Published by Thompsons Solicitors

CONTENTS

1 WORKING TIME **2** STATEMENT OF TERMS OF EMPLOYMENT PROTECTIVE AWARDS **3** COLLECTIVE AGREEMENTS **4** HEALTH & SAFETY **6** TRIBUNAL PROCEDURE **8** INDUSTRIAL ACTION

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ISSUE 59 June 2001

Summer holiday for all

R v Secretary of State for Trade and Industry ex parte BECTU, Case C-173/99, European Court of Justice 26 June 2001

BECTU HAS become the first UK union successfully to challenge the government before the European Court and has secured the right to paid annual leave for workers on short-term contracts.

The Court ruled that the requirement that workers had to be employed for thirteen consecutive weeks to qualify for paid annual leave was unlawful. The UK Working Time Regulations did not properly implement the EU Working Time Directive.

The judgment stresses that the entitlement of every worker to paid annual leave must be regarded as a particularly important principle of Community social law. It derives from the Community Charter for the Fundamental Social Rights of Workers (1989). Four weeks' paid annual leave is a social right directly conferred by the Directive on every worker as the minimum requirement necessary to ensure protection of health and safety.

The Court said that a qualifying period excluding workers in the first 13 weeks of employment negates an individual right granted by the Directive and is incompatible with the objective of the legislation. The national rule was manifestly incompatible with the Directive.

It was rightly pointed out that rules such as the 13 week qualifying period are liable to give rise to abuse because employers might be tempted to evade the obligation by employing more frequently on short-term contracts. There is plenty of evidence that this is what has happened in the UK. The Court emphasised that short-term contract workers are often more vulnerable than other categories of workers and it is all the more important that their health and safety is protected.

It is accepted that there may be some qualifications on when leave may be taken, but there can be no exclusion of the right to leave. The Court rejected the UK's arguments to the contrary as based on purely economic considerations.

The consequence of the judgment is that the 13 week qualifying period is unlawful and must be deleted.

The Government immediately issued a consultation document on amendments to the Regulations to introduce an accrual system. This would mean that a full-time worker had an entitlement to two days leave after working one month. It is not clear what rights the worker would have in that first month – either in respect of taking leave or in respect of payments for leave accrued but not taken when the engagement comes to an end. Unless workers genuinely acquire an entitlement to paid annual leave from day one, the amended law will not comply with the Directive as interpreted by the Court.

There is one further point. The Court describes the right to paid annual leave as "a social right directly conferred by the Directive" and an "individual right expressly granted by the Directive". This suggests that the ECJ regards this as a right having direct effect against state employers, contrary to the view taken by the Court of Appeal in **Gibson v East Riding of Yorkshire** (LELR 31, February 1999)

THOMPSONS SOLICITORS

Spell it out

Lange v Georg Schunemann [2001] IRLR 244

OVERTIME IS a thorny issue – both whether a worker is acting in breach of contract by refusing to work overtime and from the opposite perspective whether an employer is contractually obliged to offer and pay for overtime worked. Often there is a lack of clarity on the position in workers' contracts and statement of terms of employment.

The issue has now been considered by the European Court of Justice in **Lange v Georg Schunemann** under an employer's obligations under the Proof of Employment Relationship Directive (No 91/533). The requirements of this little publicised Directive are set out in UK law in Section 1 of the Employment Rights Act 1996, statement of particulars of employment. Under Art 2 (1) of the Directive an employer is obliged to notify an employee of the "essential aspects of the contract or employment relationship" including, under Article 2 (2) (i) "the length of the employee's working day or week".

In the UK this is transposed as "any terms and conditions relating to hours of work…including normal working hours". It would seem that in Germany as well as the UK there is often confusion about whether overtime is compulsory and the question referred to the ECJ was whether an employer must inform employees of overtime obligations under Article 2(2) of the Directive. The ECJ was also asked to rule on the consequences of a failure to do so by the employer. On the facts in this case the employee, Mr Lange had refused to work overtime and had been dismissed as a consequence.

The ECJ considered that overtime was an essential element of an employment contract and should therefore be notified to employees in writing. However, where an essential element has not been mentioned or has been mentioned but with insufficient precision then it is up to the national courts to apply their rules of evidence when determining the content of the employment relationship.

