commission it does not necessarily fall within the wider averaging provisions of section 221(4). The Court therefore found that neither his working time or paid suspension cases succeeded.This case is also a warning for applicants to remember to include a claim under Regulation 14 for any working time holiday accrued but untaken at the time of termination in an originating application. Mr Evans failed to include such a claim and the courts refused to allow him to argue it at a later stage. It only looked at the calculation of the holiday pay he had actually received.

Docking wages

International Packaging Corporation (UK) Ltd -v- Balfour [2003] 11

In an economic down turn some employers choose to introduce measures like short time working to try and save jobs and weather the economic storm. If as a result workers are paid less than their contractual pay is there consequently an unauthorised deduction from wages which the workers are entitled to recover?

This question was considered in the case of **International Packaging Corporation -v- Balfour** and the EAT in Scotland answered the question with an emphatic "Yes". Mr Balfour and his co-workers were employed for a basic 39 hour week. There were falling orders and the company introduced short time working without agreement. They paid the workers for only the short hours they worked. The workers, supported by their union took claims to an Employment Tribunal complaining of unauthorised deductions from their wages.

The workers won their case at the tribunal and their employer appealed saying that the workers were being properly paid for the hours they were actually working. The EAT confirmed the decision of the Employment Tribunal that the unilateral introduction of short time working by the employer amounted to an unauthorised deduction from wages. A reduction in hours to be worked under a contract is a variation of that contract. Unless such a variation is allowed for either expressly or by implication in the contract, any actual deduction of wages will not be authorised by statute or by the contract. Any such variation and consequential reduction in pay could only be achieved by agreement either on an individual basis or where a trade union is recognised, collectively.

In this case there had in the past been collective agreements between the workers' trade union and management for short term working. The EAT was not prepared to find that these past agreements could lead to a finding that their was an implied term that the employer could impose short time working unilaterally. There was no power in the contract to enable the employer to unilaterally vary hours so wages had been wrongly deducted.

The lesson of this for advisers, is always to carefully check express terms in contracts permitting variations in hours and pay. In collective negotiations, such unilateral powers should be strenuously resisted. No doubt many employers' lawyers will already be redrafting contracts to give as wide powers possible to their clients.

It is also important to remember that a failure to object to a change of contract such as occurred here, can be deemed to amount to acceptance of the change. It is important to object to such a change and commence unauthorised deduction claims promptly so as not to be accused of affirming the breach of contract.

Trade unions and disability discrimination

When employees and trade unions refer to the Disability Discrimination Act 1995(DDA), it is invariably the obligations on employers that are the focus of attention. In line with this, many trade unions have rightly directed energy and resources in ensuring that employers comply with those obligations. What is sometimes overlooked is that Part II of the DDA (headed "employment") does not just impose obligations on employers. Sections 13 to 15 of the Act place extensive obligations on trade unions in relation to their members with disabilities. Increasingly, union members are seeking to enforce those rights. This article outlines the nature and extent of the legal obligations imposed by the DDA on trade unions, and considers some of the practical issues that are likely to arise.

Section 13 sets out the scope of the application of the Act to trade unions. It states that it is unlawful for a trade union to discriminate in relation to admission to membership of the union, or in relation to benefits of membership, or in subjecting the member to any other detriment. As with the entire DDA, the protection is only available to members who are "disabled" as defined in the Act. It must be remembered that this definition is broad and covers anyone who has a mental or physical impairment that has a significant effect on his or her normal day to day activities. Therefore members who are suffering, for example, from RSI, clinical depression, a bad back, chronic fatigue syndrome or dyslexia, may all be covered by the definition of disabled.

Sections 14 and 15 of the DDA then mirror the two definitions of discrimination that are imposed on employers: firstly, the duty not to treat disabled people less favourably unless the treatment can be justified, and, secondly the duty to carry out reasonable adjustments to prevent a particular disability putting a disabled person at a disadvantage.

The less favourable treatment provisions came into effect in December 1996. The duty to make reasonable adjustments to arrangements came into effect in October 1999, with the exception of the duty to make adjustments to physical features of premises. The duty to adjust the physical features of premises will come into effect in October 2004.

LESS FAVOURABLE TREATMENT

Section 14 provides that it is unlawful to treat a member less favourably for a reason which relates to their disability unless that treatment can be justified.

