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FOR THE CAC to make decisions on cases is one thing, but their decisions are susceptible to judicial review. The lessons from the past are that the High Court is not shy of overturning CAC judgments and that employers in particular are keen to use the High Court to prevent a trade union from gaining recognition. The CAC has now faced its first judicial review applications under the new statutory procedure.

In ISTC v Fullarton Computer Industries the employer took out judicial review proceedings to overturn a panel's decision to award recognition without a ballot where the union had 51% of members. Even though the density of trade union membership was only just a majority of the workforce, the panel decided that to view that fact as a reason to order a ballot would have the effect of raising the threshold of trade union members required, which is clearly set out in the legislation as a majority and not something higher. There was also an issue as to what date the assessment of trade union members should be made. This is particularly relevant where the workforce is constantly fluctuating as the legislation is silent as to the date when the membership levels should be judged for the purposes of deciding whether to order a secret ballot.

The judicial review failed. The Scottish Court of Session respected the panel's judgment and said it would be inappropriate for the court to substitute its view for the industrial jury of the CAC. An appeal against the judgment was withdrawn with Fullarton stating their intention to build a new relation with the union and accept the fact of recognition.

In BAJ v Essex Chronicles, the British Association of Journalists (a non-TUC affiliated trade union) sought statutory recognition with one of the *Daily Mail* group papers. The employer did not want to recognise the union. When the panel decided to accept the application on the basis of an agreed membership check that showed just under 50% of the workers in the bargaining unit were members of the union, they sought a judicial review of the decision. They challenged the conclusion of the panel that a density of 49% union members established likely majority support for recognition, and objected to the membership check results. The employer had consented to their list of workers in the proposed bargaining unit being compared with the union's list of members without either party seeing the other's list. The High Court rejected the application for judicial review on the papers. The employer sought a hearing to renew its application for leave to judicially review the CAC panel decision.

In the meantime, the CAC process continued and the union lost the ballot. As the union had not gained recognition via a secret ballot under the statutory procedure, the employer abandoned its judicial review.

The Central Arbitration Committee received its 100th application for statutory recognition from a trade union on 3 August 2001, just 15 months after the new law came into force.

This is not the flood of applications that some anticipated, but it is a respectable workload, and one that is well manageable within the CAC's resources. It would seem that statutory recognition has now become an accepted feature of the industrial landscape.

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Term time workers fall through the net

Banks and Stafford v Chief Adjudication Officer
House of Lords June 2001

UNISON'S TEST case on whether term-time only workers are entitled to claim job seekers' allowance has unfortunately been rejected by the House of Lords. However, the House of Lords emphasise the extreme financial hardship this conclusion entails for term-time workers and increases the pressure for amendments to the social security legislation.

Mr Banks and Mr Stafford were special needs assistants working term-time only. With Unison's support, they claimed that they should be entitled to claim job seekers' allowance during school holidays. The Doncaster Social Security Appeal Tribunal refused their claims, as did the Court of Appeal. They both appealed to the House of Lords.

Under section 124(1) of the Social Security Contributions and Benefits Act 1992, Mr Banks was entitled to claim job seekers allowance if:
(i) he had no income or his income did not exceed "the applicable amount";
(ii) he was not engaged in "remunerative work"; and
(iii) except in certain circumstances-
(a) he was available for, and actively seeking, employment.

It was accepted that Mr Banks qualified under (i) and (iii). The issue was therefore whether or not he was engaged in "remunerative work".

Regulation 5, as amended of the Income Support (General) Regulations 1987 and Regulation 53 of the Jobseeker's Allowance Regulations 1996 define the circumstances in which someone like Mr Banks is to be regarded as engaged in "remunerative work". If Mr Banks was employed for an average of at least sixteen hours per week, then he would be treated as engaged in remunerative work. For this purpose, the whole school year had to be looked at as a "recognisable cycle of work". School holiday periods, however, had to be discounted.