This decision is helpful in that employers should now include overtime obligations routinely as part of their Section 1 duties, but the refusal of the ECJ to hold that notifying the terms to an employee is necessary for the employer to rely on them is disappointing. The judgment will bring little comfort to the large number of employees who do not have a written statement of terms despite the requirement under s1 of the Employment Rights Act (ERA) 1996 let alone a written contract.

It means that there is no change to the tortuous process of analysing the contractual position relying on express as well as implied terms to determine whether overtime is compulsory in any particular case and it may therefore be left to employees to apply to an Employment Tribunal to seek a declaration of what their contractual terms are under s11 of the ERA 1996 before refusing to work overtime.

Time's up?

Howlett Marine Services Limited-v Bowlam & Others [2001] IRLR 201

THE RECENT case of Howlett Marine Services Limited v Bowlam & Others, considered the application of the statutory time limit in claims for protected awards where the employer has failed to consult over collective redundancies. A complaint has to be made within three months beginning with the last day of the protected period, unless it is not reasonably practicable for the applications to be presented within that period.

In Howlett, the tribunal found in favour of the employees and protective awards were made. The employers appealed. The EAT dismissed the appeal. The employer then failed to pay the employees for any part of the protected periods and the employees

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

Collective v individual

Henry v London General Transport Services Ltd. [2001] IRLR 132.

THE ISSUE as to whether a collective agreement applies to all staff was examined in Henry v London General Transport Services Ltd. Another case where the terms were not express: the individual contracts did not say that they were subject to changes introduced as a result of collective bargaining.

The case concerned platform staff for whom the T&GWU was the only recognised union. In preparation for a management buy-out the employers negotiated changes to the terms and conditions of employment. A new framework agreement was reached which included changes in rates of pay, hours of work, holidays and holiday pay, sick and overtime pay. After workplace meetings the union told management that most staff affected consented to the new terms and a notice was displayed at each workplace notifying the changes. However, some employees objected: the changes were then introduced in January 1995, a petition from the refuseniks was presented in September 1995 and tribunal claims were lodged by them nearly two years after the changes were introduced. The case was brought for unauthorised deduction of wages – the refuseniks seeking to rely on the old contracts before the changes were introduced. Were all the individual contracts validly changed?

The tribunal held that whilst there had been a tradition of collective negotiation between the company and the union, the framework agreement proposed fundamental changes and it was not satisfied that the tradition was sufficient to establish that such fundamental changes were incorporated into individual contracts by virtue of collective bargaining. According to the tribunal the burden was on the employers to establish that but they had failed.

The employers successfully appealed to the EAT and the employees' cross appeal was dismissed.

In upholding the appeal the EAT considered that:

1. When determining the terms of the contract the Tribunal should adopt a neutral approach to the burden of proof.
2. For a term to be incorporated into a contract of employment the custom and practice must be reasonable, certain and notorious. Once this has been proven it must be assumed that the term applies to all relevant parties. Again the burden of proof is neutral. The tribunal had erred in distinguishing between changes and "fundamental" changes without having considered what changes had been effected in the past.
3. The fact that two petitions had been presented to the company objecting to the terms were insufficient in themselves, to justify a finding that the employees had not accepted the new terms. They had worked and been paid in accordance with the new terms for two years without further protest.

This case is a thorough restatement of the principles to be applied in interpreting contracts and the incorporation of collective agreements. It is a re-assertion of the importance of collective rights. It also establishes that it is not always enough to protest for the old contractual terms to survive.

made a further application to the Tribunal. The question at the second Tribunal hearing was whether the applications had been presented in time. The Tribunal decided that it was not reasonably practicable for the applications to be presented within three months but that they had been presented within a further reasonable period and therefore that they had jurisdiction to hear the complaints. The employers appealed again.

The EAT stated that it was not reasonable for the applicants to present their complaints in circumstances where the protective awards were not made till after the period had expired. It was reasonable for them to delay presenting their complaints until the employers appeal had been disposed of and the written decision of the EAT received and to give further time so that the recoupment notices could be ascertained. Whilst the complaints could have been presented earlier, the existence of the above factors made it reasonable to delay the presentation.