The duty on unions not to treat disabled members less favourably is fairly self-explanatory. So for example it is likely to be unlawful for a union officer to decide not to send out campaigning or other material to a member who is visually impaired, on the basis that they would not be able to read it so there would be little point in sending it. Certain aspects of the duty are however easy to overlook. For example the fact that a union was not aware that a particular member had a disability would not amount to a defence: as with the parallel duty on employers, knowledge of a disability is not necessary for the less favourable treatment provisions of the Act. Arguably, it is easier for an employer to comply with this in that an employer is likely to be more aware of the likely disabilities of its staff than a trade union officer is likely to be aware of any disabilities of the union's members, many of whom the officer may not have had any previous contact with at all. However, the point here is that the DDA does expect some anticipatory foresight on the part of both employers and unions, and a union is expected to have anticipated at least the most common types of disability, or possibly, depending on the circumstances, enquired of a particular member or group of members whether they have any particular disability that needs to be taken into account. On the

other hand, in circumstances where the disability was hidden and could not reasonably have been anticipated by the officer, then it is likely that the officer would be able to rely on this fact as justification: as with the employment sections, a union will not be regarded as having treated a member less favourably if they can show that the treatment was justified (section 14 (1) (b)).

The less favourable treatment provisions, like all the other sections dealing with unions, imposes duties not just on the employed staff of the union, but also lay representatives and officials such as shop stewards.

THE DUTY TO ADJUST

Section 15 imposes obligations on trade unions to carry out reasonable adjustments to both arrangements and – as from October 2004 – the physical features of premises occupied by them.

As with the sections applying to employers, it is this section which currently imposes the most extensive obligations on unions. The duty to adjust, which is dependent on the union having actual or constructive knowledge of a disability, applies wherever the union's arrangements place a member at a disadvantage by reason of their disability. Obvious examples would include visually impaired members who cannot read union circulars, members who are wheelchair users who cannot attend branch meetings held in upstairs rooms, or members who are deaf and cannot therefore hear education sessions or branch meetings. A recent Tribunal claim concerned a wheel chair user who had difficulty accessing the conference hall of the union's annual conference.

Stress cases often cause problems. Although stress in itself is not a disability, anxiety and depression may be. The sorts of adjustments that a union may be required to make in these cases might, for example, involve allowing more time for meetings with members, or face to face communication in meetings as opposed to correspondence.

The Government issued a Code of Practice in 1999 dealing specifically with the obligations on trade organisations, a definition which includes trade unions. The Code provides a number of illustrations of the sorts of adjustments that a Tribunal would be likely to regard as reasonable.

The obligation on the union to adjust is not absolute, and in all cases the issue which the union has to determine is what adjustment to their arrangements would be "reasonable". If an adjustment is unreasonable, then the union is not under an obligation to carry it out.

The Government issued a Code of Practice in 1999 dealing specifically with the obligations on trade organisations, a definition which includes trade unions. The Code provides a number of illustrations of the sorts of adjustments that a Tribunal would be likely to regard as reasonable. One example relates to the provision of free transport to a union conference: normally free minibuses are provided for members to enable them to attend conference. However, the minibuses provided are not wheelchair accessible, so a member who is a wheelchair user cannot access the benefit of free transport. The Code states that this is likely to be regarded as a breach of the Act. Another example relates to a free telephone helpline which members with a hearing impairment cannot use. The Code suggests that in these circumstances the same service could be provided by email or textphones.

The TUC's Equal Rights Department issued some very useful guidance to unions about compliance with the adjustment provisions of the Act in 1996, dealing in particular with accessibility of union materials, such as written circulars and websites.

The 1999 statutory Code of Practice is currently being rewritten to coincide with the introduction in October 2004 of the new duty to adjust premises. The new duty will require unions to consider such matters as how premises should be adapted to accommodate wheelchairs, and sight impaired visitors.

To comply with both the spirit as well as the detail of the DDA, unions have to take a proactive attitude towards disability discrimination, to identify members' needs and take action accordingly. The Code recommends that unions undertake an audit of membership to ascertain the numbers of disabled members and their needs. It is wise advice which could ensure that unions who do so much to use the DDA to advance the rights of their disabled members in employment, do not find themselves on the wrong end of litigation under the DDA.

Family friendly or just another paper right?

Qua -v- John Ford Morrison Solicitors [2003] IRLR 184 (EAT)
Darlington -v- Alders of Croydon (Unreported ET. C/no. 2304217/01)

The Employment Rights Act 1996 at Section 57A gives employees the right to take unpaid time off work to care for or make arrangements in respect of a "dependant".