Unison argued that Mr Banks could only be treated as engaged in "remunerative work" when he was actually working and that the definitions in the 1987 and 1996 regulations did not mean that he was necessarily to be treated as engaged in "remunerative employment" throughout the whole calendar year.

The House of Lords disagreed. It found that Mr Banks was to be treated as engaged in "remunerative employment" throughout the "recognisable cycle of work" – ie the calendar year. This meant that he could not treat the school holidays differently, and he could not satisfy criterion (iii) set out above. His appeal therefore failed on a majority decision.

Although finding against Mr Banks, each of the Law Lords questioned whether this result was socially desirable, effectively inviting the Department of Social Security to change the law. Lord Scott, dissenting, thought that Mr Banks' appeal should succeed. He said that Mr Banks' annual income of £3,367 was "surely below poverty level", and recognised that he had little prospect of supplementing his income when he would only be available for other work during the school holidays. This was a "poverty trap sequence that the Social Security Act 1986 was intended to cure".

The Department of Social Security must now to remedy this long-standing injustice in the social security system.

NEXT MONTH **Labour and European Law Review will include a comprehensive listing of useful employment and employment law related websites**

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

Regulations delayed

Council Directive 99/70/EC concerning the framework agreement on fixed-term work concluded by the ETUC, UNICE and CEEP

THE EUROPEAN Directive on fixed term work was agreed in 1999 and was due to be implemented by the UK by 10 July 2001. The Government has consulted on draft regulations. The closing date for the consultation was 31 May. The DTI website somewhat coyly says "the UK will be taking extra time to implement it [the Directive] and the fixed term regulations will not be coming into force on 10 July this year. The directive gives member states that have 'special difficulties' up to an extra year to implement." It is not clear what "special difficulties" the DTI think there are!

The draft regulations were disappointing in many ways. Thompsons along with many trade unions and the TUC responded to the government's consultation document. Our main areas of concern are that the regulations as drafted would only apply to "employees" narrowly defined rather than the wider definition of "worker" used in most European employment legislation. Also the current regulations would exclude equal pay and pensions. This would dilute the original purpose of the Directive and leave many fixed term workers without legal remedies.

The delay in implementation could be positive if the government uses the Employment Bill as an opportunity to bring forward enabling legislation to ensure that the regulations can apply to pay and pensions in the same way as the government took enabling powers in the Employment Relations Act 1999 to extend the remit of the Part Time Work Regulations to pay and pensions.

In a recent survey the TUC have found that temporary workers are more likely to be : women (54%); part time workers (47%); under 30 (44%); and from ethnic minorities (11%). Full details are available at www.tuc.org.uk.

Lucy Anderson from the TUC said "It is important that this issue is included in the forthcoming Employment Bill. The TUC is still campaigning to get permanent rights for temporary workers".

TUPE consultation document published at last

AFTER MANY months of waiting, the DTI has published its consultation paper on amendments to the TUPE Regulations. The consultation period lasts until 15 December 2001.

The main proposals, on which views are sought, are:

- options for new rules as to when TUPE applies, particularly in contracting-out cases;
- proposals for better protection of occupational pension rights;
- greater flexibility when applying the Regulations to transfers of insolvent businesses, to make it more attractive for potential buyers to rescue those businesses and save jobs (including that some – albeit limited – liabilities of insolvent transferors be met from the DTI National Insurance Fund);
- better guidance for both employees and employers on the extent of protection against transfer-related dismissals – in particular, clarifying the 'ETO' defence;
- making it clear that TUPE does not preclude transfer-related changes to terms and conditions, where the changes are made for an ETO reason; and
- a legal requirement for the old employer (transferor) to give the new employer (transferee) proper notification about the rights and obligations being transferred.

The full consultation document, and information about the consultation process, can be found at www.dti.gov.uk/er/tupe/consult.htm.

Thompson's response will be available from the Employment Rights Unit. Contact info@thompsons.law.co.uk

What's the damage?