Advisers should be careful to ensure that the primary time limit of three months is complied with but Howlett will be a helpful case where they cannot. It is important to remember that the tribunal has a discretion to decide whether the delay is reasonable.

Human error – who is to blame?

WHEN THERE is a disaster, like an aeroplane or train crash, it is not unusual for media reports to attribute the incident to 'human error'. The employee making the error can then expect to be blamed for the whole matter and in some cases vilified. Although there may be management failures these will be seen as secondary, or even insignificant, compared to the acts or omissions of the individual.

Fortunately disasters are few and far between. However incidents at the workplace that lead to injury, or could have led to injury, happen every week. Management, like the media reports, has a tendency to blame incidents on the errors of individuals directly involved. This in turn can culminate in disciplinary action against them. The basic assumption is that people are able to choose between safe and unsafe acts. Therefore if something goes wrong, then it must be the fault of that individual.

Given this approach, how can individuals in these circumstances be defended? It is suggested that putting the error into context, looking for the underlying causes and considering the management of human error by the company will be important for defending disciplinary proceedings (and also criminal proceedings if these are brought).

The Health and Safety Executive (HSE) estimates that human error is involved in approximately 80% of accidents. In its publication *Reducing error and influencing behaviour* (1999), more often called by its reference HSG48, it states:

"Many accidents are blamed on the actions or omissions of an individual who was directly involved in operational or maintenance work. This typical but short-sighted response ignores the fundamental failures which led to the accident. These are usually rooted deeper in the organisation's design, management and decision-making functions"

It goes on to say:

"Organisations must recognise that they need to consider human factors as a distinct element which must be recognised, assessed and managed effectively in order to control risks."

HSG 48 is quoted by Lord Cullen in his report into the Ladbroke Grove crash of 1999, published last June. One of the train drivers passed a red signal (known as a SPAD – signal passed at danger) which resulted in the collision. The signal in question had been passed on eight previous occasions in six years and each had been attributed to 'driver error'. Lord Cullen found that the industry investigations into these incidents had failed to identify root causes. Lord Cullen's analysis explains how the driver's error was a consequence of poor infrastructure and management failures rather than looking at his error as a cause of the crash.

There are now proposals to amend the Management of Health and Safety at Work Regulations 1999 (MHSWR) to require employers to investigate the causes of certain workplace accidents. In addition the findings of the investigation will have to be taken into account when reviewing any relevant risk assessments.

Annexed to the Health and Safety Commission's Consultative Document setting out these proposals, there are extracts from a contract research report detailing a survey carried out of current industry practice in incident investigation. The report, entitled *Accident investigation – the drivers, methods and outcomes* (CRR 344/2001) and published by the HSE, says that the survey found the incident investigation of companies ranged from a largely unstructured approach to one supported by clear procedures and associated analysis tools. Approaches to investigation varied from 'system' based (which examine all potential contributory factors) to 'traditional' methods (focusing on the individual concerned and the most immediate cause). Overall, companies were found to favour the traditional approach. The findings also

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

suggest that that the majority of companies do not differentiate between immediate and underlying causes.

Human error can clearly be a hazard which may need to be risk assessed in appropriate circumstances (as required by Regulation 3 MHSWR). HSG 48 gives guidance as to how this type of hazard should be risk assessed. Therefore in any disciplinary proceedings it is important to consider any relevant risk assessments. It is important to also consider how the company took human fallibilities into account when designing the task, activity and/or workplace relevant to the incident. In other words, was it possible that these elements made an error by an individual more likely?

It must be ensured that those carrying out the investigation into the incident have the appropriate training and understanding or have expert advice available to them so that all contributory factors can be identified and understood. That is to say an organisational approach needs to be taken to the investigation, finding the underlying causes so that the nature of the error can be understood and any culpability determined fairly.