Working parents and employees caring for dependents breathed a sigh of relief when this legislation was introduced. It was hoped to be another thread in the web of support to help employees balance their work and home commitments.

How real is this right and how are Tribunals interpreting it?

There is good and bad news from the cases so far.

In the recent case **Qua -v- John Ford Morrison Solicitors** these issues were considered by the Employment Appeal Tribunal.

Ms Qua, a single mother, worked as a legal secretary from the 5 January 2000 until she was dismissed just over 10 months later on 27 October 2000. The employer stated she had been dismissed because she had been absent without authorisation on a number of occasions. She claimed she had been automatically unfairly dismissed for exercising her right under Section 57A of the ERA to take time off to care for a dependant. She said the majority of her absences had occurred owing to ongoing medical problems that her son had been suffering. She argued she had always informed the employer of the reason for her absence and that on each occasion she had taken a reasonable amount of time off work to deal with the problem.

Ms Qua lost her case at the Employment Tribunal on a number of grounds. The Tribunal accepted that she had taken time away from work on 17 days because of her son's medical problem. On 14 of those days she had not attended work at all. The Tribunal accepted on each occasion her son had been too unwell to attend school. However the Tribunal said that on a number of occasions Ms. Qua had failed to inform the employer of the reason for her absence. They also said that she had failed to update her employer daily on her situation when she had been away for more than one day. The Tribunal concluded

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

that her failure to operate this procedure properly meant that her right to take time off under the Act had not arisen at all and she had not been automatically unfairly dismissed.

The Tribunal then considered whether Ms. Qua had taken "reasonable" time off , taking action that was "necessary" to perform a task listed in Section 57A. It noted that the Act refers to the care of a dependant who "falls ill" not one who is "ill". In its view it said that an employee was not necessarily entitled to take time off to provide care personally for an ill dependant but rather to take time off to make arrangements for such care to be provided by others. Finally the Tribunal found that the amount of time Ms. Qua had taken off had not been reasonable. When reaching this decision it took into account the fact the employer was a small firm and that Ms. Qua's absences had caused disruption and inconvenience.

This was clearly an extremely disappointing decision. Ms. Qua went on to appeal.

The good news is that the EAT have submitted this case back to a freshly constituted Tribunal. It specifically provided guidance as to the meaning of the terms "necessary" and "reasonable" in Section 57A. In its view when deciding whether an action is necessary, factors to be taken into account include the nature of the incident which has occurred, the relationship between the employee and the dependant in question, and how far anyone else can provide assistance.

When deciding what constitutes a "reasonable" amount of time off, the circumstances of the individual employee should be taken into account. By contrast, the disruption or inconvenience caused to the employer is not relevant.

The EAT then considered the specific right to take time off to provide assistance when a dependant falls ill upon which Ms Qua was relying. Here the interpretation of the EAT was less positive. It stated that this sub-section is concerned with unexpected events and does not entitle employees to take time off beyond a reasonable amount necessary "to deal with the immediate crisis" as it does not entitle an employee to provide personally long term care for a sick child. The EAT noted that a parent who has attained one year's service and wishes to care for a sick child personally is entitled under Section 76 of the ERA and the Maternity and Parental Leave Regulations, 1999 to take parental leave. In order to do so however, it fails to point out that this right should normally be exercised before a child's fifth birthday. The age of Ms Qua's son is not given but there is reference to his absence from school and therefore it is highly likely that unless he was a disabled child, Ms. Qua would not have had the benefit of this right even if she did have the sufficient service, which she did not.

The EAT continued to give further guidance which restricts the applicability of the right. Where a child is suffering from a recurring illness it is said that the number, length and dates of the previous absences should be taken into account when determining whether further time off is reasonable and necessary. It also stated that when a recurring medical condition causes a child to become unwell, such a child would not have fallen ill unexpectedly.

Finally the EAT helpfully stated that the question of when an employee will be entitled to take time off under Section 57A to care for a child suffering from a long term or recurring illness would be determined with reference to the facts of the individual case.

So although this case provides us with some useful guidance it shows that the EAT is still construing the legislation in a restrictive manner.