Gbaja – Biamila v DHL International (UK) LTD & Ors 2000 ICR, EAT
Alexander v Home Office [1988] ICR 685, EAT
ICTS v Tchoula [2000] IRLR 643, EAT
Virdi v Commissioner of the Metropolitan Police (2001), ET

IN RECOGNITION of the damaging effect that discrimination can have on individuals, legislation provides that damages can be awarded for any injury to the applicant's feelings in Employment Tribunals. The cases dealing specifically with damages in discrimination show a wide range of variation in awards. This article considers the factors and principles which tribunals should apply in calculating the award, and gives some pointers for estimating the appropriate level of an award.

Whilst the term "Injury to feelings", is used in the Race, Sex and Disability Discrimination Acts, it is not defined. In practice it covers a wide range of suffering, from feelings of shock and upset to complete nervous breakdowns. The most fundamental point is that the award is subjective and the level of damages depend on how any particular individual had been affected. Although experience suggests that many applicants do not want to focus on their feelings, but on the wrong done by the employer, damages for discrimination are not punitive or deterrent, and an award should not be influenced by the Courts feelings of indignation at the way that the applicant has been treated by their employer.

Of course, the type of injury to feelings will vary. A stoical applicant may have a greater awareness of discrimination and react with anger and a determination to pursue the employer for a remedy, whilst an applicant who has placed faith in an employer's equal opportunities promises may be find their illusions shattered and their health severely affected. Both will have suffered an injury to their feelings, though the manifestations are different, and both should be compensated.

Advisors need to explore the wider effect that discrimination has had on the applicants life and work. A loss of confidence and sense of failure at work may lead to increased headaches, lack of concentration, associated sleep loss, tearfulness, depression, loss of appetite, a deliberate change in appearance, or a loss of interest in friends, or activities which have previously been enjoyed. Many applicants talk of feeling undermined, and even if they manage to cope at work report a loss of interest in their family life and activities outside work.

In considering how serious the injury to feelings is, the evidence of the applicant will obviously be central. However, courts are increasingly placing great emphasis on medical evidence, as an indication of, for example, the seriousness of sleep loss or headaches.

However, since applicants often also have a claim for damages for personal injury, which will specifically not include an award for shock, or hurt feelings unless it leads to a recognised clinical condition, courts can make an award for injury to feelings with no medical evidence, if they accept that the applicant has suffered the effects described. Where there is no medical backup, evidence from other family members, or friends, or work colleagues, who may have observed changes in behaviour and mood will be valuable.

The length of time that a person has suffered and will continue to suffer needs consideration, since this will affect the level of damages. To suffer an injury to feelings, a person needs to know that they are being discriminated against. Therefore, damages can start to run from the time that an applicant realises, or suspects they are being discriminated against.

Injury to feeling can include damage to reputation either in work or outside work, if this causes associated humiliation and distress. In Virdi v Commissioner of the Metropolitan Police, the police officer whose employers published allegations that he had sent himself racist hate mail in the national press, was compensated by the Employment Tribunal on the basis that he had suffered something akin to libel.

Describing the nature of the injury is the first stage, the second is determining the level of the award. In Alexander v Home Office [1988] IRLR 190, the Court of Appeal, outlined the principles a tribunal should bear in mind when considering how much to award. Firstly, courts must bear in mind that whilst awards must compensate for actual loss, they should not be so high as to appear as untaxed riches, but should be sufficient to reflect society's condemnation of discrimination. Awards for injury to feeling should bear some similarity to the levels of awards made in personal injury cases in general and that the everyday value of the award should be borne in mind. Lastly, it was stated that there is a need for public confidence in the level of awards for discrimination.

In practice, this translates to an inexact science, and awards for discrimination have stayed low, with most awards being below £10,000, unless, as in Mr. Virdi's case, there are very particular facts which take awards up to and above £20,000.

However, more recently two different courts of the EAT have expressed contrasting views of the approach that tribunals and appeal courts should take to quantification. What is common ground, is that the EAT should only interfere with a Tribunal award, if the decision is based on a wrong principle of law, the facts have been misapplied or if the tribunal have made a wholly erroneous estimate of the damages suffered.