It is interesting to note another publication by the HSE, *Successful Health And Safety Management*, referred to as HSG 65, (1997) which states that the prime responsibility for accident and ill health prevention rests with management. It says:

"Accidents, ill health and incidents are seldom random events. They generally arise from failures of control and involve multiple contributory elements. The immediate cause may be a human or technical failure, but they usually arise from organisational failings which are the responsibility of management. Successful policies aim to exploit the strengths of employees. They aim to minimise the contribution of human limitations and fallibilities by examining how the organisation is structured and how jobs and systems are designed."

The approach set out above does not seek to justify a blanket immunity from sanctions for all acts and omissions by individuals involved in incidents. This would clearly be undesirable as it might be seen as encouraging unreasonably reckless, negligent or even malevolent behaviour. However the problem lies in distinguishing between truly bad conduct and unsafe acts and omissions for which discipline, it is suggested, is neither appropriate nor useful.

Professor James Reason, a human factors expert, in his book *Managing The Risks of Organisational Accidents* (Ashgate 1997) refers to the *substitution test* put forward by Neil Johnston as a way of determining when there should be disciplinary action. If the unsafe acts of a person are implicated in an incident then the following test should be applied. Substitute the individual concerned for someone else coming from the same area of work and having comparable experience and qualifications. Then ask the question: 'In the light of how events unfolded and were perceived by those involved in real time, is it likely that this new individual would have behaved any differently?' If the answer is 'probably not' then apportioning blame, Professor Reason argues, has no material role to play. He adds that this test can be expanded upon by asking the individual's peers: 'Given the circumstances that prevailed at the time, could you be sure that you would not have committed the same or similar type of unsafe act?' If the answer again is 'probably not', then blame is inappropriate.

So far these theories are being examined in the context of major disasters and criminal litigation and have a crucial role to play. In addition, the understanding of these concepts in employment law – particularly in disciplinary and unfair dismissal cases – could alter the law and perception of the very meaning of capability and conduct.

Thompsons' Health and Safety Unit

MICHAEL APPLEBY is the Co-ordinator of Thompsons' new Health & Safety Department, based at our Ilford office.

The Department will provide advice, assistance and training to Thompsons' clients in relation to Health and Safety Law and work place safety issues. The Department will also handle inquiries, inquests and prosecutions involving health and safety matters.

New Rules OK?

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001

THE NEW Employment Tribunal rules eventually came into force on 16 July 2001 and have immediate effect in all cases regardless of when they were started.

Schedule 1: The Employment Tribunals Rules of Procedure which will apply to the majority of employment tribunal cases, is the most important of the seven schedules that together make up the new rules.

The main changes include the introduction of an "Overriding objective" into the Tribunal regulations. Since the introduction of the Civil Procedure Rules (CPR) in 1999 lawyers have become used to the concept of an overriding objective which is the yardstick against which every step in civil proceedings is judged and basically means that litigation should be proportionate to the value of the claim. The Tribunal regulations introduce an overriding objective into the rules of procedure "to enable tribunals to deal with cases justly".

Regulation 10(2) explains what dealing with a case justly means and it includes, so far as practicable:

(a) ensuring that the parties are on an equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate to the complexity of the issues; and
(d) ensuring that it is dealt with expeditiously and fairly.

Interestingly the definition does not include the monetary value of the claim. Many employment tribunal cases particularly those involving unauthorised deductions of salary or payment for working time holiday have a very low value, but may involve complex issues. Those conducting employment tribunal cases need to be aware of the overriding objective as for the first time the regulations include a duty on parties to "assist the tribunal to further the overriding objective".

This objective may help the non legally represented applicant resist oppressive requests for particulars, documents and unnecessary preliminary hearings – tactics well loved by many employer's lawyers.

Employment Tribunals are given for the first time explicit case management powers. Previously tribunals relied on the old rule 13 which allowed them to regulate their own proceedings. Now the tribunal are given powers to "give such directions on any matter arising in connection with the proceedings as appear to the tribunal to be appropriate" (rule 4).

Failure to comply with a direction may result in an award of costs under Rule 14(1)(a) or the striking out of the whole or part of an application or notice of appearance, and, where appropriate, a Respondent being debarred from defending altogether.