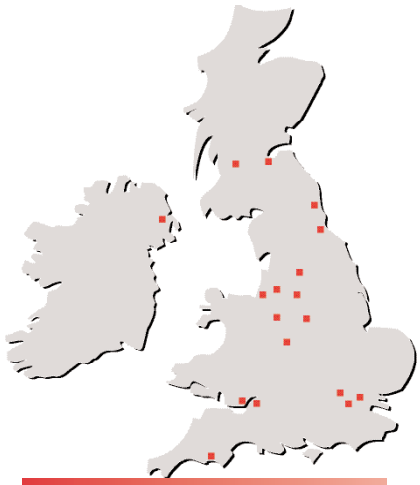
By contrast, a more positive note was sounded in an unreported Employment Tribunal case, **Darlington -v- Alders of Croydon**. The facts in that case were that another single mother with less than one year's service was sacked when she sought five weeks' unpaid leave in accordance with the Regulations following an accident where her daughter suffered a fractured skull. The hospital advised that although the applicant's daughter was allowed home, she could not return to school until the fracture was mended and extreme care must be taken to prevent any risk of knocks or bumps during the recovery process.

The applicant informed her employer of the circumstances but despite this was sacked.

The Tribunal in this case considered the horrific circumstances of the daughter's accident, noted the fact the applicant was a single parent with two other children and no family assistance, and was prepared to find that the time sought by the applicant was reasonable within the meaning of 57A.

Let us all hope for the sake of effective implementation of family friendly policies that Tribunals will now consider the guidelines issued by the EAT and look at the facts in individual cases but be prepared to come to decisions such as the Tribunal in the Darlington case rather than the original Tribunal in the case concerning Ms Qua.

Sick of no notice



Scotts Company (UK) Ltd -v- Budd [2003] IRLR 145

Mr Budd brought a claim for pay during his statutory notice period, despite being on long term sick absence and having exhausted his contractual entitlement to sick pay.

Mr Budd's original contract of employment provided for termination on three calendar months notice. A new staff handbook issued by his employer in 1997 provided that "staff are entitled to a minimum of four weeks notice from the company. The statutory minimum period of notice from the company is that after fours years' service, staff are entitled to one additional week's notice for each completed year of service up to a maximum of twelve weeks after twelve years' service."

In February 1998, Mr Budd went on sick leave. After one yearof absence , he exhausted his contractual entitlement to sick pay. On 10 May 2000, he received a letter from his employers giving notice that, in accordance with his contractual entitlement to thirteen weeks' notice of termination, his employment would terminate on 4th August 2000.

Mr Budd applied to the Tribunal, stating that he believed he was entitled to be paid during his notice period. Under s.88(1)(b) of the Employment Rights Act 1996, "If an employee has normal working hours under the contract of employment in force during the period of notice and during any part of those normal working hours…(b) the employee is incapable of work because of illness or injury…the employer is liable to pay the employee… a sum not less than the amount of remuneration for that part of normal weekly hours calculated at the average hourly rate of remuneration produced by dividing a week's pay by the number of working hours".

The employer argued that these provisions did not apply. They relied on s.87(4) ERA 1996, which provided that s.88 to 91 ERA 1996 did not apply, if the notice given by an employer to terminate a contract was at least one week more than statutory notice. The employer argued that under the terms of Mr Budd's contract, he had been given thirteen weeks' notice and therefore where the employer had given one week more than the required statutory requirement, payment for the notice period did not apply.

The Employment Tribunal accepted the employer's interpretation, but found that the contractual provisions regarding notice had been varied in 1997. They found Mr Budd was contractually entitled to only twelve weeks' notice and therefore entitled to pay during the notice period.

The employers appealed. The EAT agreed that the right of the employee to be paid a week's pay of each week of the statutory minimum period of notice did not apply where contractual notice which the employer was required to give to terminate a contract was at least one week more than the statutory minimum notice. But the EAT decided that the Employment Tribunal had erred in deciding that the Applicant's contractual period of notice had been reduced by variation from thirteen weeks to twelve and therefore he was not entitled to pay during the notice period.

Although Mr Budd did not succeed, this decision highlights that where employees' contracts are terminated whilst on long term sick leave and they have exhausted their contractual entitlement to sick pay, they can still receive pay during their notice period, subject to them receiving statutory notice. This could offer an employee some financial package where there is little room to argue any compensation at all.

CONTRIBUTORS TO THIS ISSUE
STEPHEN CAVALIER
NICOLA DANDRIDGE
VICTORIA PHILLIPS
KATE ROSS
ANITA VADGAMA

EDITOR **MARY STACEY**
PRODUCTION **ROS ANDERSON-ASH**
NICK WRIGHT
PRINTED BY **TALISMAN PRINT SERVICES**

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

VISIT US AT: **www.thompsons.law.co.uk**
OR
CONTACT US AT: **info@thompsons.law.co.uk**