In Tchoula , the EAT accepted that they had to look for other similar cases, with which to compare, and then decide whether the tribunal had made a wholly erroneous award. To do this, they looked at a range of cases, of differing factual backgrounds, different types of discrimination, and different levels of award. They then divided the cases into higher and lower level cases. The cases in the higher category attracted awards for injury to feeling of upwards of £20,000, whilst those in the lower category, attracted awards of below £10,000.

However, any comparative approach relies upon accurate available case analysis, and care must be taken. Firstly, reported cases which have been appealed will focus on the amount of the award, and the type of discrimination, rather than the individual's evidence of injury. Since comparison will only be useful if the same or similar level of injury has been experienced, care needs to be taken in selecting appropriate cases. This leads to the second problem, which is that, unlike in personal injury cases, there is no accepted body of cases law on damages for discrimination. Noting these difficulties, in Gbaja- Biamilla Mr. Justice Lindsey commented,

"Circumstances can vary dramatically from cases to case. In such an area consistency, however desirable in general may prove to be an elusive chimera and is likely to be preferable that an Employment Tribunal, relying on that experience and good sense, should pay more respect to doing justice to the case before it."

This brings us full circle, to the subjective nature of the awards. Tribunals have power to make significant awards for injury to feeling, and will do so where there are factors to justify them. In general however, awards remain low, with the difference between an award of £3,000 and £7,000 often depending on the Tribunal's discretion.

This month's guest author is Catherine Rayner, barrister at Took's Court Chambers.

Statutory equality duty

Section 75 Northern Ireland Act 1998 Guide to the statutory duties, Practical Guidance on Equality Impact Assessment published by the Northern Ireland Equality Commission

IMAGINE IF all public bodies were required by law to equality proof their work by reference to gender, race, disability, religion and other potential grounds of adverse impact. Such a new wide-ranging duty has already been introduced in Northern Ireland as part of the 1998 'Good Friday Agreement' and is at a early stage of implementation.

The statutory equality duty replaced the previous more limited 1993 PAFT *(Policy Appraisal & Fair Treatment)* guidelines. PAFT had been much criticised on grounds including the lack of a statutory basis; the lack of any adequate monitoring system; the very uneven response across public bodies; its limited remit which did not extend to many public bodies including local authorities; the lack of consultation and transparency; and inadequate resourcing.

A more elaborate system is now in place which appears to have the potential to have a real impact on inequality. But the process has only just begun and already both public bodies and, to an even greater extent, those who are being consulted at every stage of the process are feeling the strain.

The section 75 duty

Under section 75 of the Northern Ireland Act 1998 a public authority in carrying out it's functions must 'have due regard to the need to promote equality of opportunity' between persons of different religious beliefs, political opinions, racial groups, age, marital status, sexual orientation, gender, those with a disability and those without, and those with, and those without, dependants. The 'Guide to the statutory duties' describes the promotion of equality of opportunity as entailing more than the elimination of discrimination. It is stated to also require proactive measures to secure equality of opportunity between groups and to enable action to redress inequalities of opportunity.

Section 75 also creates an additional duty to 'have regard to the desirability of promoting good relations between persons of different religious belief, political opinion or racial group'. The two duties are seen as complementary as social cohesion is seen as requiring that equality should be reinforced by good community relations. However in the event of any conflict between the two duties, the 'equality of opportunity' duty is to take precedence over the 'good relations' duty.

The Act requires public bodies to produce an 'Equality Scheme' stating how they propose to fulfil these duties. This must be submitted to the Equality Commission (which also has a remit for all areas of discrimination law in NI) for approval. All such schemes must conform to detailed guidelines as to form and content produced by the Commission and must be reviewed by the public body within five years.

Public bodies are also required as part of the overall process to engage in wide-ranging and continuing consultation in the process of developing their Equality Schemes; and to produce 'equality impact assessments' to consider particular policies, examine the extent to which they will promote equality of opportunity and consider any adverse impact on the protected groups.