Rule 7 covers Pre Hearing Reviews which enable a Tribunal to order a deposit to be paid as a condition of being allowed to continue bringing or defending the proceedings. Currently Pre Hearing Reviews are rarely used by employment tribunals, although routinely employers lawyers request them, particularly when faced with an unrepresented applicant. The maximum size of the deposit a Tribunal may order has been increased from £150 to £500 and the tribunal must take reasonable steps to ascertain the ability of a party to pay.

Rule 14 deals with costs. The rule has changed so that a claim for costs can be awarded if the Tribunal's opinion is that the case is "misconceived". And if the claim is misconceived or a party or a party's representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, the Tribunal must consider whether to award costs, but has a complete discretion not to do so. Also the amount of costs a tribunal can order without referring to the County Court for assessment has increased to £10,000. It is important to note that for the first time the conduct of a party's representative is included.

Rule 15 sets out the Tribunals' miscellaneous powers and states:

(2) (c) subject to paragraph (3), at any stage of the proceedings, order to be struck out or amended any originating application or notice of appearance, or anything in such application or notice of appearance, on the grounds that it is scandalous, misconceived or vexatious;

(d) subject to paragraph (3), at any stage of the pro-

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

ceedings, order to be struck out any originating application or notice of appearance on the grounds that the manner in which the proceedings have been conducted by or on behalf of the applicant or, as the case may be, respondent has been scandalous, unreasonable or vexatious;

Cases can also be struck out for want of prosecution. There is a change of wording from the old rules "frivolous" to the wording of the new of "misconceived" and "unreasonable". The new test of misconceived is defined in the Regulations as including "having no reasonable prospect of success" (Regulation 2 (2)).

It is arguable that this could deal with a case like **Bache v Essex County Council** [2000] NLJ 99 CA where a representative was barred by the employment tribunal for being disruptive. Or indeed **Harmony Healthcare plc v Drewery** a case where the respondent's representative was involved in a scuffle in the employment tribunal waiting room grabbing back witness statements where the applicant's representative was slightly injured. As a result the Employment Tribunal struck out the case.

The new rules reverse the effect of the decision in **Care First Partnership v Roffey** [2001] IRLR 85 a case under the old rules where the Court of Appeal held that the absence of an express power to strike out if an application had no reasonable prospect of success meant that the Employment Tribunal could not strike out.

Multiple applications (IT1s) and responses (IT3s) arising out of the same facts may be presented in a single document which will save trees and administration time for representatives and the tribunal alike.

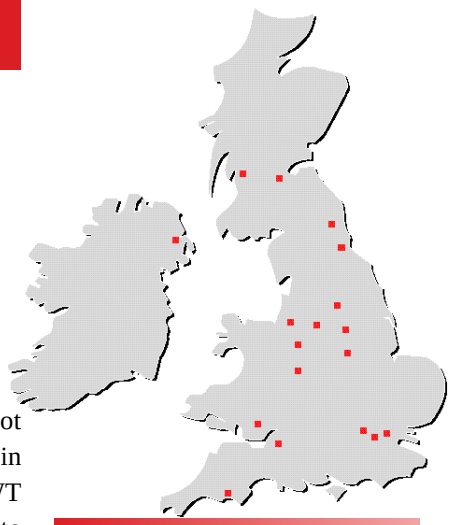
A new Rule 9 provides that in relation to unfair dismissal in connection with industrial action the tribunal has discretion to adjourn proceedings pending the outcome of civil interlocutory proceedings under section 219 TULR(C) A 1992 (protection from certain tort liabilities)

Rule 16 introduces a new paragraph dealing with media coverage which extends the circumstances in which a tribunal may make a Restricted Reporting Order to cases where evidence is likely to be heard of a personal nature. This specifically relates to claims under the DDA but does not deal with **Chief Constable of West Yorkshire v A** (LELR issue 49). This was a case of a transsexual seeking anonymity in proceedings, which is still a gap in the rules and may also amount to a breach of the Human Rights Act 1998.

Finally there are new provisions which allow Crown employees (including members of the security and intelligence agencies) to bring claims to employment tribunals in a similar way as other employees with certain restrictions.