The Equality Commission is required to keep under review the effectiveness of the duties imposed by section 75; to offer advice to public authorities in connection with those duties; and to generally facilitate and monitor the operation of the system including preparing guidelines on Equality Schemes, approving Schemes, investigating complaints of failure to comply with an approved Scheme, and producing an annual report on the operation of the equality duty.

Mainstreaming Equality

There can be little doubt about the potential impact of the equality duty. The Equality Commission's 'Guide to the statutory duties' states at the outset that 'The new statutory duty makes equality central to the whole range of public policy decision-making.' It

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refers to this as 'mainstreaming equality' and states:

Experience in Northern Ireland and elsewhere shows that questions of equality may easily become sidelined… Effective attention to mainstreaming addresses this problem, by requiring all public authorities to engage directly with equality issues at an early stage of policy development. This is complementary to making more effective those measures adopted specifically to tackle discrimination, such as anti-discrimination law'.

The mainstreaming of equality should also ensure that public bodies comply with the obligation on public authorities under the Human Rights Act 1998 not to act in a way which is incompatible with the European Convention of Human Rights, including the right to enjoy Convention rights without discrimination.

Consultation overload?

One ironic feature of the new system is that the very success of the critics of PAFT and, in particular, the correct insistence of the trade union movement, voluntary and community sector that there be meaningful consultation, has resulted in layers of consultation which could threaten the feasibility of the process. This has been described by a leading equality campaigner as 'the curse of the answered prayer'.

For example, in the first year since Equality Schemes were submitted to the Equality Commission, the Irish Congress of Trade Unions has been consulted about 120 Schemes currently in the system. This has involved consultation in the drafting of the scheme, on the final Scheme submitted to the Equality Commission, on the screening process to decide which policies to subject to an equality impact assessment, and on the outcome of these assessments. While this process rolls on another batch of new schemes are being produced. Similarly, voluntary organisations with a remit over a range of areas including ethnic minority groups are trying to respond to a deluge of (welcome) consultation. This presents enormous practical and resource problems and, of necessity, organisations are having to prioritise and participate in a more limited way than they would prefer. Similarly the volume of consultation puts strains on public bodies.

A partial solution to the consultation dilemma which is beginning to emerge is that public bodies and those to be consulted should better co-ordinate the consultation process. Already there are good examples of bodies coming together in partnerships and networking to consult with affected groups and organisations in different geographic areas. The creation of Health Forums in two Health Board areas is one example. Ultimately there is a resource issue to be addressed by government – if the system depends on meaningful consultation then there is an onus on government to seek to ensure that the consultation process is workable by making resources available for that purpose.

Current Situation

One vital aspect of the equality duty is the equality impact assessments. At this stage most authorities should be nearing the end of a consultation to help them identify and prioritise those policies which have a significant impact on equality. The purpose of an equality impact assessment is to examine the extent to which particular policies will promote equality of opportunity and to consider any adverse impact on the various groups covered within Section 75. If there is such an impact, the authority must consider how they might reduce it and look at alternative policies which might fulfill the same function while promoting equality of opportunity. This process must be conducted in consultation with those affected by the policies and this highlights the need for the effective involvement of the voluntary, community and trade union sectors.

The Equality Commission has established an Advisory Group made up of public, trade union and voluntary sectors which has worked with consultants to produce practical guidance on equality impact assessments. The commission is also to commence a training programme mainly targeted at the trade union and voluntary sectors to help enable their full participation in this process.

Public bodies will also be required to set out their procedure for dealing with complaints about the implementation of their scheme in an accessible and transparent way. Monitoring and analysis of complaints from particular groups should be a good indicator of how a policy is impacting on that group and may trigger the Equality Commission's use of its power to investigate complaints of a failure by a public authority to fulfill its approved equality scheme.

The new duty provides an opportunity for all aspects of public policy and practice to be inclusive of the needs of all members of the community and could be a historic milestone on the road to promoting equality in Northern Ireland. However, we are only at the beginning of this process. It will only be when the equality schemes have been fully implemented that we will be able to judge how effectively

they have achieved their purpose.