Are the new rules OK? We think maybe not – for two main reasons. Firstly, they could have a deterrent effect on genuine claimants and their advisors by increasing the risk of costs. Although it is argued that the costs threat applies equally to both parties this analysis ignores the reality of the situation. Who would a costs order affect most – a dismissed worker or the company they used to work for? Secondly, by giving so much discretion to individual Tribunals, widely different practices are likely to develop from region to region and chairman to chairman. Consistency and a degree of certainty in litigation is necessary for both sides of industry and these new rules may provide the opposite. We will monitor the cases closely and update readers as they develop.

Teachers action ruled lawful



P v NASUWT (Court of Appeal, 9 May 2001)

THE TEACHERS' union NASUWT has won an important victory in the Court of Appeal in a case concerning industrial action over a disruptive pupil.

The pupil had been excluded from the school by the head teacher, but this had been overturned by the school governors. NASUWT balloted its members to take industrial action. The action consisted of refusing to accept the direction to teach the pupil. This action had the result that the child was taught separately by supply teachers. The pupil unsuccessfully took legal action against the school and then took legal action against the union. A High Court judge rejected his case, but the student appealed.

Industrial action only has legal protection if it is in contemplation or furtherance of a trade dispute. The pupil argued there was no trade dispute. The Appeal Court disagreed. There was a dispute as to whether it was reasonable for the teachers to be made to teach the pupil in class. The teachers' terms and conditions require teachers to perform duties in accordance with directions reasonably given by the head teacher. This was a dispute about terms and conditions of employment and therefore a trade dispute.

The Court went on to say that it would be anomalous to regard a dispute about the physical conditions of the classroom as a trade dispute, but not to do so in relation to disputes about working conditions such as the amount of overtime, number of pupils or the reasonableness of a direction as to whom they were expected to teach.

The other point in the case is that two NASUWT members at the school had not been balloted. The vote was 26 to nil in favour of the action taken. All NASUWT staff at the school were then called upon to take action, including the two who did not receive ballot papers.

The union argued that there had been an accidental failure on a scale which did not affect the outcome of the ballot. They relied upon changes introduced by the Employment Rights Act permitting such failures. However, despite confusion caused by a drafting error in the Act, these new provisions did not apply to calling to action those who had not been balloted.

For future reference, where section 232B on small accidental failures refers to "section 230(2A)", it should refer to "section 230(2B)" which relates to balloting of merchant seamen.

Despite this, the Court said that the calling out of someone on action who has not been balloted must be disregarded where the failure to ballot is accidental and would not have affected the outcome of the ballot.

In deciding whether it was reasonable for the union to believe at the time of the ballot that someone would be called upon to take action, the Court said that the time of the ballot means the date on which the ballot papers were sent out. There is not a continuing obligation on the union to send out ballot papers to all who join during the dispute or to recommence a ballot when members join once the ballot has started.

This is a helpful judgment. Despite this, it is still important to bear in mind that where the number of members omitted from the ballot is significant and may affect the result or where the union should have known at the date of the ballot that those members should have been included, the industrial action will not have legal protection.

HEAD OFFICE	020 7290 0000
BELFAST	028 9089 0400
BIRMINGHAM	0121 2621 200
BRISTOL	0117 3042400
CARDIFF	029 2044 5300
EDINBURGH	0131 2254 297
GLASGOW	0141 2218 840
HARROW	020 8872 8600
ILFORD	020 8709 6200
LEEDS	0113 2056300
LIVERPOOL	0151 2241 600
MANCHESTER	0161 8193 500
MIDDLESBROUGH	01642 554 162
NEWCASTLE	0191 2690 400
NOTTINGHAM	0115 9897200
PLYMOUTH	01752 253 085
SHEFFIELD	0114 2703300
STOKE	01782 406 200

CONTRIBUTORS TO THIS ISSUE
MICHAEL APPLEBY
JAG BAINS
STEPHEN CAVALIER
VICTORIA PHILLIPS
JO SEERY

EDITOR MARY STACEY
PRODUCTION NICK WRIGHT
PRINTED BY TALISMAN PRINT SERVICES

THOMPSONS LABOUR AND EUROPEAN LAW REVIEW

19926/0701/0019